Federal Judge Strikes Down Key Parts Of New Joint Employer Rule

9.9.20

In a move sure to frustrate employers and usher in a wave of confusion, a New York federal court judge just struck down critical portions of the Labor Department's new joint employer rule that went into effect a few months ago. Concluding that the agency's rule has "major flaws," U.S. District Judge Gregory Woods decided yesterday that the rule did not comport with the Fair Labor Standards Act (FLSA). The September 8 ruling tosses out the new standard that had applied to "vertical" employment relationships (when staffing company or subcontractor workers are contracted to work with another entity, for example), while keeping intact the rarer "horizontal" relationships between related entities that employ the same worker – which was not significantly changed by the final rule. Affected employers may have to chart a more difficult course in order to ensure they are not deemed liable in joint employer situations.

Quick Background

Many businesses across the country breathed a sigh of relief in March 2020 when the Department of Labor's new joint employer took effect, creating a four-part test to determine whether a business is equally liable for obligations under the FLSA. It assesses whether the entity in question:

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

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4. maintains the employee's employment records.

Some of the other critical points from the new rule:

- no single factor is dispositive in determining joint employer status, as the appropriate weight to give each factor will vary depending on the circumstances;
- maintaining employment records alone does not demonstrate joint employer status;
- an entity must actually exercise— directly or indirectly — one or more of the four control factors in order to be considered a joint employer, not just reserve the right to control;
- whether an employee is economically dependent on the potential joint employer is notrelevant to the analysis; and
- operating as a franchisor or entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more likely.

Yesterday's Ruling Tossed Critical Portions Of Rule

A group of 17 states and the District of Columbia challenged the rule in a New York federal court, and the case came to a conclusion with a 62-page ruling by Judge Woods yesterday. The decision provides an in-depth and complex analysis, so here are some of the highlights from his decision:

Rule Inappropriately Adopts A Narrow Definition Of "Employer"

The judge first ruled that the new rule conflicts with the FLSA because it "ignores the statute's broad definitions." He concluded that the FLSA created an expansive system for examining employees with relation to employers, and that the USDOL inappropriately narrowed it when it limited the definition of "joint employer" to solely encompass the four-part test. Specifically, the judge held that the rule's requirement that an entity actually exercise control over a worker to be deemed a joint employer conflicts with the FLSA, and that control is merely one factor courts and the Department of Labor have and should continue to review.

Agency Didn't Explain Its Change Of Course

While the judge said it was generally acceptable for a federal agency to shift stances on an issue – as the Trump USDOL did when compared to positions taken by agency officials under the previous administration – it can only do so when it displays awareness of the changed position and provides good reasons for the new policy choice. Judge Woods said that the USDOL did not do so here, failing to address critical questions raised during the notice-and-comment period and offering no reasoned explanations for its departure from past actions.

"Suffered And Permitted" To Work Captures Joint Employment

The judge also said the agency failed to properly appreciate the context of the FLSA's definition indicating that "employing" a worker includes "suffering or permitting" them to work. He pointed to the origins of that phrase, which specifically derived from child-labor laws designed to reach businesses that used "middlemen" to illegally hire young workers. "This," the judge said, "is a joint employment scenario" – but he concluded that the agency impermissibly ignored this history. He pointed to the FLSA's legislative history and concluded that Congress intended businesses that allow work to be done on their behalf and have the power to prevent wage and hour abuses, regardless of indirect business relationships and business formalities, should be captured in the joint employer definition.

Prohibiting Consideration Of Certain Factors Is Incorrect

Finally, the judge said that the USDOL slipped up when it indicated that certain factors (such as economic dependence, or the type of business model used) are prohibited from being considering when arriving at a determination. He pointed to language from the statute and several previous court decisions, including several from the Supreme Court, that he believed would require an examination of such factors in any joint employer determination.

What's Next?

First, we will have to wait and see whether this decision is appealed. For now, employers should first focus on the next few weeks as the fallout from this decision will help determine the proper scope of its breadth. What's for certain is that it only applies to "vertical" employment relationships. Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and an intermediary business contracting with that employer receives the benefit of the employee's labor. The judge specifically kept in place the final rules very minor "non-substantive" changes made to "horizontal" employment relationships (relationships where the entities share a common legal or ownership arrangement).

In the interim, if you made any significant changes to rules or structure as a result of the final rule, you should look to see how those changes would have been reviewed under the law applicable prior to the effective date. In most cases, the impact of this ruling should not immediately impact your workforce. However, it may have significant impacts on your planning for the future.

We anticipate that the USDOL will appeal this decision and attempt to resurrect the entire rule for all employers as soon as possible. This process could drag on for several months, at least, unless an appellate court agrees to put Judge Woods' ruling on hold while any appeal plays out. We will monitor the situation and provide updates as appropriate, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions,

please contact your Fisher Phillips attorney, or any attorney in our Staffing and Contingent Workers Practice Group or Wage and Hour Practice Group.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.