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DOL Updates Joint Employer FLSA Regulations

For the first time in sixty years, the U.S. Department of Labor (DOL) has issued a final rule to substantively update the regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA). The regulations, which address joint employer liability *only* under the FLSA, become effective **March 16, 2020**. The DOL's Wage and Hour Division is offering a public webinar on these changes on February 25, 2020 and will post a recording of the webinar on its joint employer website after the live presentation.

The new regulations provide a four-factor balancing test for determining FLSA joint employer status in situations where an employee performs work for one employer that simultaneously benefits another individual or entity. The balancing test examines whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

While no single factor is dispositive in determining joint employer status, the potential joint employer must *actually* exercise—directly or indirectly—control over the employee. Contractual language reserving a right to act is insufficient, standing alone, for demonstrating joint employer status. Moreover, maintenance of the employee's employment records alone will not lead to a finding of joint employer status.

The revised regulations also identify factors that are *not* relevant to the determination of FLSA joint employer status. For example, the regulations provide that whether the

employee is economically dependent on the potential joint employer is not relevant to determine joint employer liability.

Perhaps most importantly, the new regulations provide that the following factors are "neutral" in that they do not make joint employer status more or less likely:

- operating as a franchisor or entering into a brand and supply agreement, or using a similar business model;
- the potential joint employer's contractual agreements with the employer requiring the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of its employees or the public;
- the potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation; and
- the potential joint employer's practice of providing the employer with a sample employee handbook, or other forms, allowing the employer to operate a business on its premises (including "store within a store" arrangements), offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer, jointly participating in an apprenticeship program with the employer, or any other similar business practice.

The new regulations provide a number of useful examples, applying the four-factor balancing test to a variety of business models, and thereby giving employers practical guidance. As you review materials regarding the new regulations, which have a business-friendly approach, remember that DOL Regulations are advisory only and that courts are not obligated to follow them. As such, we will need to closely monitor how the Ninth Circuit Court of Appeals addresses FLSA joint employer liability and continue to keep an eye out for joint employer rules from both the National Labor Relations Board and the U.S. Equal Employment Opportunity Commission.

If you have questions about joint employer liability, please contact a KZA attorney.