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U.S. Department of Labor Promulgates Final Joint Employer Standard

On January 16, 2020, the U.S. Department of Labor ("DOL") announced its final rule (the "Final Rule" or "Rule")[1] setting out a four-part balancing test for determining whether a person or entity is a "joint employer" under the Fair Labor Standards Act (the "FLSA") when an employee performs work for one employer that simultaneously benefits another individual or entity.

The Final Rule, which is largely as proposed[2] in last April's Notice of Proposed Rulemaking ("NPRM"),[3] focuses on the actual exercise of control over an employee and considers the following four factors:

Whether the other individual or entity

(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.[4]

The Rule is the DOL's first major overhaul of the joint employer regulations since 1958 and is scheduled to become effective on March 16, 2020.

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1 Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020) (to be codified at 29 C.F.R. pt. 791), available at https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

2 85 Fed. Reg. at 2,820.

3 Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043 (Apr. 9, 2019) (to be codified at 29 C.F.R. pt. 791), available at https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06500.pdf.

4 85 Fed. Reg. at 2,820.

Background

The FLSA defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[5] While the statute does not explicitly use the term "joint employer," the current DOL regulation states that "there is nothing in the [FLSA] which prevents an individual employed by one employer from also entering into an employment relationship with a different employer."[6] Under the FLSA, when two businesses are considered "joint employers," they share the responsibility for their employees' wages, as well as liability for noncompliance with regulations.

The Final Rule revised and updated the current regulation titled "Joint Employer Relationship under Fair Labor Standards Act of 1938"[7] promulgated in 1958. According to the DOL, the 1958 regulation explained that joint employer status "depends on whether multiple persons are 'not completely disassociated' or 'acting entirely independent of each other' with respect to the employee's employment."[8] The Obama Administration issued guidance in 2016 which broadened the standard for determining joint employer status. The Trump Administration revoked that guidance in 2017.[9]

On April 1, 2019, the DOL issued the NPRM which is "intended to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decision, and encourage innovation in the economy."[10] The NPRM proposed a four-factor test derived from the test adopted by the Ninth Circuit in *Bonnette* v. *California Health & Welfare Agency*[11] with one modification. While the *Bonnette* court considered whether the alleged employer had "the power to hire and fire the employee" as the first relevant factor, the NPRM limited the scope of joint employer status to those who exercise *actual* power, explaining that a theoretical ability to act with respect to the employee's terms and conditions of employment would not be relevant.[12] The DOL explained that it was motivated to provide additional guidance in part because the 1958 regulation is overly broad at times—for example, where the employer is a subcontractor or staffing

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5 29 U.S.C. 203(d).

6 29 C.F.R. § 791.2; *see also 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 Joint Employer Relationship under Fair Labor Standards Act of 1938, 23 Fed. Reg. 5905, (Aug. 5, 1958) (codified at 29 C.F.R. pt. 791), available at https://www.govinfo.gov/content/pkg/CFR-2002-title29-vol3/pdf/CFR-2002-title29-vol3-sec791-2.pdf.

8 85 Fed. Reg. at 2,820 (citing 23 Fed. Reg. 5905 (Aug. 5, 1958) (codified at 29 C.F.R. pt. 791) and 29 C.F.R. § 791.2(a)) .

9 News Release, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance," Department of Labor (June 7, 2017), available at https://www.dol.gov/newsroom/releases/opa/opa20170607.

10 84 Fed. Reg. at 14,046.

11 *Bonnette* v. *California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

12 *See* 84 Fed. Reg. at 14,044.

agency and the other person is a general contractor or staffing agency client.[13] According to the DOL, the 1958 standard would suggest that they are joint employers, since they are almost never "completely disassociated," contrary to the Department's longstanding position.[14]

The Final Rule

The Final Rule adopts the four-factor test derived from the *Bonnette* case, but explains that "[n]o single factor is dispositive of determining joint employer status" and emphasizes 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."[15] Satisfying the fourth factor—maintenance of employment records—alone does not demonstrate joint employer status under the Rule.[16] In addition, whether the employee is economically dependent on the potential joint employer is not relevant in determining joint employer liability.

The DOL identifies the following business practices and contractual agreements as "not making joint employer status more or less likely" under the FLSA.[17]

- "Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model";
- "Contractual agreements with the employer requiring the employer to comply with specific legal obligations or to meet certain standards to protect the health and safety of its employees . . . [such as] mandating that employer . . . institute sexual harassment policies";
- "Contractual agreements with the employer requiring quality control standards";
- "Providing the employer a sample employee handbook, or other forms";
- "'[S]tore within a store' arrangements";
- "Offering an association health plan or retirement plan"; and

13 *See id.* at 14,046–47.

14 *Id.* at 14,047.

15 85 Fed. Reg. at 2,821.

16 *Id.* at 2,820.

17 *Id.* at 2,821.

- "Jointly participating in an apprenticeship program with the employer."[18]

The Final Rule as Compared to Existing Federal Standards

There are varying approaches to the issue of joint employment in the circuit courts. The Final Rule closely resembles the *Bonnette* joint employment test, which is on the more restrictive end of the spectrum of joint employer tests applied by circuit courts. 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 Final Rule narrows the *Bonnette* test by requiring "some actual exercise of control,"[19] and is therefore even more favorable to putative joint employers than *Bonnette*.

On the other hand, the Second Circuit has found the *Bonnette* test to be "unduly narrow," given the FLSA's broad definition of "employees," and has adopted a broader view of joint employment.[20] The Second Circuit instead considers the following more expansive factors from *Zheng* v. *Liberty Apparel Company*: (1) whether a putative employer's premises and equipment were used by its putative joint employees; (2) whether the putative joint employees are part of a business organization that shifts as a unit from one putative joint employer to another; (3) the extent to which the putative employees performed a discrete line job that was integral to the putative joint employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer or its agents supervised the putative employees' work; and (6) whether the putative employees worked exclusively or predominately for the putative joint employer.[21] Courts applying the New York Labor Law ("NYLL") have held that the NYLL "embodies the same standards" for joint employment as the FLSA and have thereby applied the same *Zheng f*actors.[22]

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18 *Id.* at 2,859

19 *Id.* at 2,821.

20 *Zheng* v. *Liberty Apparel Company*, 355 F.3d 61, 69 (2d Cir. 2003).

21 *Id.* at 72.

22 *See Chen* v. *Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 278–79 (E.D.N.Y. 2005), *Fernandez* v. *HR Parking Inc.*, 407 F. Supp. 3d 445, 456 (S.D.N.Y. 2019).

The First Circuit[23] has adopted the *Bonnette* test, while the Fifth, [24] Seventh, [25] and Third[26] Circuits have used the *Bonnette* factors in their decisions, but have not explicitly adopted the test. In contrast, the Fourth[27] and Eleventh[28] Circuits, much like the Second Circuit, have rejected the *Bonnette* test, and apply more expansive factors in determining whether a business is a joint employer. Additionally, the Tenth[29] and Sixth[30] Circuits have adopted the economic realities test, which considers whether an employee is "economically dependent" on the putative employer—the same factors discussed above that the DOL has specifically stated would not be relevant in its proposed rule.

Potential Effect of the Final Rule

The DOL has stated that the Final Rule is intended to promote innovation and certainty in business relationships and to clarify its interpretation of the statute in light of the varying approaches of the circuit courts and the public interest in the issue of joint employment.[31]

Under the Final Rule, it is expected that fewer businesses would be considered joint employers and, thereby, not subject to the requirements of the FLSA. Although the Rule does not provide an estimate of the financial magnitude of these changes, explaining that the DOL "lacks the data needed to calculate the potential amount or frequency," it acknowledged that "employees will have the legal right to collect wages due under the [FLSA] from fewer employers" as a result of the Rule.[32] The new Rule would not change the amount of wages an employee is due under the FLSA, but could reduce, in some cases, the number of entities who are liable for payment of those wages.

For potential joint employers, the narrowed scope of the joint employer standard may mean that there is additional flexibility and clarity as to how to structure business relationships. For example, as the Rule has clarified that allowing an employer to operate a business on one's premises in and of itself does not make

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23 *Baystate Alt. Staffing, Inc.* v. *Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

24 *Gray* v. *Powers*, 673 F.3d 352, 354–55 (5th Cir. 2012).

25 *Moldenhauer* v. *Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008) (applying the same four factors under the FMLA); *In re Jimmy John's Overtime Litig.*, 2018 WL 3231273, at *2 (N.D. Ill. June 14, 2018) (applying the same factors under th0065 FLSA).

26 I*n re Enterprise Rent-A-Car Wage & Hour Emp't Pracs. Litig.*, 683 F.3d 462, 469 (3d Cir. 2012).

27 *Salinas* v. *Commercial Interiors, Inc.*, 848 F.3d 125, 141–42 (4th Cir. 2017).

28 *Layton* v. *DHL Express (USA), Inc.*, 686 F.3d 1172, 1175–76 (11th Cir. 2012).

29 *Johnson* v. *Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 371 F.3d 723, 729 (10th Cir. 2004).

30 *Keller* v. *Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015).

31 85 Fed. Reg. at 2,853.

32 *Id.* at 2,821.

joint employer status more likely, businesses may become more inclined to enter into "store within a store" arrangements.

As multiple circuit courts currently apply joint employer tests that differ from the Final Rule, it remains to be seen how much judicial deference the Rule would receive. While the FLSA does not expressly grant the DOL the authority to define joint employment, an agency's interpretation of a statute can still have a binding effect.[33] We anticipate potential legal challenges against the Final Rule, particularly in circuits which currently have more expansive joint employer tests.

Importantly, this 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. Indeed, in September 2018, the National Labor Relations Board issued a proposed rule interpreting the joint employer test under the NLRA.[34] The Equal Employment Opportunity Commission likewise has announced its plan to propose a joint employer rule under the federal employment discrimination laws.[35] A covered employer should be mindful of the fact that other federal statutes or applicable state laws may impose a different or more stringent joint employer standard.

The Final Rule can be found here: https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

The NPRM can be found here: https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06500.pdf.

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33 *United States* v. *Mead*, 533 U.S. 218, 227–28 (2001).

34 New Release, "The Standard for Determining Joint-Employer Status," National Labor Relations Board, available at https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/standard-determining-joint-employer.

35 Agency Rule List, "Joint Employer Status Under the Federal Equal Employment Opportunity Statutes" Office of Information and Regulatory Affairs, available at: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB16.

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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