# States May Proceed with Lawsuit Challenging DOL's New 'Joint Employer' Rule

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The 18 states challenging the U.S. Department of Labor's (DOL) new "joint employer" rule may proceed, a district court has decided, over the DOL's motion to dismiss the case. *State of New York v. Scalia*, 2020 U.S. Dist. LEXIS 96486 (S.D.N.Y. June 1, 2020).

## Background

Since 1939, regulations interpreting the Fair Labor Standards Act (FLSA) have recognized that two or more "employers" can be jointly and severally liable for a single employee's hours worked under the FLSA.

After not meaningfully updating its joint employer regulation in more than 60 years, in April 2019, the DOL issued a Notice of Proposed Rulemaking (NPRM) to update its interpretation of the standard for establishing joint-employer liability under the FLSA. Following a review and comment period, and consideration of the submitted comments, the DOL announced a Final Rule in January 2020, effectively adopting the rule as proposed in the NPRM. The Final Rule became effective in March 2020.

## Final Rule

Rather than assessing whether two employers are "not completely disassociated" from one another, under the new Final Rule, the test focuses on "the potential joint employer's exercise of control over the terms and conditions of the employee's work."

Derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the Final Rule adopts a four-factor balancing test assessing whether the purported joint employer:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedules or conditions of employment;
3. Determines the employee's rate and method of payment; and
4. Maintains the employee's employment records.

Moreover, the DOL limits the test to "actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability" to take such actions. For a complete discussion of the proposed (and ultimately final) rule, see our article, Department of Labor Proposes Updated Interpretation of Joint Employer Standard Under the FLSA.

## Challenged by States

Although the Final Rule is merely interpretive, and therefore need not be followed by the courts, in February 2020, Attorneys General on behalf of 18 states nevertheless filed suit in the U.S. District Court for the Southern District of New York to have it vacated.

The plaintiffs claim that the Final Rule was promulgated in violation of the Administrative Procedure Act and that it will harm their states in multiple ways, including by lowering wages, decreasing compliance with worker protection laws, reducing their tax revenue, and increasing the administrative and enforcement costs for their comparable state law equivalents to the FLSA.

The DOL moved to dismiss the case for lack of both constitutional and prudential standing. On June 1, 2020, the district court denied the motion, agreeing that the states had "staked out an entirely plausible theory of injury with the requisite specificity" and, therefore, had satisfied the pleading standards sufficient to survive a motion to dismiss.

Jackson Lewis attorneys will continue to monitor and report any significant developments in the case. In the meantime, if you have any questions about the case, the new joint employer rule, or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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