HR COMPLIANCE BULLETIN

Federal Court Strikes Down Part of the DOL Joint Employment Rule

On Sept. 8, 2020, a federal district court struck down parts of the U.S. Department of Labor (DOL) joint employer rule. This new rule became effective March 16, 2020. The district court judge found that the current DOL test was inconsistent with the Fair Labor Standards Act (FLSA) and failed to justify or account for its costs to workers.

Joint Employment

Joint employment situations arise when two or more organizations share the control and supervision of one or more employees. A joint employer can be an individual, partnership, association, corporation, business trust, legal representative, public agency or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of a labor organization.

The DOL holds joint employers equally and individually responsible for compliance with labor and employment laws. The DOL looks at joint employment situations to prevent scenarios where one organization avoids complying with labor standards by using another employer as a "shield."

Action Steps

- ☑ Employers should become familiar with the DOL joint employment rule and the district court's decision and identify any co-employment situations within their workforce that may have been affected.
- ☑ The DOL is currently evaluating their legal options to respond to this judicial decision. Employers should continue to monitor the DOL website for guidance and developments on the joint employment rule.

Highlights

- The DOL recognizes two types of joint employment—horizontal and vertical.
- Vertical joint employment is the most common scenario.
- A federal district court ruling vacated the DOL's test for determining vertical joint employment.
- The test for determining horizontal joint employment remains in force.
- The DOL is currently considering its options to challenge the lower court's ruling.

Important Dates

Jan. 12, 2020
DOL announced new joint employment rule.

March 16, 2020
DOL joint employment rule became effective.

September 8, 2020
Federal District Court for the Southern District of New York vacated vertical joint employment standard.

COWDEN
444 Liberty Avenue, Suite 605
Pittsburgh, PA 15222
Ph: 412.394.9330
Website: www.cowdenassociates.com

Provided to you by **Cowden Associates, Inc.**

The Joint Employment Test

On Jan. 12, 2020, the U.S. Department of Labor (DOL) announced a four-factor balancing test to determine whether two or more organizations should be considered "joint employers" under the FLSA. The final rule establishing the new test became effective March 16, 2020.

The final rule recognizes two potential scenarios where an employee may have one or more joint employers—**horizontal** and **vertical** joint employment.

The rule was adopted to clarify conflicting interpretations of how to establish joint employment relationships in various situations. These conflicts posed a significant business concern for restaurant franchise owners and large companies that use third-party janitorial services, temporary staffing agencies and similar arrangements.

Horizontal Joint Employment

Horizontal joint employment exists in situations where workers divide their work between two or more businesses that are **sufficiently associated** with one another. In general, employers are sufficiently associated if:

- ☑ There is an arrangement between them to share the employee's services;
- ☑ One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
- ☑ The employers share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Typically, horizontal joint employment situations arise when an individual works for two establishments that belong to the same parent company.

However, when employers act independently of each other and are disassociated with respect to a workers' terms and conditions of employment, each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA.

Vertical Joint Employment

Vertical joint employment situations arise when an employee works for one company, but another individual or entity simultaneously benefits from that work. Typically, this scenario applies to individuals hired by staffing agencies or subcontractors, that are economically dependent on another employer. Vertical joint employment situations are much more common than horizontal joint employment scenarios.

For vertical joint employment to exist, the DOL requires that employers apply a four-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee. With this rule, the DOL has emphasized that employers must **actually** exercise control over the employee. In other words, under the current DOL rule, having the authority or the right to exercise control is not enough to establish joint employment. To determine control, an employer must actually:

- Hire or fire the employee;
- Supervise and control the employee's work schedule or conditions of employment to a substantial degree;
- Determine the employee's rate and method of payment; and
- Maintain the employee's employment records.

Whether joint employment exists will depend on all the facts in a particular case. The weight given to each factor will vary depending on the circumstances. Additional factors may also be relevant in determining whether joint employment exists, but only when they show whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work. However, the DOL has clarified that maintaining the employee's employment records alone will not lead to a finding of joint employer status.

The final rule also identifies factors that are ***not relevant*** to the determination of FLSA joint employer status. For example, the final rule specifies that whether the employee is economically dependent on the potential joint employer, including factors traditionally used to establish whether a particular worker is a bona fide independent contractor (such as the worker's opportunity for profit or loss or his or her investment in equipment and materials) are not relevant in determining joint employer liability. The final rule also identifies certain other factors that do not make joint employer status more or less likely under the FLSA, including:

- Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model;
- Contractual agreements with employers requiring the employers to comply with their legal obligations or to meet certain standards to protect the health or safety of their employees or the public;
- Contractual agreements with employers requiring quality control standards to ensure the consistent quality of the work product, brand or business reputation; and
- Providing the employer with a sample employee handbook, or other forms, allowing the employer to operate a business on its premises (including "store within a store" arrangements), offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer, jointly participating in an apprenticeship program with the employer, or any other similar business practice.

The Court's Decision

The district court judge ruling vacated the DOL's vertical joint employment test, arguing that it was too narrow and inconsistent with the FLSA's broad interpretation of the term "employ" as "to suffer and permit to work."

In addition, the judge explained that while it is generally acceptable for a federal agency to shift its stance on any issue, the agency can only do so when it provides good reason for the change. The judge then proceeded to remark that the DOL provided no explanation for adopting a more restrictive joint employment rule and that the DOL failed to address critical questions raised during the comment period between the notice of proposed rulemaking and the announcement of the final rule.

This decision supported the petition of a coalition of 17 states and the District of Columbia that sued the DOL in February over the new joint employment test. The coalition argued that a narrow interpretation of joint employment makes "workers even more vulnerable to underpayment and wage theft." In fact, the federal court found that the estimated cost of the current rule to workers was $1 billion per year.