VOLUME 74 ◆ NUMBER 4

Employee Benefit Plan Review

A Quick Wage-Hour Tip on Joint Employer Status Under the Fair Labor Standards Act

Adriana S. Kosovych

With the effective date of the new rule interpreting joint employer status under the Fair Labor Standards Act ("FLSA") having taken effect on March 16, 2020, employers that have not already done so should brush up on the updated guidance and review their relationships with workers to ensure compliance. Otherwise, they may face the expensive possibility of being held jointly and severally liable under the FLSA for all of the hours the individuals worked in the workweek, including hours worked for a different company.

The New Rule

A joint employment relationship may arise under two potential scenarios.

Scenario 1

One company employs an individual to work and a second, independent company also employs the individual or simultaneously benefits from that work.

A four-part balancing test analyzes whether the putative joint employer *actually* exercises control, directly or indirectly, in one or more of the following ways:

1) Hiring or firing the employee;
2) Supervising and controlling the employee's work schedule or conditions of employment to a substantial degree;
3) Determining the employee's rate and method of payment; and
4) Maintaining the employee's employment records.

The power or reserved right to exercise this control may be relevant to the joint employer determination, but it will not confer joint employer status where there is no *actual* exercise of control and none of the other factors is present. Additional factors also may be relevant if they indicate whether the putative joint employer exercises significant control over the terms and conditions of the individual's work. As with most balancing tests, no single factor is dispositive, and the weight of each factor will vary depending on the circumstances.

In contrast to the four (or more) factors that may inform the determination of joint employer status, certain other factors are definitively not relevant under the revised FLSA regulations – namely, those assessing an employee's economic dependence on the putative joint employer, including:

- Whether the employee is in a specialty job or in a job that 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 the putative joint employer has entered into to receive similar services.

Nor do any of the following contractual arrangements or business practices make FLSA joint employer status any more or less likely:

- A particular business model (including a franchise model);
- Entering into, monitoring, and enforcing contractual agreements requiring the employer to comply with specific legal obligations or to meet certain health and safety standards, and requiring inclusion of such policies and standards in an employee handbook (e.g., mandating compliance with the FLSA and similar laws, institution of sexual harassment policies, and implementation of workplace safety protocols and training);
- Entering into, monitoring, and enforcing contractual agreements with the employer requiring quality control standards;
- Providing the employer a sample employee handbook or other forms to the employer;
- Offering an association health or retirement plan with the employer;
- Allowing the employer to operate a business on the putative employer's business; and
- Jointly participating in an apprenticeship program with the employer.

Scenario 2

One employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate job in a separate set of hours in the same workweek. In this scenario, each employer may disregard all work performed by the employee for the other if they act independently of each other and are disassociated with respect to the employment of the employee.

By contrast, employers that are sufficiently associated with respect to the employee's employment must aggregate all hours worked for each in determining their respective compliance with the FLSA. "Sufficient association" between two putative joint employers turns on whether:

1) There is an arrangement between them to share the employee's services;
2) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
3) They share direct or indirect control over the employee.

Employers that are sufficiently associated will be jointly and severally liable for compliance with the FLSA (including overtime) for all hours worked by the employee in a particular workweek by any of the associated joint employers. However, each joint employer may take credit toward minimum wage and overtime payments by the other.

Key Takeaways

Under both scenarios, the key to the joint employer analysis is the putative joint employer's sufficient control over the employee or sufficient association with the employer, and either scenario can potentially lead to unanticipated liability for overtime based on aggregated hours about which a putative joint employer may not have even been aware.

To mitigate against a finding of joint employer status, employers should carefully consider existing (or potential) situations in which they may come into contact with other employers' workers or where their own workers may be coming into contact with other employers. This should include a review of any contractual arrangements for the performance of work or provision of services (whether with entities providing workers or individuals).

By identifying these situations, a potential joint employer may then make informed decisions about how to manage the risks: either by treating a situation as joint employment and tracking and paying for work time accordingly, or by potentially reducing the amount of control or association to lessen the risk of a joint employment finding.

Adriana S. Kosovych is an associate in the Employment, Labor & Workforce Management practice, in the New York office of Epstein Becker Green. She may be contacted at *akosovych@ebglaw.com*.