DOL Proposes Pro-Employer Changes to Joint Employer Rule

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Employers should be applauding a new federal proposal to amend its currently murky definition of what constitutes a joint employer.

The proposed U.S. Department of Labor regulation released Monday would revise joint employer status under the Fair Labor Standards Act. The rule change is intended to provide clarity about the responsibilities of employers to employees in joint employer situations.

Genesis of this proposed rule change

The FLSA requires employers to pay their employees minimum wage and overtime for every hour worked over 40 hours in a workweek. Issues arise as to liability for compliance with the FLSA when two employers are involved. Historically, the existing regulation determined joint employer status by asking whether multiple persons are "not completely disassociated" with respect to a particular employee. But this standard does not give adequate guidance for resolving the situation where an employee's work for another person also benefits another employer (like where the employer is a subcontractor or staffing agency and the other person is a general contractor or staffing agency client). In the subcontractor, staffing agency and franchisor situations, the employers are rarely "completely disassociated" as required by the 1958 DOL regulation, and would always be joint employers. Case law has interpreted the joint employer rule through an exercise of power/control test which has not been consistently applied in different judicial jurisdictions. That inconsistent application overwhelmingly focuses on actual versus potential exercise of control.

Proposed Rule

This joint-employer rule proposes a clear and consistent four-part test - based on judicial precedent - to define the joint employment analysis on whether the potential joint employer actually exercises, whether directly or indirectly, the power to:

- Hire or fire the employee
- Supervise and control the employee's work schedules or conditions of employment
- Determine the employee's rate and method of payment
- Maintain the employee's employment records

Why would this proposed rule benefit employers?

Businesses have embraced the flexibility and cost effectiveness provided by temporary staffing, independent contractors and franchise relationships. A simple, easy-to-apply standard that does not unreasonably put temporary contract workers or franchisors/franchisees under a "joint employee" standard will help employers. For franchisors/franchisees, that relationship does not make employer status any more likely or unlikely.

Thus, franchisors may provide more franchisee support, training, brand standards, and business coaching without fear that such franchisee support or interactions may trigger joint-employment liability. Additionally, cost effective business practices don't necessarily trigger joint employment liability. Those practices could include:

- Providing sample handbooks
- Requiring safety, equal employment opportunity or other programs
- Participating in a health or retirement plan

Takeaway

The proposed rule provides a clear and simplified analysis of joint employment. For employers, the mere potential to exercise control is not relevant anymore, as actual exercise of control prevails. This proposed rule is very helpful to the business community.

Timing

This proposed regulation has been submitted to the Office of the Federal Register for publication. The public will have 60 days to comment on the proposed regulation once it is published in the Federal Register.

If you have any questions on the proposed change, please reach out to me or anyone in the Barley Snyder Employment Practice Group.