The Clarity Project: The U.S. Department of Labor Issues New Guidance On The Joint Employer Standard

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Overview

On Monday April 1, 2019, the United States Department of Labor ("DOL") released a Notice of Proposed Rulemaking to adopt a new standard for determining whether two or more enterprises are joint employers for purposes of the Fair Labor Standards Act (FLSA).[1] The FLSA requires, *inter alia,* that employers whose annual revenues equal or exceed $500,000 or who are engaged in interstate commerce pay their employees for each hour worked and pay overtime compensation for each hour worked in excess of forty (40) in a workweek.[2] The DOL joint employer standard defines when two employers will be considered responsible for the same employee and subject to joint and several liability for violations of the FLSA's minimum wage and overtime requirements.

If the proposed rule is adopted, it will represent the first revision to the regulations in fifty-eight (58) years.[3] The proposed rule has significant implications for employers who: franchise; utilize contractors or staffing firms to perform any segment of their business; and for employers who provide temporary or contingent workers to other businesses or use such temporary and contingent workers. In sum, it is likely that the proposed new rule would make it more difficult to establish that a user of labor or services is the joint employer of the supplying entity's employees and to establish that a franchisor is the joint employer of its franchisee's employees.

The Current DOL Joint Employer Standard

The Code of Federal Regulations

The 1958 DOL joint employer standard, codified at Part 791 of Title 29, Code of Federal Regulations (CFR), provides that joint employer status will be determined by examining whether two companies are "not completely disassociated" or "acting entirely independently of each other" with respect to employees.[4] The existing standard further explains that "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek" a joint-employer relationship will be found:

- Where there is an arrangement between the employer to share employees;
- Where one employer is acting directly or indirectly in the interest of the other employer with respect to its employees;
- Where employers are not disassociated from a particular employee and may be deemed to share control of said 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"[5]

The current test, focusing on disassociation, leaves many companies and courts with uncertainty as to how they can measure when an entity has "not completely disassociated." Various federal courts have interpreted the current test differently, creating additional uncertainty for employers and advocates. For example, in *Zheng v. Liberty Apparel Co.*, the Second Circuit created a six- to ten-factor test to determine disassociation,[6] while the Fourth Circuit adopted its own test in *Salinas v. Commercial Interiors Inc.*[7] Four other circuit courts of appeal have adopted the test which the Ninth Circuit established in *Bonnette v. California Health and Welfare Agency.*[8] In

[1] *See* https://www.dol.gov/whd/flsa/jointemployment2019/. *See also* Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. No. 68 (April 9, 2019).

[2] *See* 29 U.S.C. §§ 206(a), 207(a).

[3] *See* 26 FR 7732 (Aug. 18, 1961) (amending a footnote in the regulation to clarify that a joint employer is also jointly liable for overtime pay).

[4] 29 CFR § 791.2(a).

[5] *See* 29 CFR § 791.2(b).

[6] *See Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61,72 (2d Cir. 2003) and 617 F.3d 182, 186 (2d Cir. 2010).

[7] *See, e.g., Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 141-42 (4th Cir. 2017) (providing, in the context of the Fair Labor Standards Act, that "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment").

[8] *See Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469-72 (9th Cir. 1983).

(Pub. 1239)

Bonnette, the Ninth Circuit found that "regardless of whether the appellants are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial." In other words, if the employer had the authority to hire and fire, it was a joint employer, whether or not that authority was ever actually exercised control over the employee(s). The inconsistency between the Circuit Courts leaves employers who operate in multiple jurisdictions with the risk of being subject to joint employer liability is one jurisdiction, but not another.

Obama Administration Guidance

In January 2016, the Obama Administration issued an Administrative Interpretation (AI) addressing the joint employer standard under FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) in which it stated it was seeking to clarify the DOL's position on the increasing number of circumstances under which two or more entities may be deemed joint employers.[9] These actions were widely perceived as a move to broaden the standard and expand the circumstances in which unrelated businesses could be held to be joint employers.

The AI stated that the "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA."[10] To expand the definition of joint employer the DOL identified two different types of scenarios in which joint employment could be found – "horizontal" and "vertical." "Horizontal" joint employment occurs where a worker has an employment relationship with two or more related or commonly owned business entities that share an employee.[11] In a case of horizontal joint employment under the AI, the DOL applied the FLSA regulations codified at Part 791 of the CFR to assess whether a joint employment relationship existed between the two business entities.[12]

"Vertical" joint employment exists where an individual performs work for an intermediary employer, but was also economically dependent on another employer, such as a staffing agency.[13] In a vertical joint employment scenario, the DOL focus shifted on the relationship between the worker and each business entity, applying an "economic realities test" to determine whether the worker was economically dependent on the putative joint employer(s).[14] This test focused on the control an entity may assert over a contractor or the control a franchisor may assert over its franchisees.

Overall, David Weil – who was then Administrator of the Wage and Hour Division of the DOL – sought to reduce functions which lead to what he considered "fissured" workplace relationships and policies.[15] Under this concept, policies which split and divide the workplace – such as the use of third-party contractors who control the primary's workforce – also have the impacts of undermining the employees' ability to organize under the National Labor Relations Act and of reducing an employee's ability to request a change in working conditions unless the third-party contractor agrees. By adopting a more expansive view of the joint employer relationship, Weil sought to close this gap.[16]

AI 2016-1 failed to pass through an administrative rulemaking process and was withdrawn in 2017 with the advent of the new Republican administration.[17]

The National Labor Relations Act and the Browning-Ferris Standard Add Additional Confusion

In August 2015, the National Labor Relations Board (Board) issued its decision in *Browning-Ferris Industries of California, Inc.* (*Browning-Ferris*), which expanded its joint employer definition under the National Labor Relations Act. *Browning-Ferris* held that two entities may be joint employers if one exercises either direct or indirect control over the terms and conditions of the other's employees or possesses the reserved right to do so, even if that right is never exercised.[18]

In late 2017, the Board's new Republican majority unsuccessfully attempted to substitute its decision in *Hy-Brand Industrial Contractors, Inc.* (*Hy-Brand*) for the *Browning-Ferris* standard.[19] Under *Hy-Brand* to qualify as a joint

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[9] *See* U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[10] U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[11] U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[12] U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[13] U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[14] U.S. DOL, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016).

[15] *See* David Weil, The Fissured Workplace (2014).

[16] *See* David Weil, The Fissured Workplace (2014).

[17] *See* U.S. DOL News Release (June 7, 2017), reprinted at https://www.dol.gov/newsroom/releases/opa/opa20170607.

[18] *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[19] *See Hy-Brand Industrial Contractors, Inc.*, 365 NLRB No. 156 (2017).

employer, the employer must "directly and immediately exercise control over the essential employment terms of another entity's employees."[20] Indirect control of another entity's employees or simply possessing – but not exercising such right – would not result in a joint- employer finding.[21] *Hy-Brand* was vacated in February 2018 because of a finding that Member William Emanuel should have recused himself and not participated in the *Hy-Brand* decision.[22]

The Board's decision to vacate its decision in *Hy-Brand* meant that *Browning-Ferris* is once again good law. *Browning-Ferris* imposes a two-part test to determine joint employment. The Board will find two or more entities are joint employers if:

- A common-law employment relationship with employees exists; and
- If putative joint employer has control over employees' essential terms and conditions of employment.[23]

To satisfy the second prong for joint employment, the Board does not require "direct and immediate" control over workers.[24] A joint employer relationship can be established by indirect control, such as a contract provision or financial arrangement which allows a potential joint employer to exercise control at a later time.[25] It is irrelevant whether the employer exercises actual control over the employees at issue.[26]

In September 2018, the Board proposed a new joint employer standard under proposed rulemaking standards.[27] The initial comment period for the Board's proposed rule closed on February 11, 2019.[28] Under the proposed rule, an employer would have to possess and exercise "substantial, direct and immediate control" over the hiring, firing, discipline, supervision and direction of another firm's employees to be considered a joint-employer, similar to the standard expressed in *Hy-Brand*.

In December 2018, the D.C. Circuit reviewed *Browning-Ferris*, partially validating the Board's test previously adopted in that case.[29] Specifically, the court stated that the "right to control" and "indirect control" factors were consistent with common-law agency principles.[30] It expressly stated that it was not addressing the question of whether a "right to control" alone or indirect control alone could be dispositive to a joint employer finding, but that that the finding was relevant.[31] The court also gave the Board was specific instruction to clarify the types of indirect control that factored into the Board's analysis, thereby eliminating the Board's ability to use the Court's remand to change the joint-employer standard again.[32] Since that time, the Board has not taken further action in *Browning-Ferris.*

The U.S. DOL's Proposed New Rule

The DOL's newly published proposed rule represents a sharp departure from the Obama-era proposal to broaden the test for determining joint employer status. Specifically, the DOL seeks to abandon the "not completely disassociated" standard of the current DOL test and replace it with a four-part balancing test derived by the Ninth Circuit Court of Appeals in *Bonnette v. California Health and Welfare Agency.*[33] Under the proposed new rule, "[o]nly actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the [FLSA]."[34] The DOL proposed rule notes that four other circuit courts of appeal have

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[20] *See Hy-Brand Industrial Contractors, Inc.*, 365 NLRB No. 156 (2017).

[21] *See Hy-Brand Industrial Contractors, Inc.*, 365 NLRB No. 156 (2017).

[22] *See* NLRB News Release, February 26, 2018, https://www.nlrb.gov/news-outreach/news-story/board-vacates-hy-brand-decision.

[23] *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[24] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[25] *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[26] *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[27] *See* U.S. Office of the Federal Register Notice, September 14, 2018, https://www.federalregister.gov/documents/2018/09/14/2018-19930/the-standard-for-determining-joint-employer-status.

[28] *See* NLRB News Release, January 11, 2019, https://www.nlrb.gov/news-outreach/news-story/nlrb-further-extends-time-submitting-comments-proposed-joint-employer-1.

[29] *See Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

[30] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[31] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[32] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

[33] *See Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469-70 (9th Cir. 1983).

[34] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. No. 68 (April 9, 2019).

adopted tests that are similar to the *Bonnette* test, while the remaining circuit courts apply different tests, but "each of them applies at least one factor that resembles one of the Department's proposed factors derived from the *Bonnette* test."[35]

Under the proposed new rule, joint employer status would be determined by considering four key factors assessing whether the potential joint employer actually exercises 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; and
- Maintain the employee's employment records.

Other factors may be considered when determining joint employer status, but only where there is evidence that a potential joint employer is exercising significant control over the terms and conditions of an employee's work or otherwise acting directly or indirectly in the interest of the employer in relation to the employee in question.

The proposed regulations include nine examples that the DOL to provide clarity on who is a joint employer. The examples involve workers at franchised restaurants, janitorial service workers at an office complex, landscaping employees at a country club, staffing agency employees at a packaging company, a national chain that requires its suppliers to sign a code of conduct, and a subcontractor in a large retail store. One example highlights that a franchisor will not be found to be a joint employer with its franchisee merely because it provided sample employment applications and other forms to the entity – particularly where the franchisee maintains control over hiring, firing and record-keeping. In contrast, the examples suggest that an employer will be considered a joint employer where they directly set pay rates, supervise employees, or make termination decisions regarding the workforce.

Related Guidance that Impacts Employers

Depending on your perspective, the proposed rule may be viewed as a blessing or a curse. On its face, the new rule may "promote certainty for employer and employees, reduce litigation, and encourage innovation in the economy."[36] The joint employer proposed rule, however, is the third of four proposed changes to the FLSA announced by the DOL since January of 2019 – making it clear that the DOL seeks to have clarity and a new direction in the wage and hour space prior to another potential change in U.S. administration in November 2020.

To give an overview of the related proposed rules, in March, the DOL published two separate proposed rules. First, the DOL announced a proposed rule to increase the minimum salary required for an employee to qualify for the white-collar exemption by approximately $224.[37] The proposed rule would increase the salary threshold for exemptions from $23,660 to $35,308. While this is higher than the existing threshold, it is significantly lower than a 2016 Obama administration proposed amendment that would have increased the threshold to $913 per week or $47,476 annually.[38] Second, the DOL announced a proposed rule to clarify the types of compensation that must be included in an overtime calculation. Specifically, the proposed rule clarifies that the cost of wellness programs, payments for unused paid or sick leave, reimbursed expenses, discretionary bonuses, benefit plans, and tuition programs should be excluded from an employee's regular rate of pay.[39] On April 29, 2019, the DOL issued new guidance narrowing the definition of who qualifies as an employee under the FLSA.[40] The guidance mirrors recent guidance set forth by the National Labor Relations Board and departs sharply from the Obama Administration's Interpretation of the definition which generally found that most workers were employees under the FLSA's broad definitions. The test set forth by the DOL looks at six-factors to determine if a subject is economically independent and therefore an independent contractor rather than an employee.[41]

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[35] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. No. 68 (April 9, 2019).

[36] *See* The DOL Proposed Joint Employer Rule, https://www.federalregister.gov/documents/2019/04/09/2019-06500/joint-employer-status-under-the-fair-labor-standards-act.

[37] *See* DOL Wage and Hour Division March 7, 2019 Announcement, https://www.dol.gov/whd/overtime2019/.

[38] *See* 80 Fed. Reg. 38516 (July 6, 2015). The final regulations were scheduled to become effective on December 1, 2016, but were temporarily enjoined on a nationwide basis in late November 2016. *State of Nevada et al. v. U.S. Department of Labor et al.*, case number 4:16-cv-00731, in the U.S. District Court for the Eastern District of Texas. Read more at: https://www.law360.com/articles/996432?copied=1.

[39] *See* DOL Wage and Hour Division March 28, 2019 Announcement, https://www.dol.gov/whd/overtime/regularrate2019.htm.

[40] *See* DOL W-H Op. Letter, FLSA2019-6. (Apr. 29, 2019).

[41] DOL W-H Op. Letter, FLSA2019-6. (Apr. 29, 2019).

The joint employer proposed rule, and all the DOL proposed changes this year face many challenges from what will surely be strong opposition from workers' rights advocates before any one proposed regulation can become official guidance from the DOL. Consequently, the future of the joint-employer standard and the employers' quest for clarity under the FLSA overall will continue into the near future.

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