Legal Backgrounder

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Joint-Employment Liability: What Federal Agencies' Rule Revisions Mean for Employers

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Nearly 60 years ago, the United States Department of Labor ("DOL") promulgated 29 CFR § 791.2, which imposes joint liability under the Fair Labor Standards Act ("FLSA") where multiple persons are "not completely disassociated" or "acting entirely independently of each other" with respect to an individual's employment. Recognizing that the "not-completely-dissociated" standard is unclear and subject to broader application than intended, on January 1, 2020, the DOL issued a final rule to revise and clarify the responsibilities of businesses in potential joint-employment arrangements. Specifically, the final rule sets forth a new four-factor test for determining joint employment, focusing on whether an entity exercises certain powers to a degree that justifies joint status with a given employer.

The DOL's efforts to relax the joint-employer standard mirror those of the National Labor Relations Board ("NLRB"), which, during the Trump administration, has enacted a rule that reverses the expansive view taken in *Browning-Ferris Industries*.[1] Not to be left out, the Equal Employment Opportunity Commission ("EEOC") has announced that it will issue proposed amendments to regulations implementing several of the laws under its purview, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Although the EEOC's position is not entirely clear, it would not be surprising if the EEOC joins the DOL in narrowing the scope of joint employment—a trend that should be welcome news to employers.

DOL's Final Rule

Prior to revision, 29 CFR Part 791 contemplated three joint-employment scenarios: (1) where multiple actual employers arrange to share the employee's services (*e.g.*, to interchange employees); (2) where one entity is acting directly or indirectly in the interest of a second entity; or (3) where two or more entities are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, because one entity controls, is controlled by, or is under common control with the other entity. In applying the joint-employer regulations, the courts have developed a number of multi-factor tests to distinguish separate employment or non-employment from joint employment, placing companies with multi-state operations at risk of joint-employer liability in some states but not others—uniform business practices notwithstanding.

The DOL's final rule, effective March 16, 2020, revises the regulations in Part 791 to eliminate the not-completely-disassociated standard and to adopt in its place a successor four-factor balancing test derived from the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983):

[1] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015), *enfd. in part* No. 16-1028 (D.C. Cir. Dec. 28, 2018).

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1. Whether the putative joint employer hires or fires the employee;
2. Whether the putative joint employer supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. Whether the putative joint employer determines the employee's rate and method of payment; and
4. Whether the putative joint employer maintains the employee's employment records.

The last factor, maintenance of employment records, cannot establish joint liability alone, nor can an entity's "ability, power, or reserved right" to take these actions. In addition, no single factor is dispositive, and additional factors may be relevant.

Notably, the revised regulations state that factors assessing a worker's economic dependence on a company are *not* relevant to the question of joint employment. These factors include:

- Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
- Whether the employee has the opportunity for profit or loss based on his or her managerial skill;
- Whether the employee invests in equipment or materials required for work or the employment of helpers; and
- The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

To provide further clarity, the final rule includes illustrative examples of business models/arrangements/practices that *do not* give rise to joint employment as a matter of law, such as operating as a franchisor or entering into a brand and supply agreement, or using a similar business model; a contractual right to control the employee's conditions of employment; or contractual requirements to comply with applicable laws and regulations, a code of conduct, or a dress code.

NLRB's Final Rule

In 2015, during President Barack Obama's administration, the NLRB deviated from longstanding precedent in *Browning-Ferris*, which held that a company can be considered a joint employer for purposes of the National Labor Relations Act if it possesses the *right to control* various terms and conditions of employment, even if it does not actually exercise such control—a vastly expanded theory of liability from previous tests, which emphasized actual control. In that decision, the Board stressed that in making a joint-employment determination it would consider whether a putative employer exercised control over the terms and conditions of employment indirectly through an intermediary, or whether the putative employer reserved the authority to do so.

Unsurprisingly, under the Trump administration, the NLRB, a majority of whose members are Republican appointees, has attempted to walk back the *Browning-Ferris* decision. In 2017, the Board attempted to overrule *Browning-Ferris* and reinstate the prior joint-employer standard through its ruling in *Hy-Brand Industrial Contractors*.[2] The NLRB, however, ultimately vacated *Hy-Brand* after its controversial determination that a conflict of interest should have disqualified one of the Republican-appointed Board members. Consequently, the Board undertook to jettison the reserved-right-to-control standard through a new rule.

[2] *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017).

Under the final regulation released on February 25, 2020 (effective April 27, 2020), an entity may only be considered a joint employer of another business's employees if it possesses and actually exercises "substantial direct and immediate control" over one or more of the essential terms and conditions of employment. This inquiry is thus focused on whether the entity meaningfully affects matters relating to the employment relationship with those workers. Critically, evidence of an entity's indirect control, or authority that has been reserved but never exercised, over essential terms and conditions of employment of another business's employees, or the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is merely probative of joint-employer status. Neither indirect control nor reserved authority establishes joint employment absent evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.

Helpfully, the final rule defines its key terms. "Essential terms and conditions of employment" are those impacting wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. For each of the foregoing terms and conditions, the final rule indicates what does and does not constitute direct and immediate control. For example, the rule provides that an entity exercises direct and immediate control over wages if it actually determines the wage rates, salary, or other rate of pay that is paid to another business's individual employees or job classifications. Notably, the rule advises that an entity does not exercise direct and immediate control over supervision if it tells another business's employees what work to perform, or where and when to perform the work, but not how to perform it.

Under the NLRB rule, "direct and immediate control" is established where an entity assigns particular workers their individual work schedules, positions, and tasks, but not where the entity merely sets project completion schedules and describes the work to be accomplished on a project. To rise to the level of "substantial direct and immediate control," the action at issue must have a regular or continuous consequential effect on an essential term or condition of employment of another business's employees, as opposed to control exercised on a sporadic, isolated, or *de minimis* basis.

Thus, the new rule eliminates joint-employment liability based solely on a potential joint employer's indirect influence, a contractual reservation of authority, or exercise of only limited and routine supervision, thereby restoring the *status quo* pre-*Browning Ferris*. While many employers may not have changed their practices following *Browning-Ferris*, the new rule will provide a greater measure of comfort as to potential joint-employer liability.

Workplace Impact

Businesses should energetically support the new joint-employer liability standards adopted by the DOL and the NLRB. By focusing primarily on actual control, the new standards are likely to result in fewer findings of joint employment by these agencies. And, because actual control tests yield more predictable and consistent outcomes, they reduce the need for businesses to expend resources auditing each other's employment practices to mitigate the risk of joint-employer liability.

Nevertheless, although the DOL's new final rule should be a welcome development for employers, the true impact of the rule will depend on the level of deference given to it by the courts. The DOL's regulations interpreting the FLSA generally are entitled to deference, but such deference is not automatic. Interests backing the Obama-era interpretation of the joint-employer standard continue to advocate for a broad reading of the standard, and thus business should expect significant litigation over the DOL's rule once it makes its way to the courts.[3] Likewise, the NLRB's rule may be challenged in court or by Congress. The U.S.

[3] Indeed, on February 26, 2020, the District of Columbia and seventeen states (including California, New York, Illinois, Massachusetts, Pennsylvania, and Virginia) filed a lawsuit to vacate the DOL's final rule and enjoin its implementation. *State of New York v. Scalia*, No. 20-cv-1689 (S.D.N.Y.) (filed Feb. 26, 2020).

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House of Representatives recently cleared the Protecting the Right to Organize Act of 2019 (the "PRO Act"),[4] which would codify the *Browning-Ferris* standard for purposes of determining joint employment under the NLRA.

Second, joint-employer standards under state law may be different from, and sometimes broader than, the test that the DOL is proposing for the FLSA. The California Supreme Court, for example, specifically stated in *Martinez v. Combs*[5] that California's definition of "employ" is "[i]n no sense … based on federal law." Instead, California courts focus on whether a business has the *right* to control the manner and means on various factors deemed indicative of a common-law employment relationship. Additionally, California Labor Code § 2810.3 automatically makes most companies that use workers from staffing agencies jointly liable with the staffing agency for the payment of those workers' wages.

Thus, despite changes on the federal level, employers must continue to monitor developments in applicable state law. Indeed, the interplay between state and federal law in this area remains opaque, as some states have taken steps to impose similar requirements while others have imposed broader standards than the federal rules. Last year, for instance, Ohio passed a law, H.B. 494, that amended the definition of "employer" in the Ohio Minimum Fair Wage Standards Act, the Bimonthly Pay statute, the Ohio Workers' Compensation Act, and the Ohio Unemployment Compensation Act to provide that franchisors are not the employers of their franchisees or the employees of their franchisee absent a franchisor's express written agreement to assume that role or a court finding that the franchisor exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by the franchisor for the purpose of protecting the franchisor's trademark, brand, or both. Although this law applies only to state wage-and-hour and unemployment laws, and not to discrimination laws or federal laws such as the FLSA, it appears consistent with the NLRB's proposed rule.

In a related context, California recently enacted new legislation, Assembly Bill 5, that codifies the so-called ABC Test utilized in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018), for determining whether a worker is properly classified as an independent contractor or an employee under the California Labor Code, the Industrial Welfare Commission ("IWC") Wage Orders, and the California Unemployment Insurance Code. Under the ABC Test, a worker is presumed to be an employee unless (1) the worker performs his/her work free from the hirer's control and direction; (2) the worker performs work outside the "usual course" of the hirer's business; and (3) the worker is customarily engaged in an independent established trade, occupation, or business of the same nature as the work performed. While the courts have thus far limited application of the ABC Test to the independent contractor-employee context,[6] businesses should be aware that the California legislature or courts could expand the ABC Test to the joint-employer analysis.

Clearly, the changes to the joint-employer standard imposed by the DOL and the NLRB's final rules should be welcome developments for businesses, at least in terms of federal enforcement. The current administration clearly is mandating that *actual* control be the touchstone for determining whether a joint-employment relationship exists. At the same time, businesses not only should support the federal effort in every way possible, but also should urge their state representatives to act consistently with federal authorities and, where state law is unclear, suggest to state agencies and state courts that they follow federal governmental analysis and methodology with respect to determining joint employment.

[4] H.R. 2474, 116th Cong. (2019).
[5] 49 Cal. 4th 35, 66 (Cal. 2010).
[6] *See Salazar v. McDonald's Corp.,* No. 17-15673 (9th Cir. Oct. 1, 2019); *Henderson v. Equilon Enterprises, LLC,* No. A151626 (Cal. App. Dist. Oct. 8, 2019).

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