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U.S. Department of Labor Issues Final Rule on Joint Employment

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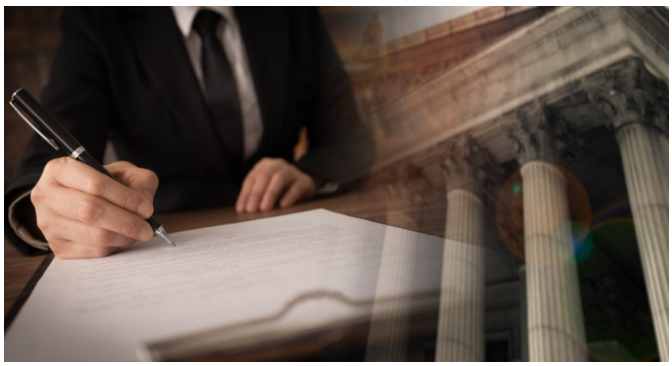

On January 12, 2020, the United States Department of Labor ('USDOL') Wage and Hour Division announced a final rule regarding joint employment under the Fair Labor Standards Act ('FLSA'), to be published on January 16 of this year, and effective 60 days after publication.

The stated purpose of this final rule is to "promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy."

Since the FLSA's enactment, the USDOL has recognized that an employee can have two or more employers who are jointly and severally liable for unpaid wages due to an employee. Under the Obama administration, attempts were made to broaden what defines joint employment. It was suggested at the time that employers were getting a free pass by using separate entity formations and contracts (among other strategies) to get around employer liability.

At the same time, the business community argued that for joint employment to be established between two or more entities and/or people, some level of control over the employee(s) in question needed to be exercised by the entity/person claimed to be a joint employer.

With the USDOL Wage and Hour Division's final rule on joint employment, we at long last have guidance on this issue. The good news for employers is that the final rule is friendly to the business community and its point of view. For example, the USDOL describes several key aspects of the final rule:

- The final rule states that "when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee."
- It also "provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of any employer in relation to the employee." No one factor being determinative, the four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* assesses whether the other person: "(1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records."
- The final rule, "clarifies that an employee's 'economic dependence' on a potential joint employer does

not determine whether it is a joint employer under the FLSA."
- It "specifies that an employer's franchisor, brand, and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely."
- The final rule also "provides several examples applying [USDOL Wage and Hour Division] guidance for determining FLSA joint employer status in a variety of different factual situations."

The USDOL states that application of the four-factor test should determine joint employer status in most cases, but we would urge you to seek counsel in the event that a finding of joint employment is possible. A copy of the yet-to-be published final rule can be found here.

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