April 25, 2019

DOL Proposes New Joint-Employer Rule

U.S. Department of Labor Proposes Significant Revision to Test for Determining Joint-Employer Status Under the FLSA

SUMMARY

On April 1, 2019, the U.S. Department of Labor ("DOL") proposed a new four-part test for determining whether a person or entity may be held liable as a "joint employer" for violations of the wage-and-hour provisions of the federal Fair Labor Standards Act ("FLSA"). The proposed rule is the DOL's first meaningful proposed modification of the rule in over 60 years, and follows conflicting and at times controversial interpretations of the joint-employer standard issued by the courts and federal agencies over the past several years.

BACKGROUND

The FLSA defines an "employee" as a person "employed by an employer" and defines "to employ" as "to suffer or permit to work."[1] Under the FLSA, if two or more people or entities are "joint employers," they are jointly liable to employees for, among other things, wages and overtime pay.[2] The statute does not define a joint employer, and the determination of who constitutes a "joint employer" in various employment-related contexts has been the source of considerable debate and confusion in recent years.

National Labor Relations Board ("NLRB"). In 2015, in *Browning-Ferris Industries of California, Inc.*, the NLRB (during the Obama administration) abandoned its long-standing test that an entity must both possess and exercise direct control over employees' terms and conditions of employment in order to be considered a joint employer under the National Labor Relations Act and, thus, be required to bargain with a union.[3] The standard adopted by the NLRB in 2015 provided that a joint-employer relationship may be found merely based on the putative joint employer's right to control terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. Our memorandum on the *Browning-Ferris* decision is here.

In December 2017, in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, the Trump administration's NLRB reversed the guidance issued by the Obama administration in *Browning-Ferris* and reinstated the joint-employer standard that was in place prior to *Browning-Ferris*.[4] In February 2018, however, the NLRB vacated its decision in *Hy-Brand*, finding that one of the NLRB's board members who voted with the 3-2 majority in *Hy-Brand* should not have cast a vote in the decision because his former law firm had represented one of the unsuccessful litigants in *Browning-Ferris*.

In the fall of 2018, the NLRB proposed a revised joint-employer standard, which would find a joint-employment relationship only if a person or entity "possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship."[5] While the comment period for the proposed rule was pending, the District of Columbia Circuit Court of Appeals upheld the NLRB's *Browning-Ferris* standard.[6] In that decision, the court cautioned that "[t]he policy expertise the [NLRB] brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary."[7]

The comment period for the NLRB's proposed rule closed in February 2019, and the NLRB is currently reviewing the nearly 30,000 public comments that it received. The NLRB has stated that it expects to issue a final rule by the end of 2019.

FLSA Civil Litigation. The federal circuit courts have issued decisions with inconsistent tests for joint-employer status under the FLSA. The April 1, 2019 rule proposed by the DOL (discussed below) derives from a 1983 decision by the Ninth Circuit in *Bonnette* v. *California Health & Welfare Agency*. The *Bonnette* test considers whether the alleged employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[8] Courts within a number of circuit courts of appeal—including the First, Third, Fifth and Seventh—currently apply tests similar or identical to the *Bonnette* test,[9] while the Second Circuit has expressly rejected the *Bonnette* test.[10] In doing so, the Second Circuit found that the *Bonnette* test "cannot be reconciled" with the language of the FLSA and has adopted a broader, six-part test that permits a court to find joint employment when "an entity has functional control over works even in the absence of [] formal control[s]."[11] The Fourth Circuit has similarly rejected the *Bonnette* test, and adopted an entirely different test, rejecting the decisions of other courts as focusing too much on the "economic realities" between a worker and an alleged employer rather than the relationship between the two alleged joint employers.[12]

THE DOL'S PROPOSED RULE

The DOL has not issued significant rulemaking on the joint-employer standard under the FLSA since the 1950s. Under the Obama administration, the DOL in 2016 issued guidance calling for joint employment to be considered "expansively" and "as broad as possible." Shortly after Secretary Acosta arrived at the DOL, however, the DOL rescinded that guidance.

On April 1, 2019, the DOL proposed a rule that would significantly narrow the joint-employer standard under the FLSA proposed by the DOL under the Obama administration. Among other things, the proposed rule clarifies that "[o]nly actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint-employer status under the [FLSA]."[13]

Accordingly, the DOL proposed a four-part test that would impose liability under the FLSA on a person or entity as a joint employer "only if that person is acting directly or indirectly in the interest of the employer in relation to the employee."[14] The four-part balancing test—which modifies the *Bonnette* test's first factor—considers whether an alleged joint employer: 1) "hires or fires the employee"; 2) "supervises and controls the employee's work schedule or conditions of employment"; 3) "determines the employee's rate and method of payment"; and 4) "maintains the employee's employment records."[15]

According to the DOL, the answers to these questions will help to answer the question of "[w]hether a potential joint employer, as a matter of economic reality, actually exercises sufficient control over an employee to qualify as a joint employer under the Act."[16] The DOL clarified that whether an employee is economically dependent on the alleged joint employer is not relevant to the joint-employer analysis; thus, whether an employee "[i]s in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight," "[h]as the opportunity for profit or loss based on his or her managerial skill," and "[i]nvests in equipment or materials required for work or for the employment of helpers" should not be considered.[17]

The proposed rule also explains that additional factors may be relevant to this joint-employer analysis, but only if they are indicia of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee. The proposed rule further explains that, in determining the economic reality of the potential joint employer's status under the FLSA, whether an employee is economically dependent on the potential joint employer is not relevant. As such, the DOL proposes to identify certain ''economic dependence'' factors that are not relevant to the joint-employer analysis. Those factors would include, but would not be limited to, whether the employee: "(1) Is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight; (2) Has the opportunity for profit or loss based on his or her managerial skill; and (3) Invests in equipment or materials required for work or for the employment of helpers."[18]

The proposed rule provides nine examples and applies them to the proposed four-factor test.[19] Three examples are of particular note:

First, where a large national company contracts with other businesses in its supply chain and requires those other businesses to comply with a "code of conduct" that includes a minimum wage higher than the federal minimum wage, the DOL would not consider the large national company to be a joint employer of the other businesses' employees, because it is not "hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment" of the other businesses' workers and the other businesses "retain[] control over how and how much to pay its employees."[20]

Second, where a franchisor provides franchisees with sample employment applications, handbooks, and other documents, and the franchise agreement provides that the franchisee is "solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment," the DOL would not consider the franchisor to be a joint employer of the franchisees' employees because the franchisor "does not exercise direct or indirect control over [the franchisees'] employees."[21]

Finally, where a retail company owns a large store and contracts with a cell phone repair company to operate its business within the retail company's store and requires the cell phone repair company to provide specific shirts to its employees that look similar to the retail company's employees' shirts and mandates that the cell phone repair company institute a code of conduct for its employees stating that all employees must act professionally with customers, the DOL would not consider the retail company to be a joint employer of the cell phone repair company's employees because the requirement to wear specific shirts "does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment" and "[t]here is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records."[22]

IMPLICATIONS

The public comment period for the proposed rule is scheduled to end on June 10, 2019. If adopted by the DOL, the proposed rule should provide welcome guidance to employers. As stated by the DOL, the rule is designed to "promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy."[23] That being said, there is a debate over the authority of the DOL to issue binding legal authority. Critics may argue that the DOL is not permitted to re-define joint employment or the meaning of an employer or employee because, although the FLSA gives the DOL authority to craft regulations on matters such as overtime exemptions and child labor issues, nothing in the statute delegates authority to the DOL to adopt rules defining joint employment.

Finally, we note that certain state laws may impose joint employer standards that are different (and broader) than the federal standard proposed by the DOL.

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ENDNOTES

1 29 U.S.C. § 203(e)(1), (g).

2 29 C.F.R. § 791.2(a).

3 362 NLRB No. 186 (2015).

4 365 NLRB No. 156 (2017).

5 The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681, 46,683 (to be codified at 29 C.F.R. ch. 1).

6 *Browning-Ferris Indus. of Cal., Inc.* v. *NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

7 *Id.* at 1208.

8 704 F.2d 1465, 1470 (9th Cir. 1983).

9 *See In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469–71 (3d Cir. 2012); *Gray* v. *Powers*, 673 F.3d 352, 355–57 (5th Cir. 2012); *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 675–76 (1st Cir. 1998); *In re Jimmy John's Overtime Litig.*, 2018 WL 3231273, at *13–14 (N.D. Ill. June 14, 2018).

10 *Zheng* v. *Liberty Apparel Co. Inc.*, 355 F.3d 61, 69, 72 (2d Cir. 2003).

11 *Id.*

12 *Salinas* v. *Commercial Interiors, Inc.*, 848 F.3d 125, 136–139 (4th Cir. 2017).

13 Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14,043, 14,044 (Apr. 9, 2019) (to be codified at 29 C.F.R. pt. 791).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 14,044–14,045.

18 *Id.* at 14,059.

19 *Id.* at 14,059–14,061.

20 *Id.* at 14,060.

21 *Id.*

22 *Id.*

23 *Id.* at 14,043.

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