August 6, 2021

U.S. Department of Labor Rescinds Trump-Era Joint Employer Rule

Last week, the U.S. Department of Labor (the "DOL") announced a final rule (the "Final Rule") to rescind an earlier rule (the "March 2020 Rule") setting out a test for determining whether a person or entity is a "joint employer" under the Fair Labor Standards Act (the "FLSA").[1] The March 2020 Rule, adopted under the Trump Administration, had narrowed the criteria under which multiple entities could be found to be joint employers under the FLSA and focused on the actual exercise of control over an employee rather than an employee's economic dependence on a potential joint employer. By rescinding the March 2020 Rule, the DOL intends to ensure that "more workers receive minimum wage and overtime protections" of the FLSA.[2]

The DOL is not proposing regulatory guidance to replace the March 2020 Rule and indicated that it would continue to consider legal and policy issues relating to joint employment under the FLSA before determining whether alternative regulatory guidance is appropriate.[3] It is possible that the DOL will revert to the prior, and broader, "economic realities" test for assessing whether a party may be deemed a joint employer that had been issued by the Obama Administration, which focused on whether an employee is economically dependent on multiple employers.

The Final Rule is scheduled to become effective on September 28, 2021.

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1 *See* DOL, *US Department of Labor Announces Final Rule to Rescind March 2020 Joint Employer Rule, Ensure More Workers Minimum Wage, Overtime Protections* (July 29, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210729-0.

2 *Id.*

3 Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40,939, 40,954 (July 30, 2020) (to be codified at 29 C.F.R.791), available at https://www.govinfo.gov/content/pkg/FR-2021-07-30/pdf/2021-15316.pdf.

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Background

FLSA Joint Employment

Under the FLSA, when two businesses are considered "joint employers," they share the responsibility for their employees' wages, as well as joint employer liability under the FLSA. While the FLSA does not explicitly use the term "joint employer," it defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[4] The DOL has recognized the joint employer doctrine since 1939,[5] and the Supreme Court expressly recognized joint employer liability in 1973.[6]

In 1958, the DOL published a joint employer rule which provided that two or more employers that ''are acting entirely independently of each other and are completely disassociated'' with respect to an employee are not joint employers, but joint employment exists if ''employment by one employer is not completely disassociated from employment by the other employer(s).''[7] The rule stated that a joint employment relationship "generally will be considered to exist" (1) where there is an arrangement between the employers to share the employee's services; (2) where one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) where the employers are not completely disassociated with respect to a particular employee and may be deemed to share control of the employee by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[8] The rule further noted that the determination of joint employer status ''depends upon all the facts in the particular case.''[9]

Obama-Era Guidance on Joint Employment

In 2016, the DOL issued guidance which broadened the standard for determining joint employer status (the "2016 Guidance").[10] In addition to noting that the scope of joint employment under the FLSA should be interpreted broadly, the 2016 Guidance discussed two scenarios under which a joint employment relationship may exist.[11] The 2016 Guidance provided that "horizontal joint employment" exists where potential joint employers are "sufficiently associated or related with respect to the employee," and "vertical joint employment" exists where an employee is employed by one employer (typically a staffing agency or other intermediary employer) and "the economic realities" show that the employee is "economically dependent on" another entity—which typically contracts with the intermediary employer—involved in the work.[12] The 2016 Guidance opined that the focus of the horizontal joint employer analysis is the relationship between the potential joint employers, and the focus of the vertical joint employer analysis is whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer.[13]

According to the 2016 Guidance, with respect to horizontal joint employment, factors such as (1) who owns the potential joint employers; (2) existence of overlapping officers, directors, executives or managers; (3) whether the potential joint employers share control over operations; (4) whether the potential joint employers' operations are intermingled; (5) whether one potential joint employer supervises the work of the other; (6) whether the potential joint employers share supervisory authority for the employee; (7) whether the potential joint employers treat the employees as a pool of employees available to both of them; (8) whether the potential joint employers share clients or customers; and (9) whether there are any agreements between the

4 29 U.S.C. § 203(d).

5 Interpretative Bulletin No. 13, Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation under the Fair Labor Standards Act of 1938 (July 1939). *See New York* v. *Scalia*, 490 F. Supp. 3d 748, 758 (S.D.N.Y. 2020) ("The Department has recognized joint employment since 1939.").

6 *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973) (holding that maintenance workers at apartment buildings were employees of both building owners and management company that managed the buildings).

7 29 C.F.R. § 791.2(a) (1958).

8 *See id.* § 791.2(b).

9 *Id.* § 791.2(a).

10 Administrator's Interpretation No. 2016-1, 2016 WL 284582 (Jan, 20, 2016).

11 2016 WL 284582 at *2.

12 *Id.*

13 *Id.* at *13.

potential joint employers may be relevant when analyzing the degree of association between, and sharing of control, by potential horizontal joint employers.[14]

With respect to vertical joint employment, the 2016 Guidance stated that the joint employer analysis should consider the following "economic realities" factors: whether (1) the potential joint employer directs, controls or supervises the work performed; (2) the potential joint employer controls employment conditions such as hiring and firing of employees; (3) the potential joint employer maintains indefinite, permanent, full-time or long-term relationship with the employee; (4) the employee's work is repetitive and rote; (5) the employee's work is an integral part of the potential joint employer's business; (6) the employee's work is performed on the potential joint employer's premises; and (7) the potential joint employer performs administrative functions for the employee.[15]

The 2016 Guidance was withdrawn in 2017 after former President Trump took office.[16]

The March 2020 Rule

Promulgation of the March 2020 Rule

In January 2020, the DOL promulgated the March 2020 Rule, which focused on the actual exercise of control over an employee and considered the following four factors: whether a potential joint employer (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.[17] The March 2020 Rule explained that "[n]o single factor is dispositive of determining joint employer status" and emphasized that "additional factors may be relevant . . . only if they are indicia of whether the potential joint employer exercised significant control over the terms and conditions of the employee's work."[18] Satisfying the fourth factor—maintenance of employment records—alone does not demonstrate joint employer status under the March 2020 Rule. In addition, whether the employee is economically dependent on the potential joint employer is not relevant in determining joint employer liability.

The four-factor test in the March 2020 Rule closely resembled the joint employment test adopted by the Ninth Circuit in *Bonnette California* v. *Health & Welfare Agency*.[19] While the *Bonnette* test takes into consideration whether an employer has reserved a contractual right to act with respect to an employee's terms and conditions of employment, the March 2020 Rule narrowed the *Bonnette* test by requiring "some actual exercise of control,"[20] and was therefore more favorable to putative joint employers than the *Bonnette* test.

The stated expectation under the March 2020 Rule was that fewer businesses would be considered joint employers, and the rule specifically acknowledged that "employees will have the legal right to collect wages due under the [FLSA] from fewer employers" as a result of the rule's promulgation.[21]

Decision Vacating the March 2020 Rule in Part

In September 2020, the District Court for the Southern District of New York vacated a significant portion of the March 2020 Rule except for certain non-substantive revisions in a lawsuit filed by 18 states which argued that the March 2020 Rule violated the

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14 *Id.* at *6–7.
15 *Id*. at *10.
16 DOL, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.
17 Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2,820 (Jan. 16, 2020) (to be codified at 29 C.F.R.791), https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf. Refer to our January 2020 memorandum on the March 2020 Rule for additional details.
18 *Id.* at 2,821.
19 *See id*. at 2,823.
20 *Id*. at 2,821.
21 *Id.*

Administrative Procedure Act (the "APA").[22] The court concluded that the March 2020 Rule violated the APA because it conflicted with the FLSA's broad definition of joint employment.[23] Specifically, the court identified the following conflicts: (1) the March 2020 Rule's reliance on the FLSA's definition of ''employer'' as the sole textual basis for joint employment liability; (2) its adoption of a control-based test for determining vertical joint employer liability; and (3) its prohibition against considering additional factors beyond control, such as economic dependence.[24] In addition, the court found that the March 2020 Rule was "arbitrary and capricious" in violation of the APA because it failed to adequately justify its departure from prior interpretations, did not consider the conflict between it and another regulation which adopted the FLSA joint employer doctrine, and failed to account for its cost to workers.[25]

While the DOL appealed the decision to the Second Circuit in November 2020, it represented to the court in May 2021 that the Final Rule may moot the states' challenge to the March 2020 Rule, making any resolution of the appeal unnecessary.[26] The appeal remains pending.

The Final Rule

On July 29, 2021, the DOL announced the promulgation of the Final Rule to rescind the March 2020 Rule, stating that the earlier rule included a description of joint employment "contrary to statutory and Congressional intent" and failed to take into account its prior joint employer guidance.[27] By rescinding the March 2020 Rule, the DOL intends that "more workers receive minimum wage and overtime protections" of the FLSA.[28] The Final Rule is scheduled to become effective on September 28, 2021.

The DOL is not proposing regulatory guidance to replace the March 2020 Rule at this time and indicated that it would continue to consider legal and policy issues relating to the FLSA joint employment standard before determining whether alternative guidance is appropriate.[29]

The Final Rule does not address joint employment under federal statutes other than the FLSA, such as the National Labor Relations Act ("NLRA"), or analogous state statutes.[30]

Implications for Employers

- While the DOL is not proposing a regulation to replace the March 2020 Rule at this time, it has indicated that it will consider legal and policy issues and may in the future determine whether alternative regulatory guidance is warranted.

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22 *New York* v. *Scalia*, 490 F. Supp. 3d 748, 757, 795 (S.D.N.Y. 2020).

23 *See id*. at 774.

24 *See id*. at 774–92.

25 *See id.* at 792–95. The court found that the March 2020 Rule did not consider the conflict between it and the Migrant and Seasonal Agricultural Workers Protection Act joint employment regulations, which "adopt[] the FLSA joint employer doctrine as the 'central foundation.'" *Id*. at 759 (alteration in original).

26 Appellants' Reply Br. at 11, *State of New York* v. *Walsh*, 20-3806 (2d. Cir. May 28, 2021), ECF No. 121.

27 *See* DOL, *US Department of Labor Announces Final Rule to Rescind March 2020 Joint Employer Rule, Ensure More Workers Minimum Wage, Overtime Protections* (July 29, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210729-0.

28 *Id.*

29 86 Fed. Reg. at 40,954.

30 In August 2015, the National Labor Relations Board (the "NLRB") adopted a new and broader standard for determining when two or more employers may be found to be joint employers of the same employees under the NLRA. Under that standard, an entity could be a joint employer even if its control over essential terms or conditions of a separate entity's employee was indirect, "limited and routine," or contractually reserved but never exercised. *Browning-Ferris Indus. of California, Inc*., 362 N.L.R.B. 1599, 1613–14 (2015). On February 25, 2020, the NLRB adopted a rule that reinstated the standard that existed prior to August 2015, *i.e*. that, in order to be considered a joint employer under the NLRA, an entity "must possess and exercise [] substantial direct and immediate control" over one or more "essential terms or conditions of employment," which "are exclusively defined" as wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184, 11,184, 11,235 (Feb. 26, 2020) (to be codified at 29 C.F.R. Part 103). Given the DOL's rescission of the March 2020 Rule, it is also possible that the NLRB may restore its August 2015 standard or adopt a more expansive rule than the one currently in place.

- There is a possibility that the DOL may adopt a joint employer standard that is similar to the Obama-era 2016 Guidance, which broadly interpreted the scope of joint employment under the FLSA, and focused on whether an employee is economically dependent on multiple employers, rather than on the actual exercise of control over an employee.

- A potential joint employer under the FLSA may want to be mindful of the fact that other federal statutes or other applicable laws may impose a different or broader joint employer standard. As discussed above, the Final Rule does not address joint employment under any federal, state or local statute other than the FLSA.

- Employers should monitor any changes to the joint employer standard under the FLSA, as well as under other federal, state or local statutes, that may affect their obligations and liabilities as a potential joint employer.

The Final Rule can be found here.

The March 2020 Rule can be found here.

Our previous memorandum on the March 2020 Rule can be found here.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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