The Joint Employer Merry-Go-Round Comes Full Circle: The USDOL Proposes to Change the FLSA Joint Employer Rules Yet Again

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Increasing business consolidation and joint ventures present more complex challenges for counsel attempting to advise clients accurately as to how to structure these complex relationships to their clients' advantage. These challenges have been exacerbated by the whipsaw changes wrought on the United States Department of Labor's (DOL) already complex Joint Employer rules under the Fair Labor Standards Act (FLSA), creating uncertainty and placing counsel in a nearly untenable situation. Recent employer-friendly changes, made during the latter part of the Trump Administration, are now under complete reconsideration as the Biden Administration's reconstituted DOL proposes to roll back the Trump Administration's revision and likely reinstitute the rules as they previously existed. This article will review the substance and background of the Joint Employer rules, describe what the Trump Administration was attempting to achieve in its issuance of its final rule in January 2020, and discuss the impact of the proposed rescission of the January 16, 2020 final rule.

Under the FLSA, which strictly regulates the payment of compensation by employers to the vast numbers of their employees, persons or entities are liable for paying minimum wages and overtime only if it is determined that they are "employers" under the FLSA's rules. Employers are defined in pertinent part under the FLSA to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."[1] Employees are defined as "any individual employed by an employer."[2] The FLSA also defines the term "employ" broadly, as "to suffer or permit to work."[3] Employees can have two or more employers who would be jointly and severally liable for the employees' wages, thus being considered "joint employers." Although the FLSA does not specifically refer to joint employment, for a considerable time, the DOL has recognized that employees may have multiple employers. Joint employment may occur in two contexts, "vertical" employment, where companies contract out their own employees to another unrelated entity, such as in the case of a staffing company, and "horizontal" employment, where a worker is employed jointly by two related companies, such as a parent and subsidiary or related businesses with common ownership. The Trump Administration's final rule focused only on altering the legal standards for determining whether two or more entities in a "vertical" employment relationship were considered joint employers and therefore, jointly and severally liable for employee wages, leaving "horizontal" relationships essentially untouched.

Prior to the issuance of the Trump Administration's final rule, the DOL's approach had been guided by the many court decisions handed down over decades. Although differing in meaningful ways from circuit to circuit and depending on the particular industry involved, many courts generally followed an "economic realities" test in determining whether a joint employment relationship should be found. In its decision in *Enterprise Rent-A-Car Wage & Hour Emp. Pracs. Litig.*,[4] the Third Circuit held in 2012 that "Joint employers" are employers who exert "significant control" over an employee by sharing or co-determining the "essential terms and conditions of employment," even if they do not have "ultimate" control. The Third Circuit set forth the following factors in *Enterprise* to determine whether an alleged employer is a joint employer:

1) the alleged employer's authority to hire and fire the relevant employees;

2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment;

3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and

4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.[5]

The court noted that "[t]hese factors are not exhaustive, and whether an alleged employer is a joint employer depends on the "total employment situation and the economic realities of the work relationship."[6] The court further indicated that an alleged employer could be found to be a joint employer even if not all the *Enterprise* factors are present.[7] In 2016, without going through the notice and comment period required by the Administrative Procedures Act for establishing a final administrative regulation, the DOL issued an informal Administrator's Interpretation,[8] urging its investigators to look beyond employers' control over their employees and instead, focus upon the "economic realities" of their employment relationship. The Administrator instructed that the DOL's investigators should draw upon the following seven economic reality factors when engaging in their analysis:[9]

- Directing, Controlling, or Supervising the Work Performed
- Controlling Employment Conditions
- Permanency and Duration of Relationship
- Repetitive and Rote Nature of Work
- Integral to Business
- Work Performed on Premises
- Performing Administrative Functions Commonly Performed by Employers

Within months after President Trump was inaugurated, however, the DOL rescinded this Administrator's Interpretation and proposed the first formal update to the joint employment relationship in decades.[10] In its final rule issued January 16, 2020,[11] the DOL, in a dramatic departure from decades of prior law, adopted a new four-factor balancing test to guide the determination of joint employment status. This substantially revised test considers whether the potential joint employer:

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

The final rule, which sought to refocus the joint employer analysis upon the degree of control exerted over the employee, a far more employer-controllable variable, mandates that no single factor is dispositive in determining joint employer status, and that additional factors may be considered "if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."

This new-found oasis of analysis for employers came under almost immediate attack, however, resulting in 17 states and the District of Columbia filing a federal lawsuit in New York seeking to have the final rule vacated for allegedly violating the federal Administrative Procedures Act (APA). On June 1, 2020, the Hon. Gregory H. Woods, U.S.D.J., struck down the more significant portions of the Trump Administration's final rule pertaining to vertical employment relationships.[12] Judge Woods found that final rule violated the APA, and conflicted "with the FLSA because it ignores the statute's broad definitions."[13] Judge Woods also based his ruling on the basis that "the [DOL] failed to justify its departure from its prior interpretations and to account for some of the final rule's important costs." As a result, on March 11, 2021, the Biden Administration's newly reconstituted DOL issued a Notice of Proposed Rulemaking proposing to rescind the January 16, 2020 final rule on joint employer relationships. The DOL's proposal to withdraw the January 16, 2020 final rule is open for public comment until April 12, 2021. It is not known precisely when the DOL will make a final decision and issue a new final rule, but, based upon the political fervor present, it is more than likely that this process will result in the withdrawal of the DOL's January 16, 2020 final rule and possibly signal a return to the state of the law prior to 2017.

Based upon current circumstances, we believe that counsel's safest course of action would be to advise clients situated within the Third Circuit's jurisdiction who are contemplating the rollout of joint business relationships involving more than a few employees, either to ensure that those arrangements comply with the Third Circuit's *Enterprise* factors to the greatest extent possible or to defer the rollout until the DOL takes action with respect to its March 11, 2021 Notice of Proposed Rulemaking on or after April 12, 2021. At that time, hopefully, the DOL will clarify the standards to which it intends to hold employers in making its joint employer determinations.

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[1] 29 U.S.C. § 203(d).

[2] 29 U.S.C. § 203(e)(1).

[3] 29 U.S.C. § 203(g).

[4] 683 F.3d 462, 468 (3d Cir. 2012).

[5]Id. at 469.

[6]Id. at 469 (quoting *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)) (quotation marks omitted).

[7]Id. at 470.

[8] See USDOL Administrator's Interpretation No. 2016-1. https://www.hallrender.com/wp-content/uploads/2016/01/DOL_Joint_Employment_1_20_16.pdf

[9] The Administrator actually borrowed these factors from *Migrant and Seasonal Agricultural Worker Protection Act* (MSPA), 29 U.S.C. § 1801, et seq.

[10] As noted on the DOL's website, "[t]he Department of Labor's . . . 2016 informal guidance on joint employment . . . [was] withdrawn effective June 7, 2017." The DOL noted, however, that [r]emoval of the . . . administrator interpretation[] does not change the legal responsibilities of employers under the Fair Labor Standards Act . . ., as reflected in the Department's long-standing regulations and case law. The Department will continue to fully and fairly enforce all laws within its jurisdiction including the Fair Labor Standards Act . . . ." https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa.

[11] https://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act

[12] *State of New York, et al. v. Eugene Scalia, et al*., CA No. 1:20-cv-01689 (S.D.N.Y. 6/1/2020), https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2020cv01689/533016/135/0.pdf?ts=1599643603

[13]Id. at 2.