

Federal Judge Strikes Down Major Parts of DOL's Joint-Employer Rule

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A federal judge in New York invalidated substantial portions of the U.S. Department of Labor's (DOL's) joint-employer rule. The department's rule, which was issued earlier this year, narrowed the definition of "joint employer" under the Fair Labor Standards Act (FLSA).

Proponents of the rule have said that it provides clarity to businesses about franchise and contractor relationships. "The changes in this final rule break down barriers that keep companies from constructively overseeing, guiding and helping their business partners," said Wage and Hour Division Administrator Cheryl Stanton, when the final rule was announced.

Judge Gregory Woods of the U.S. District Court for the Southern District of New York issued a ruling on Sept. 8 in favor of a coalition of state attorneys general (<https://ag.ny.gov/press-release/2020/ag-james-secures-court-win-against-trump-admin-unlawful-regulations-stripping>) who claimed that the rule weakens critical workplace protections. Among other arguments, the coalition said that 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.

Susan Harthill, an attorney with Morgan Lewis in Washington, D.C., said the court's ruling will lead to further uncertainty for organizations when they're deciding how to structure their business arrangements. "Overall, the vacation of DOL's new rule reinforces the need for uniformity and consistency in the FLSA test for joint employers," she said.

"While previous iterations were unclear, the DOL's final rule represented sound public policy that created a clearly defined standard benefiting workers and workplaces," said Emily M. Dickens, SHRM's corporate secretary, chief of staff and head of government affairs. "Now more than ever, businesses need clarity in addressing important workplace concerns without fear of running afoul of technical and outdated regulations on what constitutes a joint employment relationship. SHRM will continue to advocate for a joint employer standard which is clear, consistent, and predictable."

We've rounded up articles and resources from *SHRM Online* and other trusted media outlets on the news.

Judge Says Rule Was 'Arbitrary and Capricious'

Woods granted summary judgment for the states that challenged the joint-employer rule. He found that the rule was "arbitrary and capricious" because the DOL didn't justify the rule or account for its cost to workers. The state attorneys general argued that the rule would cost workers more than \$1 billion annually. Woods also said the rule conflicts with the FLSA's protections for workers. "The department did not adequately explain why it departed from its prior interpretations," Woods said. The DOL "must make more than a perfunctory attempt to consider important costs, including costs to workers, and explain why the benefits of the new rule outweigh those costs." Woods allowed parts of the rule to stand that relate to "horizontal" relationships, through which employees work for at least two associated employers. A DOL spokesman said the department is disappointed with the ruling and plans to review its legal options.

(U.S. News & World Report (<https://www.usnews.com/news/us/articles/2020-09-08/judge-voids-trump-joint-employer-rule-that-us-states-called-anti-labor#:~:text=NEW%20YORK%20%28Reuters%29%20-%20A%2cimportant%20labor%20protections%20for%20workers.>))

Joint-Employer Liability

The FLSA requires most employers to pay employees at least the federal minimum wage, as well as an overtime premium for all hours worked beyond 40 in a workweek. Business entities and individuals are liable for paying minimum wage and overtime premiums if they meet the definition of "employer," which the FLSA defines as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Under the FLSA, employees may have one or more joint employers, in addition to their direct employer, that is jointly and severally liable with the primary employer to pay wages.

(U.S. Department of Labor (<https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/fact-sheet#:~:text=A%20joint%20employer%20is%20any%2cemployer%20status%20under%20the%20FLSA.>))

Employer-Friendly Final Rule

In January, the DOL finalized its first significant update (<https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/>) to the joint-employer rule in more than 60 years, creating a four-factor balancing test to determine whether businesses share liability for FLSA wage and hour violations. Under the rule, the department said it would 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.

Reserving the right to control the employee's working conditions would not be enough to show that a business is a joint employer; the company would have to actually exert that control. So businesses that stay out of the day-to-day employment decisions of their contractors and franchisees likely wouldn't be deemed joint employers. In his ruling, Woods called the new rule "impermissibly narrow."

(*SHRM Online*) (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-releases-final-joint-employer-rule.aspx)

Business Groups May Press for Appeal

The DOL's new regulation was developed after courts issued conflicting interpretations about what constitutes a joint-employer relationship. Large companies and restaurant franchise owners were concerned about their contractual relationships with third parties for janitorial services, temporary staffing, and other services. Some large companies, such as McDonald's, faced lawsuits claiming that they were jointly responsible for their franchisees' and other third parties' alleged wage and hour violations. Employer advocates may pressure the federal government to appeal the district court's decision. Business groups could also influence the outcome of the litigation, because a coalition that includes the U.S. Chamber of Commerce, the International Franchise Association, and the National Retail Federation, was approved to intervene in the case.

(Bloomberg Law (<https://news.bloomberglaw.com/daily-labor-report/judge-shoots-down-part-of-labor-department-joint-employer-rule>))

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