DOL Rescinds Prior Administration's Joint Employer Rule

By Allen Smith, J.D.
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The U.S. Department of Labor (DOL) has rescinded a final rule issued under the Trump administration that narrowed the definition of a joint employer under the Fair Labor Standards Act (FLSA). The rescission makes it more likely that an employer will be determined to be a joint employer and thus liable under the FLSA for another employer's actions.

Under the rescinded rule, the DOL would, when determining if a company is a joint employer, consider whether a business:

- Hires and fires employees.
- Supervises and controls employees' work schedules or conditions of employment to a substantial degree.
- Determines employees' rate and method of payment.
- Maintains employment records.

The rescinded rule also provided that the following factors do not influence the joint-employer analysis:

- Having a franchiser business model.
- Providing a sample employee handbook to a franchisee.
- Allowing an employer to operate a facility on the company's grounds.
- Jointly participating with an employer in an apprenticeship program.
- Offering an association health or retirement plan to an employer or participating in a plan with the employer.
- Requiring a business partner to establish minimum wages and workplace-safety, sexual-harassment-prevention and other policies.

Many commenters, including the Society for Human Resource Management (SHRM), asserted that the rescinded rule provided clarity and predictability to the regulated community and argued that its rescission would lead to confusion and uncertainty.

The rescission, issued July 29, takes effect Sept. 28.

The DOL concluded that the rescinded rule included a description of joint employment contrary to its assessment of statutory language and congressional intent. According to the DOL, the withdrawn rule failed to account for the department's prior joint-employment guidance and "specifically excluded any consideration of the employee's economic dependence on the potential joint employer." The department noted that the U.S. District Court for the Southern District of New York vacated most of the rule in 2020.

"Because it conflicted with established precedent in the circuits, the [rescinded] rule presented employers with the difficult choice of conducting their business in a manner consistent with circuit precedent or with the rule," the DOL stated. "Furthermore, because employers had to consider circuit precedent, as no circuit had adopted the rule, the rule likely provided little clarity."

The new final rule asserted that there is vertical and horizontal joint employment and the rescinded rule "intertwined the horizontal joint employment provision with the vertical joint employment provisions."

Vertical joint employment exists when a worker has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider or other intermediary employer), another employer receives the benefit of the worker's labor, and the worker is economically dependent on and thus employed by the other employer.

Horizontal joint employment may be present where one entity employs a worker for one set of hours in a workweek and another business employs the same worker for other hours in the same workweek. If the two employers jointly employ the worker, the hours worked by that person for both employers must be aggregated for the workweek and the employers are jointly liable for FLSA violations.

We've gathered articles on the news from *SHRM Online* and other trusted news outlets.

Implications of Joint Employer Status

Under some circumstances, an employee of one company may be a joint employee of a second company, depending on the extent of control and supervision that one employer exercises over the employee. If the second company is a joint employer, both companies might be liable for minimum wages and overtime pay under the FLSA. A company's staffing firms, subcontractors, franchisees or other affiliated companies might be joint employers.

(JD Supra (https://www.jdsupra.com/legalnews/dol-sends-proposed-new-joint-employer-5978257/))

Prior Administration's Rule Issued Last Year

The DOL announced Jan. 12, 2020, a final rule narrowing the definition of a joint employer under the FLSA to provide clarity to businesses about franchise and contractor relationships. "The final rule, with practical examples provided in the text, provides a road map as to how an employer can structure relations with vendors to avoid joint employment wage and hour claims if under DOL scrutiny," said Michael Lotito, an attorney with Littler in San Francisco.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/labor-department-releases-final-joint-employer-rule.aspx?_ga=2.27216829.1826212939.1627303164-1102745045.1615925853&_gac=1.53287258.1624557624.Cj0KCQjw2tCGBhCLARIsABJGmZ4Mnz8sqX9rb7dvsKO6SpxUSOXFe_Imc6xdR0kNrTRbs1sI1VBPF-4aAqzuEALw_wcB))

Federal Judge Struck Down Major Parts of Rule

A federal judge in New York invalidated substantial portions of the DOL's joint employer rule on Sept. 8, 2020. The judge ruled in favor of a coalition of state attorneys general who claimed that the rule weakens critical workplace protections. Among other arguments, the coalition said the rule conflicts with the protections Congress intended to provide under the FLSA and that the DOL violated the Administrative Procedure Act's rulemaking process.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/federal-judge-strikes-down-joint-employer-rule.aspx?_ga=2.27216829.1826212939.1627303164-1102745045.1615925853&_gac=1.53287258.1624557624.Cj0KCQjw2tCGBhCLARIsABJGmZ4Mnz8sqX9rb7dvsKO6SpxUSOXFe_Imc6xdR0kNrTRbs1sI1VBPF-4aAqzuEALw_wcB))

Case Pending

The legality of the rescinded Trump rule is pending before the 2nd U.S. Circuit Court of Appeals. By repealing the regulation, Biden administration attorneys may ask the judge to dismiss the case. Business groups that have intervened in the litigation to defend the rescinded rule may oppose such an effort. Reps. Virginia Foxx, R-N.C., ranking member on the House Education and Labor Committee, and Fred Keller, R-Pa., issued a statement urging the DOL to reinstate the rescinded rule.

(Bloomberg Law (https://news.bloomberglaw.com/daily-labor-report/biden-dol-clinches-rollback-of-trump-era-joint-employer-rule))

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