

Standard to Determine FLSA Joint Employer Status Revised Under Department of Labor's Recently Adopted Final Rule

January 14, 2020

The Department of Labor (DOL) adopted a final rule on January 12, 2020, to revise and update its Part 791 regulation regarding joint employment status under the Fair Labor Standard Act (FLSA). This final rule will be published in the Federal Register on January 16 and will be effective March 16, 2020.

Joint employment involves the situation where a worker is employed by two or more employers who will be jointly and severally responsible for compensating the employee in compliance with the FLSA. The final rule sets out the standards to determine joint employer status that can arise in two potential scenarios:

Scenario 1: The employee is employed by an employer, but another individual or entity simultaneously benefits from the employee's work.

In this scenario, the simultaneous benefiter will be considered a joint employer if it is acting directly or indirectly in the interest of the employer in relation to the employee. Pursuant to the final rule, relevant factors in making this determination include whether the individual or entity:

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

Under this test, no single factor is controlling, and how much weight to be accorded to each factor will depend on the circumstances. However, mere maintenance of the employee's employment records, by itself, does not establish joint employer status.

Even though this four-factor test should resolve the joint employer status in most cases, additional factors may be relevant for consideration as indicative of a potential joint employer's significant control over the terms and conditions of the employee's work.

The final rule also clarifies what factors are not relevant when assessing FLSA joint employment:

- (A) the employee's economic dependence on the potential joint employer;
- (B) the potential joint employer's business model, such as operating as a franchisor or entering into a brand and supply agreement;
- (C) the potential joint employer's contractual agreements with employer requiring compliance with legal obligations or standards to protect the health or safety of employees or the public, as well as the monitoring and enforcement of such agreements;

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(D) the potential joint employer's contractual agreements with employer requiring quality control standards to ensure consistent quality of the work product, brand, or business reputation, as well as the monitoring and enforcement of such agreements;

(E) the potential joint employer's business practices such as: providing the employer a sample of employee handbook or other forms, allowing the employer to operate a business on its premise, offering to the employer or participating in an association health plan or retirement plan with the employer, or jointly participating in an apprenticeship program with the employer.

Scenario II: The employee works separate sets of hours (during which he or she performs separate jobs) in a same workweek for two or more employers.

In this scenario, employers who are sufficiently associated with one another with respect to the employment of the employee are considered joint employers and must aggregate the hours worked by the employee to determine compliance with the FLSA.

The employers will be found sufficiently associated if one of the followings exists:

(A) An arrangement exists between the employers to share the employee's services;

(B) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or

(C) The employers share control of the employee, directly or indirectly, by virtue of the fact that one employer controls, is controlled by, or is under common control with the other employer.

What does this mean for employers?

Even though the final rule aims to provide more clarification, it may raise more questions or cause confusion for employers in determining joint employment status under the FLSA. If you have further questions about the effects of this final rule, please contact your Miller Canfield attorney or the authors of this alert.