DEPARTMENT OF LABOR ISSUES FINAL RULE TO CLARIFY JOINT EMPLOYER STANDARD

Date: 17 January 2020

U.S. Labor, Employment and Workplace Safety Alert

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INTRODUCTION

On January 16, 2020, the U.S. Department of Labor (DOL) formally published its final rule revising DOL regulations that address joint employer status under the Fair Labor Standards Act (FLSA). According to the DOL, the final rule is aimed at giving parties more certainty and clarity regarding joint employment under the FLSA by, among other things, reiterating the DOL's longstanding position that certain business models, business practices, and contractual agreements do not themselves indicate joint employer status under the FLSA. Having clarity and consistency on joint employment is critical for employers because joint employers under the FLSA share responsibility for paying employees minimum wages and overtime and are jointly and severally liable for violations of the FLSA. The final rule takes effect on March 16, 2020.

The final rule is the first meaningful revision to this particular DOL regulation in over 60 years. It replaces DOL guidance issued in late January 2016 (and subsequently withdrawn), which espoused a broad view of joint employment under the FLSA by taking the position that one could be a joint employer if not "completely disassociated" from a worker.[1] The final rule represents a narrowing of the DOL's prior view of joint employment through its adoption of a four-part balancing test to determine whether another business that benefits from an employee's work is that employee's joint employer. While relevant to all employers, this four-part test is especially important for franchisors, staffing agencies, and contractors, who were among those employers more at risk for being considered joint employers under the 2016 guidance and are now less likely to face joint employment liability under the FLSA.

TWO JOINT EMPLOYER SCENARIOS

There are two potential scenarios where an employee may have one or more joint employers. One scenario occurs when an employer employs an individual for one set of hours in a workweek, and another employer employs the same person for a separate set of hours in the same workweek. The final rule did not make any substantive changes to the analysis of joint employment under this scenario and reiterated the requirement that joint employment arises when the employers "are sufficiently associated with respect to the employment of the employee." Employers are "sufficiently associated" when there is an arrangement between them to share the employee's services, when one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee, or when the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

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Under such circumstances, joint employers must aggregate the hours worked for each for purposes of determining whether non-exempt employees are owed overtime pay.

The other potential joint employer scenario occurs when an employee has an employer that "suffers, permits, or otherwise employs the employee to work," but another individual simultaneously benefits from the work. It is the final rule's treatment of joint employment under this scenario that signals a change from the DOL's previous approach and is the most important aspect of the final rule. To determine joint employment under this scenario, the DOL adopted a four-part test that was substantially derived from the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). The four-part test focuses on a potential joint employer's degree of actual direct or indirect control over the employee by assessing:

1. Whether the potential joint employer can hire or fire the employee;
2. Whether the potential joint employer supervises the employee's work schedule;
3. Whether the potential joint employer sets the employee's pay; and
4. Whether the potential joint employer maintains the employee's employment records, such as payroll records or other records that contain information relating to the first three factors.

No single factor is dispositive under this test, and the appropriate weight given to each factor will depend on the circumstances. The final rule stresses, however, that maintaining employment records (i.e., satisfying the fourth factor) alone does not establish joint employment. Further, while these factors are comprehensive, they are not exclusive, and other factors may be considered if they show whether the potential joint employer exercises significant control over the terms and conditions of the employee's work.

The final rule further clarifies that certain factors are irrelevant in determining joint employment or in making joint employment more or less likely. For example, factors that consider an employee's economic dependence on an employer are irrelevant to a joint employment determination. These factors, such as investment in equipment or materials, special skill sets, opportunity for realizing profit or loss, and other contractual relationships for similar services, are pertinent for assessing whether an individual is an employee, as opposed to an independent contractor, but are not relevant to determining whether an employer is a joint employer. Additionally, the final rule clarifies that certain business models, business practices, or contractual arrangements do not make joint employment more or less likely. The DOL highlights, as examples, the franchise business model, the practice of allowing a different employer to operate a business on its premises, or contractual arrangements mandating employers to comply with laws, require background checks, or institute sexual harassment policies.

CONCLUSION

The FLSA requires covered employers to pay their non-exempt employees in compliance with minimum wage and overtime requirements. An employer that is deemed a joint employer is jointly and severally liable with the other employer for proper payment of wages for all of the employee's hours. By narrowing the scope of joint employment, the final rule eases some of the risk of this liability and introduces additional flexibility into certain business relationships. It is important to note, however, that the final rule applies only to joint employer status under the FLSA. The National Labor Relations Board and the Equal Employment Opportunity Commission are expected to issue their own regulations and standards on joint employment under federal labor and anti-

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discrimination laws, respectively. In addition, some states' laws may impose different or more-stringent standards, so it is important to assess compliance under all applicable state and federal laws.

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[1] Administrator's Interpretation No. 2016-1. For an overview on this guidance, please see the K&L Gates Alert, "Department of Labor Announces Broad Interpretation of Joint Employment," http://www.klgates.com/department-of-labor-announces-broad-interpretation-of-joint-employment-02-12-2016/. The 2016 Administrator's Interpretation was withdrawn in 2017. Additional information about the withdrawal can be found in the K&L Gates Alert, "DOL Withdraws Administrator's Interpretations on Joint Employment and Independent Contractors," http://www.klgates.com/dol-withdraws-administrators-interpretations-on-joint-employment-and-independent-contractors-06-07-2017/.

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