April 5, 2019

Department of Labor Proposes New Joint Employer Standard

The Department of Labor ("DOL") issued a proposed rule on April 1, 2019, setting out a new four-factor test for determining whether a business is a "joint employer" under the Fair Labor Standards Act ("FLSA"). The four key factors are:

(1) whether the business can hire or fire employees;

(2) whether it controls their schedules;

(3) whether it determines the employees' rate and method of pay; and

(4) whether it maintains the employees' employment records.

This proposed rule is the DOL's first major overhaul of the joint employer regulations since 1958.

The Notice of Proposed Rulemaking

Under the FLSA, when two businesses are considered "joint employers," they share the responsibility for their employees' wages, as well as liability for noncompliance with regulations. This proposal, according to the DOL, is meant to ensure that employers and joint employers "clearly understand" their responsibilities with regards to wages.[1]

The Obama Administration issued guidance in 2016 that broadened liability for joint employment, which the Trump Administration rescinded in mid-2017.[2] Now, this proposed rule takes a more narrow view, based on the Ninth Circuit's current test of joint employment, which, according to Secretary of Labor Alex Acosta, is meant to "reduce uncertainty over joint employer status and clarify for workers who is responsible for their employment."[3] Additionally, the proposal is meant to "promote a greater uniformity among court decisions, and reduce litigation."[4]

The DOL explained that this four-factor test is "clear and easy to understand," "can be used across a wide variety of contexts," and is "highly probative of the ultimate inquiry in determining joint employer status: whether 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 FLSA.[5] In addition to the four factors outlined above, the DOL proposal explains that additional factors may be relevant to the analysis, but only if they help assess whether the joint employer exercises "significant control over the terms and conditions of the employee's work" or whether the joint employer is "acting directly or indirectly in the interest of the employer in

relation to the employee."[6] Furthermore, under the DOL's proposed rule, factors relating to whether the employee is "economically dependent" on the employer would *not* be relevant, such as if the employee is in a specialty job, has the opportunity for profit or loss, or invests in equipment or materials required for work.[7]

The DOL Proposed Test as Compared to Existing Federal Standards

The DOL's proposed rule closely resembles the *Bonnette* joint employment test, adopted by the Ninth Circuit in *Bonnette* v. *California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), which is on the more restrictive end of the spectrum of joint employer tests applied by circuit courts. But, the DOL's proposed rule narrows the *Bonnette* test even further. While the *Bonnette* test takes into account whether an employer has reserved a contractual right to act with respect to an employee's terms and conditions of employment, the DOL's test does not consider an employer's theoretical ability to act, but rather, considers only the actions the company has taken with respect to an employee's terms and conditions of employment.[8] The DOL's proposed test is thereby even more favorable to putative joint employers than *Bonnette*.

By contrast, the Second Circuit has adopted a broader view of joint employment. Specifically, in *Zheng* v. *Liberty Apparel Company*, 355 F.3d 61, 72 (2d Cir. 2003), the Second Circuit held that the *Bonnette* factors were too restrictive given the FLSA's broad definition of "employee," and instead adopted the following more expansive *Zheng* factors: (1) whether a putative employer's premises and equipment were used by its putative joint employees; (2) whether the putative joint employees are part of a business organization that shifts as a unit from one putative joint employer to another; (3) the extent to which the putative employees performed a discrete line job that was integral to the putative joint employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer or its agents supervised the putative employees' work; and (6) whether the putative employees worked exclusively or predominately for the putative joint employer.[9] Courts applying New York Labor Law ("NYLL") have held that the NYLL "embodies the same standards" for joint employment as the FLSA and have thereby applied the same *Zheng* factors.[10]

In adopting the *Zheng* factors, the Second Circuit found that the *Bonnette* factors did not reconcile with the language in section 3(g) of the FLSA, defining "employ" as including "to suffer or permit to work."[11] In its proposed rule, however, the DOL notes that section 3(d), not 3(g), "is the touchstone for joint employer status" and that the DOL's proposed rule is consistent with the text of that section defining employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[12]

There is considerable variability amongst the circuit courts as to which joint employer test applies. The First Circuit has adopted the *Bonnette* test,[13] while the Fifth,[14] Seventh,[15] and Third[16] Circuits have used the *Bonnette* factors in their decisions, but have not explicitly adopted the test. In contrast, the Fourth[17] and Eleventh[18] Circuits, much like the Second Circuit, have rejected the *Bonnette* test, and apply more expansive factors in determining whether a business is a joint employer. Additionally, the Tenth[19] and Sixth[20] Circuits

have adopted the economic realities test, which considers whether an employee is "economically dependent" on the putative employer—the same factors discussed above that the DOL has specifically stated would not be relevant in its proposed rule.

Effect of Proposed Regulation

Under the new rule as currently proposed, it is expected that fewer businesses would be considered joint-employers and, thereby, not subject to the requirements of the FLSA. As such, we anticipate vigorous challenges by the plaintiffs' bar to the rule during the comment period, as well as court challenges as to what force of law any final rule would have, particularly in circuits which currently have more expansive joint employer tests.

While the FLSA does not expressly grant the DOL the authority to define joint employment, an agency's interpretation of a statute can still have a binding effect, and the level of judicial deference any final rule receives varies based on the circumstances, including the rule's formality and consistency with earlier pronouncements.[21] Nevertheless, if the rule were to become final, the proposed regulation provides examples that may be useful to putative employers in assessing the risk that they could be deemed a joint employer under the FLSA. For example, exemplar fact patterns provided by the DOL's proposed rule indicate that franchisor status would not factor into whether a business is a joint employer, nor would a company's contract with a contractor requiring that contractor to abide by that company's code of conduct, wage floor policies, or uniform requirements.[22]

Importantly, this proposal does not address joint employment under federal statutes other than the FLSA or analogous state statutes, although it does follow a recent, similar rulemaking effort by the National Labor Relations Board implementing changes under the National Labor Relations Act.

This proposed regulation has been submitted to the Office of the Federal Registrar for publication, after which the public will have 60 days to comment on the proposed regulation. We will continue to monitor the proposal and provide an update on the final regulation.

The Notice of Proposed Rulemaking can be found here: https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_NPRM.pdf. Once published, the proposed rule will be available electronically at www.regulations.gov.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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1 Joint Employer Status (proposed Apr. 1, 2019), https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_NPRM.pdf.

2 News Release, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance," Department of Labor (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.

3 News Release, "U.S. Department of Labor Issues Proposal for Joint Employer Regulation," Department of Labor (April 1, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190401.

4 *Id.*

5 Joint Employer Status (proposed Apr. 1, 2019), https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_NPRM.pdf.

6 *Id.*

7 *Id.*

8 *See id.*

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

10 *Chen* v. *Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 278–79 (E.D.N.Y. 2005).

11 29 U.S.C. 203(d) (2018).

12 *Id.*

13 *Baystate Alt. Staffing, Inc.* v. *Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

14 *Gray* v. *Powers*, 673 F.3d 352, 354–55 (5th Cir. 2012).

[15] *Moldenhauer* v. *Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008) (applying same *Bonnette* factors under the FMLA); *In re Jimmy John's Overtime Litig.*, 2018 WL 3231273, at *2 (N.D. Ill. June 14, 2018) (applying factors under FLSA).

[16] *In re Enterprise Rent-A-Car Wage & Hour Emp't Pracs. Litig.*, 683 F.3d 462, 469 (3d Cir. 2012).

[17] *Salinas* v. *Commercial Interiors, Inc.*, 848 F.3d 125, 141–42 (4th Cir. 2017).

[18] *Layton* v. *DHL Express (USA), Inc.*, 686 F.3d 1172, 1175–76 (11th Cir. 2012).

[19] *Johnson* v. *Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 371 F.3d 723, 729 (10th Cir. 2004).

[20] *Keller* v. *Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015).

[21] *United States* v. *Mead*, 533 U.S. 218, 227–28 (2001).

[22] Wage & Hour Div., "Highlights of the Notice of Proposed Rulemaking (NPRM): Joint Employer Status Under the Fair Labor Standards Act (FLSA)," Department of Labor, https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_faq.htm (last visited April 3, 2019).