LABOR & EMPLOYMENT LAW UPDATE

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On January 12, 2020, the Department of Labor ("DOL") announced its Final Rule updating its regulations regarding the concept of joint employer under the Fair Labor Standard Act ("FLSA"). In April of 2019, the DOL issued a Notice of Proposed Rulemaking ("NPRM") laying out concerns that the regulations do not provide sufficient guidance regarding the when an entity might be considered a joint employer for purposes of liability under the FLSA. The NPRM further acknowledged that the concept of joint employer under the FLSA had not been addressed in the 60 years since the regulations were issued in 1958.

The concept of joint employer has been a hot button issue over the last few years. In September of 2018, the National Labor Relations Board ("NLRB") issued its NPRM regarding the standard for determining joint-employer status under the National Labor Relations Act. The Equal Employment Opportunity Commission ("EEOC") has also indicated the intent to release a proposed rule in the coming months regarding the issue of joint employer under Title VII and other statutes enforced by the EEOC.

THE CONCEPT OF JOINT EMPLOYER

Generally, each governmental agency enforces certain regulations and laws regarding the employment relationship. Each law defines who is subject to the laws and regulation at issue as the "employer," and that definition can include what is known as joint employers.

The DOL enforces the FLSA, which defines an "employer" to include "any person acting directly or indirectly in the interest of an employer relation to an employee." 29 U.S.C. § 203(d). The FLSA recognizes that one company can be an individual's employer and an independent company can be jointly and severally liable for the wages due that individual. The DOL recognizes two potential scenarios for joint employer issues to arise (1) where an entity employs the employee and another entity benefits from that individual's work, and (2) where two entities employ an employee to work separate sets of hours in the same workweek.

THE DOL FINAL RULE REGARDING JOINT EMPLOYER

In addressing the first scenario, the DOL has adopted the four-factor balancing test that was set forth in *Bonnette* v. *California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983). The four-factors to be examined to determine whether the company benefiting ("Benefiting Entity") from an employee's work should be considered a joint employer include the following:

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.

Apparently in response to certain comments seeking clarity on the DOL's NPRM, the Final Rule expressly notes that "[n]o single factor is dispositive," and that mere "maintenance of employment records" alone does not demonstrate joint employer status. The Final Rule also makes clear that the four control factors must involve control *actually* exercised by the Benefiting Entity, though it can be exercised either directly or indirectly. Accordingly, the Benefiting Entity's reservation of the right to control of one or more of the factors, without ever actually exercising that control, is insufficient to make the entity a joint employer under the FLSA.

The Final Rule also provides that factors beyond the four control factors set out in the balancing test may be considered in evaluating joint employer status, but expressly states that there must be limits on such additional factors. The DOL notes that, to be considered, additional factors must be "indicia of 'significant control' over the terms and conditions of the employee's work."

The DOL noted that the employee's economic dependence on the Benefiting Entity is not a factor that should be considered in evaluating joint employer status. Further, the DOL notes that the factor of "the number of contractual relationships, other than with the employer" that the Benefiting Entity has for similar services is not encompassed by the joint employer test.

The DOL also expressly rejected consideration of business models as indicative of joint employer status, such as the franchisor business model. The DOL further rejected as irrelevant inquiries regarding certain contractual provisions required by the Benefiting Entity that are intended to promote desired societal effects or have a branding impact, such as requiring wage floors or harassment policies of the employing entity.

In the second scenario for joint employer issues, where the employee works separate jobs and separate hours for multiple employers, the issue is whether they are "sufficiently associated with respect to the employment of the employee" to render them jointly liable. If so, the employers are joint employers and must aggregate the hours worked for each in a workweek to determine FLSA compliance. The Final Rule adopts the requirements of the NPRM, which stated that employers "will generally be sufficiently associated" if there is "an arrangement between them to share the employee's services;" "[o]ne employer is acting directly or indirectly in the interest of the other employer in relation to the employee;" or "[t]hey 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."

As with the first scenario, in the second scenario, the DOL rejects the notion that certain business relationships, such as being franchisees of the same franchisor, evidence the association necessary for joint employer status. The Final Rule goes on to provide examples under both scenarios of the application of the Final Rule for determining joint employer status.

Generally, the DOL's Final Rule is a fairly positive result for employers as it provides clarity that was not previously available under the FLSA regarding the issue of joint employer. It also narrows the factors that can be considered and specifically excludes certain factors that have previously been used to construe joint employer status not supported by the basic control factors.