Legal Update Article

Labor Department Formally Withdraws Trump-Era Joint Employer Final Rule

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In an action anticipated since it issued its Notice of Proposed Rulemaking in March, the U.S. Department of Labor (DOL) officially has withdrawn the Joint Employer Final Rule published during the previous administration. The Rescission Final Rule was published on July 30, 2021, and becomes effective on September 28, 2021.

The Joint Employer Final Rule was published under the Trump Administration and went into effect in January 2020. It addressed the standard for determining whether an employee may be deemed to be jointly employed by two or more employers. The Rule instructed that joint employer liability was to be guided by four primary, albeit non-exclusive, factors derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Those factors were whether, and to what extent, the proposed 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. Unlike the position previously taken by the DOL, and adopted by some federal courts, the Final Rule emphasized that actual, rather than mere theoretical, exercise of control was required to establish a joint employment relationship.

Although at the time of its publication the Joint Employer Final Rule was designated as merely interpretive, rather than controlling, shortly after its issuance, attorneys general for 18 states filed suit in federal court in New York to have the Rule vacated. In that lawsuit, the trial court agreed with the plaintiffs and vacated most of the Rule as violative of the Administrative Procedure Act. The trial court held the Rule improperly relied on the Fair Labor Standards Act's (FLSA) definition of "employer" as the sole basis for joint employer liability; it improperly adopted a control-based test for determining vertical joint employer liability; and it prohibited consideration of additional factors beyond control, such as economic dependence. The district court further concluded that the Rule was "arbitrary and capricious" because it did not adequately explain why it departed from the DOL's prior interpretations; it did not consider the conflict between the new standards and the existing Migrant and Seasonal Agricultural Worker Protection Act joint employment regulations; and it did not adequately consider its cost to workers.

In support of its decision to withdraw the Joint Employer Final Rule, the DOL cited the foregoing conclusions by the federal court in New York, along with the fact that the Rule failed to properly account for prior Wage & Hour Division guidance. Although the DOL under the former administration appealed the trial court's ruling, considering the current DOL's withdrawal of the Rule, that appeal likely will be dismissed as moot.

The Takeaway

While the DOL acknowledges in the Rescission Final Rule that it "appreciates employers'

desire for clarity and certainty regarding compliance under the Act," at this point, the DOL is not proposing to replace the withdrawn Rule with new guidance. Rather, as it states in the Rescission Final Rule, "the Department will continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or sub[-]regulatory guidance is appropriate."

Thus, the somewhat varying joint employer analyses adopted by the federal courts of appeals prior to the Joint Employer Final Rule will remain in effect. Moreover, employers must be aware of potentially more stringent or otherwise different standards that may apply to parallel wage and hour claims under state law.

If you have any questions about this development, the joint employer analysis, or any other wage and hour issue, please consult a Jackson Lewis attorney.