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## **DOL Issues Final Rule on Joint Employers – Effective March 16, 2020**

On January 12, 2020, the U.S. Department of Labor (“DOL”) issued a final rule revising and updating its regulations regarding joint employer status under the Fair Labor Standards Act (“FLSA”). The DOL had not substantively modified its regulations on this issue for over 60 years. As a result, federal appellate courts have created a variety of standards to determine joint employer status for purposes of FLSA compliance.

The FLSA provides that employees must be paid minimum wage for all hours worked and overtime for work in excess of 40 hours per week. Under this law, any joint employers are jointly and severally liable for the employee’s required minimum wage and overtime pay.

Among its most significant provisions, the final rule outlines four factors to be considered in determining whether a joint employer relationship exists where an employee performs work for an employer that also benefits another entity. The final rule also lists certain factors that do not themselves indicate joint employer status under the FLSA. The certainty provided by the final rule particularly benefits franchisers, staffing agencies and contractors, which are more at risk of being considered joint employers

### **Multiple Entities Simultaneously Benefiting From Employees’ Work**

The final rule identifies two situations in which an employee may have one or more joint employers. In the first (and more frequently litigated) situation, an employee is employed by an employer, but another individual or entity simultaneously benefits from that work. In this situation, four factors are to be balanced in determining joint employer status. These include whether the other individual or entity:

- Hires or fires the employee;
- Supervises and controls the employee’s work schedules or conditions of employment to a substantial degree;
- Determines the employee’s rate and method of payment; and
- Maintains the employee’s employment records.

Other factors may be relevant in this scenario, but only to the extent they indicate whether control is exercised over the employee’s work. No single factor is dispositive. Furthermore, the weight given to these factors will vary by situation, but the DOL has clarified that maintaining employment records will not, on its own, result in joint employer status. The rule also indicates that joint employer status must be based on actual exercise of control and not solely on the ability or reserved right to exercise control.

### **Two Entities Employing Employee for Separate Hours**

The second situation in which an employee may have joint employers involves one employer that employs an employee for one set of hours in a workweek and another employer that employs the same employee for a separate set of hours in the same workweek.

The final rule did not make any substantive changes to the analysis of joint employment in this situation. Instead it reiterated that entities will not be considered joint employers if they are acting independently of each other and are disassociated with respect to the employment of the employee. Employers will be considered “sufficiently associated” to be held to be joint employers if there is an arrangement between them to share the employee’s service, one employer is acting in the interest of the other in relation to the employee, or the two entities share control of the employee by reason of the fact that one employer controls, is controlled by or is under common control with the other employer.

Where two entities are not “associated,” each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA. If they are sufficiently associated to be considered joint employers, however, they must aggregate the hours worked for each for purposes of determining whether they are complying with their obligations under the FLSA.

### **Factors Not Relevant to Joint Employer Status**

The final rule also states that certain factors demonstrating an employee’s economic dependence on a potential joint employer are not relevant for determining whether that entity is a joint employer. These factors include things such as the employee’s ability to obtain a profit or loss based on his or her managerial skill, investment in equipment or materials, and the number of contractual relationships.

In addition, the final rule identifies certain business practices or contractual arrangements that are irrelevant to determinations of joint employer status. These include requiring an employer to comply with legal obligations, conduct background checks, or provide employee training, as well as requiring particular quality control standards or morality clauses. The final rule also states that providing draft handbooks, policies or procedures is irrelevant to joint employer status, as is offering an association health or retirement plan to the employer or its employees.

Finally, the final rule specifically states that operating as a franchisor or utilizing a similar business model does not make joint employer status more likely.

### **Takeaway**

The DOL’s final rule narrows the scope of joint employment. It therefore creates greater certainty for employers in determining their liability and obligations as joint employers related to minimum wage and overtime, and it permits additional flexibility in the terms that may be introduced into business and contractual relationships.

Importantly, this final rule applies only to joint employer duties and obligations arising under the FLSA and does not define the joint employer relationship under any other federal, state or local law. The National Labor Relations Board and the Equal Employment Opportunity Commission are expected to issue their own rules on joint employment under federal labor and discrimination laws.

### **Additional Information**

If you have questions related to how the DOL’s final rule may impact your organization, please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#), and we would be happy to discuss this with you. You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

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