New federal rules aim to provide clarification for employers

COMPLIANCE CORNER

Josh Goldberg

Today's economy requires businesses to work together in new and innovative ways. Companies that rely on staffing agencies to supply their workforce, or vendors to provide services, sometimes run the risk of being classified as joint employers. These risks can be costly, because joint employers are equally liable for paying employees' wages for all hours worked for both employers.

New definition of joint employer

In an effort to provide additional certainty to employers, the U.S. Department of Labor (DOL) on Jan. 16 published new rules clarifying and restricting the definition of a joint employer under the Fair Labor Standards Act (FLSA). The final rules use a four-factor test modeled after the seminal Ninth Circuit case, Bonnette v. California Health & Welfare Agency. It considers 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 rate and method of payment; and 4, maintains the employee's employment records. The DOL has also supplemented its new rules with 11 examples that provide even more guidance on how it will apply its new test.

The DOL appears to have struck a middle ground. The rules add that the degree of control over the employee's work must be substantial, but do not require day-to-day supervision or control over an employee's work schedule for a company to fall within the ambit of a joint employment relationship, as the business community wanted.

The DOL's new test has another important feature. The touchstone for a joint employment relationship is that the company actually exercise significant control over the terms and conditions of the employee's work. The DOL will not consider any theoretical or potential control that the potential joint employer could assert over the employee.

As a result, under the DOL's new rules, contracts or arrangements that provide the potential joint employer with the right to fire the employee or consult on important employment-related decisions does not necessarily create a joint employment relationship. The caveat is that the potential joint employer must never actually exercise that control. Nonetheless, companies should seek the advice of counsel before executing contracts that run the risk of creating a joint employment relationship.

Long-standing business practices embraced

The DOL drafted its new rules in recognition that long-standing business practices and arrangements should not run the risk of joint employer liability. Under the rules, certain relationships between companies, such as contractor-subcontractor or franchisor-franchisee, have no bearing on whether a company is a joint employer.

Under the DOL's new rules, companies can also exercise more control over their relationships with business partners and staffing agencies in a variety of ways. Businesses can agree to follow standards that affect the quality of the work product, brand or business reputation without making joint employer liability any more or less likely. Similarly, businesses can also provide training, offer an association health or retirement plan, and require certain employment policies. The DOL will also not hold it against businesses if they share other forms and documents relating to staffing and employment, so long as the potential joint employers do not retain supervision over the employees.

Where the test remains largely the same

In many respects, the DOL's new rules bring a fresh, welcomed clarity to the type of business arrangements that risk joint employer liability. There is one type of scenario where the rules have not changed significantly. That scenario is where 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. In these situations, the DOL will consider whether the two companies are "sufficiently associated" or share control over the employee. Accordingly, employers finding themselves in such a position should remain cautious and avoid any unnecessary entanglements over the employee's work for other companies.

As the rules go into effect on March 16, their ultimate impact on case law remains to be seen. No matter how the DOL's new final rules affect wage claims under the FLSA, they will not affect the definition of joint employment or change the standards of liability in the context of other federal or state antidiscrimination statutes. The Equal Employment Opportunity Commission is expected to propose new joint employer rules for some of those statutes in upcoming months.

Josh Goldberg is an attorney with Barran Liebman LLP. He advises management and higher education institutions on a variety of employment law matters. Contact him at 503-276-2107 or jgoldberg@barran.com.