

DOL Clarifies Standard to Determine "Joint Employer" Status

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On January 12, 2020, the Department of Labor (DOL) announced its final rule ("Final Rule") to revise and update the standard for determining "joint employer" status under the Fair Labor Standards Act (FLSA) – the federal law requiring minimum wage and overtime pay. The new rule provides guidance to determine when additional individuals or entities are jointly and severally liable for an employee's wages as "joint employers" with the employer. When an employee performs work that directly or indirectly benefits not only his primary employer but also another individual or entity, then the additional individual or entity is a "joint employer." With the Final Rule, the DOL affirmed a new, streamlined, four-factor test to determine who is a "joint employer." The effective date of the new rule is March 16, 2020.

The DOL had not updated the standard in over 60 years, and the Final Rule was designed to curtail more recent efforts to expand joint employer liability on other fronts. Under President Obama, the National Labor Relations Board (NLRB) had ruled in 2015 that McDonalds, in its capacity as a franchisor, was a "joint employer" equally responsible for labor violations alleged against its franchisees. Similarly, McDonalds franchisee employees in California asserted the joint employer theory against McDonalds, again as the franchisor, for alleged violations of state wage and hour law. This expansion of joint employer liability jeopardized not only McDonalds, but also other franchisors, staffing agencies and businesses who rely on contractual arrangements for workers.

As a result, the Trump administration worked to limit joint employer interpretation. The DOL drafted the Final Rule to provide greater certainty regarding joint employer status. To determine joint employer status under the FLSA, the Final Rule provides a four-factor balancing test when an employee performs work that simultaneously benefits another person or entity, requiring review whether the potential joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a significant degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records

Additionally, the Final Rule clarifies that a joint employer finding is not any more or less likely just because a company uses a franchisor, brand and supply, or contractual business model, and it provides examples applying the four-factor test in various situations. Under the new test, a business should be able to avoid joint employer liability if it simply stays out of the day-to-day employment decisions of its contractors and franchisees.

According to the Wage and Hour Division Administrator for the DOL, Cheryl Stanton: "The changes in this final rule break down barriers that keep companies from constructively overseeing, guiding and helping their business partners. For small business owners, and the employees working in those businesses, the relationship and the guidance coming from franchisors and other contracting companies can greatly improve the workplace and help them create jobs."

The Final Rule is consistent with recent decisions in other forums. For instance, the NLRB in December approved a settlement between workers and their employer, a McDonalds franchisee, that also absolves McDonalds as the franchisor from any direct joint employer responsibility. Even the Ninth Circuit, usually considered the most liberal federal appeals court, concluded in October that McDonalds was not a joint employer with its franchisee for violations of California wage and hour laws, finding the franchisor did not exercise the "requisite level of control" over the workers' employment.

At least for now, the risk to the franchise business model from the expansion of joint employer status appears to be abated. By creating greater certainty in interpretation of joint employer status, the Final Rule should promote greater uniformity in court decisions. Ultimately, these developments should improve FLSA compliance and reduce litigation costs for employers. However, all businesses should continue to remain vigilant in their efforts to comply with federal and state laws protecting employee rights to minimum wage, overtime pay and to organize a union.

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