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New DOL and NLRB Rules Restrict Potential Joint Employer Liability, EEOC Likely to Follow

How do you determine whether one business is the joint employer of another business's employee? The answer depends on which federal statute is being applied and which agency is applying it. The U.S. Department of Labor (DOL) issued a rule redefining joint employment under the Fair Labor Standards Act (FLSA), and the National Labor Relations Board (NLRB) issued a separate rule redefining joint employment under the National Labor Relations Act (NLRA). In both cases, the new rules make it harder to find a business to be the joint employer of another business's employee. In addition, the Equal Employment Opportunity Commission (EEOC) is expected to issue its own rule soon defining joint employment under federal anti-discrimination statutes like Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

DOL Restricts Definition of Joint Employer Under FLSA

The DOL issued a final rule, effective March 16, dictating how to determine joint employer status under the FLSA. The rule is significant because a business that is found to be a joint employer under the FLSA may be held liable for wage and hour obligations to employees, including payment of minimum wage and overtime. The DOL rule identifies two scenarios in which a business may be found to be a joint employer.

In the first scenario, one employer employs an employee to work, but another business simultaneously benefits from that work (such as franchisor/franchisee or general contractor/subcontractor). In this scenario, the other business is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. This determination is based on whether the potential joint employer (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 pay rate and method of payment; and (4) maintains the employee's employment records. No single factor is dispositive; whether one is a joint employer will depend on all the facts in a particular case.

To be liable as a joint employer under the FLSA, the potential joint employer must actually exercise one or more of the indicia of control, either directly or indirectly. Indirect control is exercised by the potential joint employer through mandatory directions to another employer that directly controls the employee. The ability or power to act in relation to the employee may be relevant in determining joint employer status, but it is not enough on its own to demonstrate joint employer status without some actual exercise of control. Whether the employee is economically dependent on the potential joint employer is not relevant. Operating as a franchisor does not make one a joint employer, nor does a contractual agreement with the employer requiring the employer to comply with specific legal obligations.

In the second scenario, one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek. The jobs and the hours worked for each employer are separate, but if the employers are found to be joint employers, both employers will be jointly and severally liable for all the hours the employee worked for them in the workweek.

Two employers will generally be sufficiently associated to be considered joint employers if (1) there is an arrangement between them to share the employee's services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) the two employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Before the new rule, joint employer liability under the FLSA was determined by a variety of tests developed by different federal courts.

NLRB Restricts Definition of Joint Employer Under NLRA

The NLRB issued a final rule, effective April 27, governing joint employer status under the NLRA. If two entities are deemed joint employers under the NLRA, both must bargain with the union that represents the jointly employed employees, both may be held liable for unfair labor practices committed by either, and both are subject to union picketing in the event of a labor dispute.

To be a joint employer under the new rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees to warrant a finding that the business meaningfully affects matters relating to the employment relationship. Essential terms and conditions of employment are defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Joint employer status cannot be based solely on evidence of indirect influence or a contractually reserved right to control that has not been exercised, but such evidence may be a consideration for finding joint employer status if it supplements evidence of direct control.

This rule restores the joint employer standard that the NLRB used before its 2015 decision in *Browning-Ferris Industries*. That decision held that a business could be deemed a joint employer if its control over the essential terms and conditions of another business's employees was merely indirect, limited, and routine, or contractually reserved but never exercised. The new rule makes it harder to find joint employer status.

EEOC Is Expected to Restrict Definition of Joint Employer Under Anti-Discrimination Laws

In late 2019, the EEOC issued a notice that it intends to clarify the standard for determining joint employer status under the federal statutes that it enforces, including Title VII, the ADEA, and the ADA. The EEOC has not yet indicated how it plans to define joint employer status.

Given the above, employers must be mindful of how they may become liable for the acts of other employers, and do what they can to prevent such result.

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