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DOL's Pass Intercepted: Court Strikes Down Narrow Definition of Joint Employer

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A federal court judge in New York has invalidated the Department of Labor (DOL)'s Final Rule that narrowly interpreted joint employer.

Background

In January 2020, the DOL published a Final Rule to provide clarity and predictability for determining whether a joint employment relationship exists when an employee performs work for an employer that simultaneously benefits another individual or entity. The Final Rule became effective on March 16, 2020. Prior to this regulation, the DOL considered "economic realities" in deciding whether a joint employment relationship existed, which was essentially a test gauging the control over an employee or the workplace environment. In recent years the question of joint employment has become a hotly contested issue resulting in expensive litigation to determine whether a joint employment relationship exists.

The DOL's Final Rule was intended "to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy." The Final Rule adopted a four-factor test to determine joint employer liability, which evaluated whether the entity (1) possessed the power to hire or fire an employee; (2) supervised and scheduled employees; (3) had the ability to set pay; and (4) maintained employment records. The Final Rule also clarified that joint employment liability is not contingent on an employee's "economic dependence" on a potential joint employer.

Brief Summary of Decision

On Tuesday, a federal judge partially struck down the Final Rule, finding the DOL's interpretation of joint employment violated the Administrative Procedure Act (APA), which instructs courts reviewing regulations to invalidate any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In a 62-page decision (found here), United States District Judge Gregory Woods held that the Final Rule's interpretation of vertical joint employment conflicts with the FLSA because it ignores the statute's broad definitions. The Judge also found that the DOL failed to

adequately justify its departure from its prior interpretations and failed to account for some of the Final Rule's important costs.

Key Takeaway

There are two types of joint employment scenarios – horizontal and vertical.

Horizontal joint employment may exist where the employee has employment relationships with two or more employers and those businesses are sufficiently associated with each other to be considered joint employers. Vertical joint employment may exist where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and that employee is dependent on another business entity. An example of a potential vertical joint employment is a construction worker that is employed by a subcontractor that in turn provides services/its employees to a general contractor.

The court invalidated the DOL's four-part test as it applies to vertical joint employment, holding that the proper test to evaluate joint employment is the "economic realities" test. Many types of businesses such as franchise owners, subcontractors, staffing agencies, and others who were relieved by the clarity brought by the Final Rule must once again struggle with the uncertainty of the economic reality test. However, these employers can rely on the FLSA's good faith exception if they used the four-part test for vertical joint employment decisions prior to September 8, 2020.

What's Next?

The partial invalidation may be universal in scope, and it is unclear at this time whether the DOL will appeal to the Second Circuit, where it would likely find an uphill battle. Employers should pay close attention to how this plays out in the upcoming months and remain in close contact with their trusted labor and employment counsel.

If you have any questions regarding this Alert, please contact the author, Thomas J. Szymanski, Counsel in our Berkeley Heights office at TSzymanski@fordharrison.com. Of course, you can also contact the FordHarrison attorney with whom you usually work.

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