DOL Releases Final FLSA Joint Employer Rule

PUBLISHED ON
January 14, 2020

The U.S. Department of Labor finalized its "joint employer" rule under the Fair Labor Standards Act (FLSA), replacing the Obama-era joint employer guidance rescinded by the Trump administration in mid-2017 with much-needed clarification and helpful examples. The rule will be published in the Federal Register this week and take effect in 60 days.

Whether the DOL considers two entities to be joint employers is important - joint employers are jointly liable to employees for the payment of wages, overtime and for violations of the FLSA. The final rule addresses two common joint employer scenarios.

Scenario One: An employee works one set of hours for one employer, but the employee's work benefits another employer, such as franchisor-franchisee arrangements and temporary staffing relationships.

Scenario Two: An employee works one set of hours for one employer and a second set of hours for another possibly related employer, such as shared employees between related restaurant chains, retail establishments or hospitality entities.

Scenario One

Under scenario one - sometimes called "vertical joint employment" - the DOL final rule clarifies the four factors it will use to determine if a joint employment relationship exists when one employee works one set of hours for one employer, but the employee's work simultaneously benefits another employer. These four factors are whether the other 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
- Maintains the employee's employment records (such as payroll records and other records that relate to the employee's hiring, firing, supervision, work schedules, conditions of employment, and rate of pay)

The DOL will look at all of the employment circumstances *between the employers and the employee*, and no single factor is determinative. Important to the determination, the final rule clarifies that the potential joint employer must *actually exercise* - directly or indirectly - one or more of these criteria of control to be a joint employer under the FLSA. This is a more narrow standard that the rescinded Obama-era guidance, which looked to whether the other employer reserved the right to control the employee's work conditions - for example, in a franchise agreement - regardless of whether the other employer actually exercised that right.

Scenario Two

Under scenario two - sometimes called "horizontal joint employment" - the DOL's final rule does not make significant, substantive changes to the test, but provides much-needed guidance as to whether two employers are sufficiently associated to one another that they must aggregate the hours an employee works at each location for purposes of wages and overtime.

Employers will be sufficiently associated and jointly responsible.for the payment of wages and overtime, if any of the following apply:

- There is an arrangement between them to share the employee's services
- One employer is acting directly or indirectly in the interest of the other employer in relation to the employee
- 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

Here, the DOL looks at the relationship between the two employers, and its determination will depend on all of the facts and circumstances. The final rule provides 11 helpful examples of whether a particular relationship will result in a finding of joint employment. Here are two:

An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

Answer: Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

Answer: Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the act.

Note that the DOL final rule does not address joint employer status beyond the FLSA, and the National Labor Relations Board and the Equal Employment Opportunity Commission are expected to release their versions of the joint employer test this year.If you have any questions on the new DOL "joint employer" standards, please reach out to me or any member of the Barley Snyder Employment Practice Group.

:

Jill Sebest Welch

Partner

Tel: (717) 399-1521

Email: jwelch@barley.com