

JANUARY 16, 2020 | WAGE & HOUR COMPLIANCE

DOL Releases Final Rule for Determining Joint Employer Status

Earlier this week, on January 12, 2020, the U.S. Department of Labor (DOL) [announced](#) the release of its final  rule revising and updating its regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA). According to DOL, "The final rule provides updated guidance for determining joint employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity, including guidance on the identification of certain factors that are not relevant when determining joint employer status." The DOL published its [Notice of Proposed Rulemaking](#) (NPRM) on April 9, 2019, and received over 12,000 comments within the 30-day comment period. The final rule becomes effective on March 16, 2020, 60 days after [publication](#) in the Federal Register today, January 16, 2020.

As a threshold matter, under the FLSA, an employee working for one company may be found to be the joint employee of a second, independent company, depending on the nature and extent of control over the employee's work. Joint employer status is important for numerous reasons, including the fact that a joint employer can be held joint and severally liable for FLSA wage and hour obligations. In 1958, DOL published an interpretive regulation, 29 C.F.R. § 791, explaining that joint employer status depends on whether multiple persons are "not completely disassociated" or "acting entirely independently of each other" with respect to the employee's employment.

Specifically, the regulation provided three situations where two or more employers are generally considered joint employers: (1) where there is an arrangement between the employers to share the employee's services (e.g., to interchange employees); (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. The DOL issued its NPRM out of concern that part 791 did not provide enough guidance for the most common joint employer scenario under the FLSA – where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work. In that scenario, the employer and the other person are almost never "completely disassociated," and the real question is not whether they are associated but whether the other person's actions in relation to the employee merit joint and several liability under the Act. Until this final rule, DOL had not meaningfully updated the regulation since its promulgation over 60 years ago.

The final rule recognizes two scenarios under which an employee can be considered to have more than one employer:

1. An individual is employed by one entity and a second entity benefits from that work; and
2. An employer employs an individual for one set of hours during a work week and a second employer employs the same individual for a second set of hours during the same work week.

Focusing largely on the first scenario, the rule directs courts to use a four-part balancing test derived from a Ninth Circuit case, *Bonnette v. California Health & Welfare Agency*, to decide whether two linked businesses jointly employ a group of workers. The test weighs whether the business, with regard to its franchisee or contractor, maintains the power:

1. To hire or fire the employee;
2. To supervise and control the employee's work schedule or conditions of employment to a substantial degree;
3. To determine the employee's rate and method of payment; and
4. To maintain the employee's employment records.

According to DOL, "No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances. However, satisfaction of the maintenance of employment records factor alone does not demonstrate joint employer status."

DOL's final rule provides guidance on how to apply this test. It specifies, for example, that to be a joint employer, the potential joint employer must actually exercise – directly or indirectly – one or more of the four control factors. It goes on further to state that the potential joint employer's person's "ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control."

The final rule also provides that, although the four factors should determine joint employer status in most cases, additional factors may be considered, but only if they indicate whether the potential joint employer exercises significant control over the terms and conditions of the employee's work. In no case, however, should an employee's economic dependence on the potential joint employer be considered for determining the potential joint employer's liability. Examples of factors that assess the employee's economic dependence and do not influence the joint employment analysis include:

1. Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
2. Whether the employee has the opportunity for profit or loss based on his or her managerial skill;
3. Whether the employee invests in equipment or materials required for work or the employment of helpers; and
4. The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

Additionally, the final rule 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.

In addressing the other joint employer scenario under the FLSA – where multiple employers suffer, permit, or

otherwise employ the employee to work separate sets of hours in the same workweek – the final rule provides that the multiple employers are joint employers if they are sufficiently associated with respect to the employment of the employee. If the multiple employers are joint employers, they must aggregate the hours worked for each for purposes of determining compliance with the FLSA. Finally, the final rule provides several examples applying DOL’s guidance for determining FLSA joint employer status in a variety of different factual situations.

Although the final rule is generally considered a win for the business community, employers assessing their joint employer status are advised to consult with counsel. This is especially important in light of the fact that the National Labor Relations Board is expected to release a final rule setting forth standards for joint-employer status under the National Labor Relations Act shortly and the Equal Employment Opportunity Commission has indicated its plan to release a proposed joint-employer rule in the months to come. If you have any questions, please contact one of our [labor and employment attorneys](#).