DOL Issues First Meaningful Revision to Joint Employer Rule in Decades

On Jan. 16, the U.S. Department of Labor (DOL) released a final rule updating its interpretation of “joint employer” under the Fair Labor Standards Act (FLSA).

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On Jan. 16, the U.S. Department of Labor (DOL) released a **final rule** updating its interpretation of "joint employer" under the Fair Labor Standards Act (FLSA). The update represents the first "meaningful revision" of its interpretation, codified at 29 CFR Part 791, since the FLSA's inception in 1958. The final rule takes effect on March 16 and carries meaningful significance for companies that rely on temporary staffing and subcontractors and franchise owners. It could also allow companies to exert more influence over temporary workers without being considered a "joint employer." While not binding on the federal courts, the final rule will serve as the DOL's official interpretation moving forward and guide its enforcement of this issue under the FLSA.

The FLSA has always recognized that an employee can have two or more employers who are jointly and severally liable for the wages of its workers. The act requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek. The FLSA defines the term "employer" to "include any person acting directly or indirectly in the interest of an employer in relation to an employee."

Part 791 recognizes two scenarios where an employee may have joint employers. In the first scenario, and most commonly, an employee performs work for an employer while another person or entity "simultaneously benefits" from that work. Thus, the employee only works one "set" of hours in a given week. In the second scenario, "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 a workweek."

The DOL's final rule primarily addresses the first scenario and adopts a four-factor balancing test derived from the U.S. Court of Appeals for the Ninth

Circuit's 1983 holding, *Bonnette v. California Health & Welfare Agency.* To determine whether a party is potentially a joint employer, the test analyzes whether the person or entity:

The DOL touts the four-part test as providing "necessary uniformity, clarity, and certainty for businesses." Of crucial importance, the employer must have an "actual exercise of control" over one of the test's four factors to be considered a joint employer. No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances. Additionally, the DOL stated that maintaining the employee's employment records alone will *not* establish "joint employer" status. Finally, the DOL provided that additional factors may be considered if they indicate that a potential joint employer "exercises significant control over the terms and conditions of the employee's work."

The new rule will not impact the second scenario above, as the DOL's interpretation will not change and the agency will continue to evaluate the "relationship" between the two employers. If the employers are in fact joint employers in this second scenario, they must "aggregate" the employees' hours to ensure compliance with the act.

During the commenting period for the proposed final rule, supporters and critics were divided along employer and employee lines, respectively. Commenters representing employers opined that the rule would bring clarity to the varying opinions in the federal courts. On the contrary, those representing the interests of employee groups asserted that the rule ignores existing Supreme Court and circuit court precedent and should not receive judicial deference moving forward. The DOL did acknowledge that the rule may reduce the number of joint employers and therefore employees "will have the legal right to collect" wages from fewer employers.

As part of its update, the DOL also provides illustrative examples of scenarios where a joint employer analysis would be necessary. As with the updated rule in general, employers "overwhelmingly supported" the inclusion of the examples, whereas employee supporters criticized them as "inadequate." Regardless, the examples offer insight for how the DOL would enforce its interpretation in certain situations.

Going forward, employers should consider the following implications and advantages of Part 791:

- **Hiring and firing:** In one of its illustrative examples, the DOL states that a company's single request of a staffing agency to fire a temporary employee does not constitute "indirect control" over hiring and firing. Based on this interpretation, a company relying on temporary workers to round out its workforce can feel more comfortable if faced with an independent contractor that it believes should be terminated. If, however, a company exerts control over multiple termination decisions, it is perhaps more likely to be determined to be a "joint employer."
- **Codes of Conduct:** Under the new rule, the potential joint employer can require another employer to comply with a contractual code of conduct. The code can even include requirements to provide hourly wages higher than the federal minimum without exercising control over rate or method of payment. This offers companies a tool to influence their employers or suppliers without becoming a "joint employer."
- **Resources and benefits:** The DOL stated that a potential joint employer may provide benefits, such as training, educational opportunities, and benefit plan options without impacting their status. Therefore, companies seeking to provide worthwhile resources and benefits to temporary employees should not hesitate to do so out of a fear of changing employer status.
- **Avoiding excessive overtime:** Subcontracted hourly workers—in particular those in the oil and gas industry—often log significant overtime at wages considerably higher than the federal minimum. Under these circumstances, the implications of "joint employer" status are magnified as the overtime calculation on a relatively high regular rate may result in large overtime penalties if a subcontractor were to make an error when calculating overtime payments. The new interpretation should lessen the

financial burden for companies that rely heavily on a subcontracted workforce.

A Look at the Courts

Although the DOL hopes the new rule will decrease litigation in the field, it remains unclear how much deference federal courts will grant the **rule**. Part 791 simply serves as the DOL's official "interpretation" and guideline for enforcement of joint employer status under the FLSA. Therefore, courts are not mandated to follow the rule and only time will tell whether it receives widespread judicial support.

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