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Electronic Alert

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U.S. Department of Labor Issues New "Joint Employer" Rules under FLSA

By Josh Goldberg

On January 16, 2020, the United States Department of Labor ("Department") will publish its first substantive revision in 60 years to rules establishing what constitutes a joint employer relationship under the Fair Labor Standards Act. These new rules are important for all employers, but especially those that rely on staffing agencies, subcontractors, and franchise agreements. When a company falls within the definition of a joint employer, it is responsible for paying an employee's wages for the entire workweek.

The final rule uses a four-factor that is modeled after the seminal Ninth Circuit case, *Bonnette v. California Health & Welfare Agency*, and considers whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Notably, the rule adds that the degree of control over the employee's work must be substantial, but does not go so far as to limit joint employers to those who retain day-to-day supervision or control over an employee's work schedule. The new rule also clarifies that the touchstone for any joint employment relationship is that the potential joint employer actually exercised significant control over the terms and conditions of the employee's work.

Employers will benefit from the Department's attempts to provide for greater certainty. Most notably, the Department will only use the murky "economic realities" test or consider the economic dependence between two potential joint employers in the situation in which two employers rely on the same employee to perform a set hours of work for each employer during the same workweek. It also clarifies that certain long-accepted business models do not make it any more or less likely for a potential joint employer to fall within the ambit of a joint employment relationship, such as franchisor-franchisee and contractor-subcontractor relationships. Finally, the Department will allow potential joint employers to provide quality control standards and policies without making it any more likely that the Department will determine a joint employment relationship exists.

The rule goes into effect on March 16, 2020, but it will not affect the definition of joint employer or change the standards of liability in the context of other federal or state statutes, such as Title VII.

For more information on the new rule and what it means for your business, contact Josh Goldberg at 503-276-2107 or jgoldberg@barran.com.