US: DOL rule narrows joint employer standard

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Jan. 15, 2020; revised March 11, 2021

A new Department of Labor (DOL) final rule that aims to clarify the standard for joint-employer status under the federal Fair Labor Standards Act (FLSA) will likely reduce the number of situations under which the status will apply. Effective March 16, 2020, the rule sets out a new four-factor balancing test that focuses on the employer's actual — not theoretical — control over an employee's terms and conditions of work. The rule is largely the same as the proposed rule issued in April 2019 and comes two and a half years after the agency rescinded informal guidance on joint employment issued during the Obama administration. This is the first meaningful revision of the joint employer rule since 1958. However, on March 11, 2021, the DOL proposed to rescind this rule. Comments can be submitted until April 11, 2021 — 30 days after publication in the federal register.

Background

Under FLSA, employers are generally required to pay their nonexempt employees — those eligible for overtime pay — at least the federal minimum wage for all hours worked, plus overtime for all hours worked over 40 in a workweek. When an employee has more than one employer and those employers are considered joint employers under FLSA, they are "jointly and severally" liable for the employee's wages.

New test

The final rule addresses situations where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another entity. Under the DOL's prior rule, joint employment may exist if an individual's employment by one employer is "not completely disassociated" from employment by another employer. The final rule eliminates this standard and provides that the other entity is a joint employer only if that entity is acting directly or indirectly in the interest of the employer in relation to the employee and adopts a four-factor balancing test — which the DOL says is

"consistent with Supreme Court and circuit court precedent." Under the new test, joint-employer status will be limited to situations where the employer *actually* exercises the power to:

- Hire or dismiss the employee
- Supervise and control the employee's work schedules or conditions of employment
- Determine the employee's payment rate and method
- Maintain the employee's employment record

Whether a person is a joint employer will depend on the facts in a particular case, and the appropriate weight assigned to each factor will vary depending on the circumstances. However, the potential joint employer's maintenance of the employee's employment records alone will not lead to a finding of joint employer status. The rule includes several examples to illustrate how the new test applies and outlines additional factors that should or should not be considered.

Further clarification

The rule clarifies that an employee's "economic dependence" on a potential joint employer; a particular business model (such as a franchise model); certain business practices (such as participating in an association health or retirement plan); and certain business agreements (such as requiring an employer in a business contract to institute sexual harassment policies) don't make joint-employer status more or less likely.

The joint-employer rule also addresses the scenario where an employee works separate sets of hours for multiple employers in the same workweek. The final rule largely leaves prior guidance intact, making only "nonsubstantive revisions," the DOL says.

Related resources

Non-Mercer resources

- Proposed rule (Federal Register, March 12, 2021)
- Information on the Joint Employer Rule (Wage and Hour Division, Jan. 12, 2020)
- Fair Labor Standards Act (Department of Labor, May 2011)

Mercer Law & Policy resource

- US: Proposed DOL Rule Narrows Joint-Employer Standard (April 11, 2019)

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