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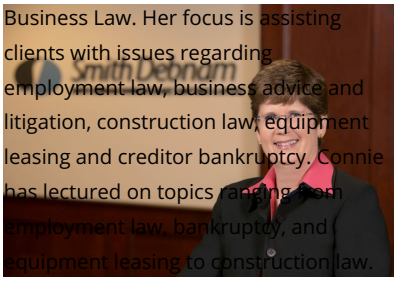

Shifting Sands Continue to Define Traditional Definitions of the Employment Relationship

January 13, 2020 | by

On January 12, 2020, the Wage and Hour Division of the United States Department of Labor announced a final rule which serves to revise regulations issued under the Fair Labor Standards Act (FLSA) that provide guidance in determining joint-employer status. This rule provides the first significant update in many years to the law governing joint employment. The final rule, which takes effect on March 16, 2020, provides clarity to employers and enables contractors and franchisors to overcome barriers that have prevented them from overseeing and guiding their business partners in a constructive manner without fear of exposure to joint employment liability.

The FLSA requires employers to pay their employees no less than the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek. The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Under the FLSA, an employee may have one or more joint employers. A joint employer is any additional person or entity who is jointly and severally liable with the employer for payment of the employee's wages.

If an employee performs work for an employer that simultaneously benefits another person or entity, the final rule adopts a four-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee.

The Department of Labor will now evaluate the following factors in determining whether a business is a joint employer:

- Does the business have significant input in the hiring and firing of the other company's employees?
- Does the business supervise and control the other company's employees' work schedules or conditions of employment to a substantial degree?
- Does the business determine the other company's employees' rate and method of payment?
- Does the business maintain employment records related to the other company's employees?

Whether a person or entity is a joint employer will depend on all the facts, and the appropriate weight given to each factor will vary depending upon the circumstances. However, under these new standards, businesses likely won't be deemed to be joint employers if they refrain from engaging in the day-to-day employment decisions of their contractors and franchisees.

This analysis is a significant transition from the former test utilized by the Department of Labor, which included factors common to franchise and contracting relationships such as whether the employee is economically dependent on the potential joint employer, whether the potential joint employer's contractual arrangements with the business includes quality control standards, whether the potential joint employer offers an apprenticeship program, and whether the potential joint employer requires the business to comply with legal, health, or safety obligations. The final rule provides that such factors do not make joint-employer status more likely under the FLSA.

Key Considerations for Employers

The effect of holding entities jointly liable under the FLSA is that both employers are responsible for compliance with the wage and hour protections provided by the FLSA. Accordingly, a worker's employment by joint employers is treated as "one employment" for purposes of compliance, including the aggregating of hours worked for each employer in order to determine whether and to what extent the worker is entitled to payment of overtime compensation.

It is evident that, despite the United States Department of Labor's announcement of this final rule narrowing the factors that would be evaluated, joint employment remains an issue of paramount concern to federal courts and agencies in today's flexible gig economy. Different tests have been applied by federal courts throughout the country and exhibit some inconsistencies in evaluating joint employment under the FLSA, Title VII, and other federal laws. That being the case, employers would be wise not to rely upon traditionally recognized business relationships as sufficient protection from a claim of joint employment.

Click here to read about other recent developments from the United States Department of Labor.

If you have questions regarding these court decisions or other legal issues, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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