U.S. Department of Labor Issues Proposed Joint Employment Rule

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On April 1, 2019, the U.S. Department of Labor (DOL) issued a proposed rule that would clarify when two entities may be considered joint employers of an employee for purposes of the Fair Labor Standards Act (FLSA), and therefore may be held jointly and severally liable for FLSA violations. The rule comes nearly two years after the DOL withdrew Obama-era guidance broadly interpreting the rules regarding joint employment (see alert here). The DOL's proposed rule would narrow the circumstances under which an entity could be deemed a joint employer of another entity's employees, particularly in situations involving franchises and staffing arrangements.

Current regulations, unchanged since 1958, identify two types of situations where a joint employer relationship may exist: (1) those "[w]here the employee performs work which simultaneously benefits two or more employers," and (2) those where the employee "works for two or more employers at different times during the workweek." Under current regulations, in either of these situations, a joint employer relationship exists when the two or more employers are "not completely dissociated" from one another with respect to the employee.

The proposed rule recognizes that, while the "not completely dissociated" test has been adequate in situations where an employee works for two or more employers at different times during a given workweek, it has led to confusion and uncertainty in situations where an employee performs work that simultaneously benefits two or more employers. Thus, in such situations, the proposed rule jettisons the "not completely dissociated" test and instead uses a four-factor balancing test to determine whether a joint employer relationship exists. Under that test, if Entity X employs employee, and Entity Y benefits from that work, the inquiry will look to whether Entity Y:

- Hires or fires employee;
- Supervises and controls employee's work schedule or conditions of employment;
- Determines employee's rate and method of payment; and
- Maintains employee's employment records.

The proposed rule contains a thorough analysis of these factors, as well as several illustrative examples. According to DOL, in the franchising context, a franchisor who provides a franchisee with sample employment applications, sample employment handbooks, and other forms and documents for use in operating the franchise, but leaves all day-to-day operations to the franchisee (including hiring, firing, rates of pay, records, supervision, and conditions of employment) is not a joint employer.

In the staffing context, a packaging company that requests workers from a staffing agency on a daily basis, and then sets the workers' hourly rate of pay, supervises their work, and adjusts workers' specific hours based on customer demand would be considered a joint employer with the staffing agency. On the other hand, an office park company that hires a janitorial company to clean the office park and pays a fixed fee to the janitorial company without setting rates of pay or schedules for individual janitors would not be considered a joint employer with the janitorial company.

As with the DOL's other recent proposed rules (see our April 2 and March 11 alerts), the proposed rule will now be subject to a notice-and-comment period, and comments from stakeholders such as employer and employee groups will be considered in developing the final rule. Foley Hoag will continue to monitor developments and provide updates.

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