



Department of Labor Issues New Joint Employer Rule By Jascha K. Clark

Earlier this month the Department of Labor (“DOL”) issued a final rule updating its test for joint-employer status under the Fair Labor Standards Act (“FLSA”), which goes into effect on March 16, 2020. As a reminder, the FLSA requires covered employers to pay their employees at least the federal minimum wage¹ for every hour worked, and also requires overtime pay when covered nonexempt employees work more than 40 hours in a workweek.

The FLSA broadly defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . .” 29 USC § 203(d). Joint-employer issues arise when this broad definition encompasses two (or more) independent entities or individuals for a single employee. Such a finding can have serious consequences, as each “employer” will be jointly and severally liable for meeting the minimum wage and overtime requirements of the FLSA (including sharing the liability for any wage violations).

There are two scenarios where an employee may have one or more joint employers. In Scenario One, the employee has an employer “who suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work.” In Scenario Two, one employer



employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek, but the jobs and the hours worked for each employer are separate.

Unfortunately for employers, there has been substantial uncertainty about whether they are considered a “joint employer” of any particular employee, which, as noted above, can lead to serious consequences. In an attempt to bring some clarity to this issue, the DOL issued a four-factor balancing test for determining joint employer status under Scenario One. Specifically, the DOL will examine whether the putative joint employer:

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

This is a fact-specific inquiry and no single factor is dispositive in determining joint employer status, however, the rule provides that “the maintenance of employment records factor alone does not demonstrate joint employer status.”

With regard to Scenario Two, the new rule did not make any substantive changes. Instead, the DOL reiterated that, “if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its liability under the [FLSA].” “However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining if they are in compliance.” The employers will generally be sufficiently associated if there is an arrangement between them to share the employee's services, the employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or they share control of the employee, directly or indirectly,



by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. Like Scenario One, Scenario Two is highly fact dependent.

Notably, the rule is only the DOL's interpretation of the FLSA, and does not constitute law. While courts are free to adopt or reject the rule, courts will often look at agency rules as "persuasive" authority.

If you have a fact-specific inquiry regarding whether you may be a joint employer under the DOL's new rule, you should consult legal counsel. The lawyers in Ray Quinney & Nebeker's Employment Section would be happy to

1. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.



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