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New York Federal Court Blocks DOL's Rule Narrowing Joint Employment Under FLSA

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The Fair Labor Standards Act ("FLSA") requires employees be paid minimum wage for all hours worked and overtime for work in excess of 40 hours per week. A "joint employer" will be jointly liable for overtime liability under the FLSA. In March 2020 the U.S. Department of Labor ("DOL") issued a final rule providing that, under the FLSA, joint employment will exist only where a putative joint employer exercises control over relevant aspects of the employment relationship; the worker's economic dependence on the putative employer does not matter to the joint employment inquiry. On September 8, however, a federal court in New York vacated this rule as inconsistent with the FLSA and the Administrative Procedure Act ("APA").

Employment Under the FLSA

The FLSA includes broad definitions of employee, employer and employ. Traditionally, and before the FLSA's passage, employment focused on the employer's degree of control over the employee. The FLSA rejected that notion in favor of a broader application. Instead, the test used to determine an employment relationship is based on the "economic realities," or whether the worker is economically dependent on the putative employer. Before March 2020, the DOL's interpretations of joint employment under the FLSA consistently applied the economic realities test.

The economic realities test attempts to answer whether a worker is economically dependent on a putative employer. The test looks to the worker's individualized business practices and is based upon the totality of the individualized circumstances. The economic realities test rarely leads to clear answers or certainty. Companies generally do not know at the inception of a business relationship how their contractors and vendors conduct business, how they market, the extent of their customer base, etc. Companies, therefore, generally do not know to what extent one of their business partners is economically dependent upon providing them products and services.

Joint Employment Under the DOL's Final Rule

The DOL's final rule, which was effective March 16, 2020, limited joint employment to situations where the putative employer controls important aspects of the employment relationship. The final rule included four factors to be considered when determining the existence of a joint employer relationship,

including whether the alleged employer hires or fires the worker, supervises and controls the worker's work schedules or conditions of employment to a substantial degree, determines the worker's rate and method of payment, and maintains the worker's personnel records. Other factors could be relevant to the control exercised over the worker. The rule clarified that economic dependence of the employee was relevant to determining whether someone was an employee under the FLSA, but that factor was irrelevant in determining joint employment. In addition, certain business models, business practices and contractual agreements also were irrelevant to determining joint employment. The final rule was based entirely on the FLSA's definition of "employer," while ignoring the FLSA's definitions of "employee" and "employ."

The DOL issued the final rule to establish a uniform joint employment standard, creating greater certainty for businesses and allowing greater flexibility in terms introduced in business and contractual relationships. And the final rule succeeded in providing certainty. Companies relying on other companies to provide products and services no longer needed to worry about whether the employees of those companies were economically dependent on them. Companies needed only to follow a simple rule: Don't control other companies' workforces.

The Court's Rejection of the DOL's Final Rule

On September 8, 2020 the U.S. District Court for the Southern District of New York held the DOL's final rule conflicted with the FLSA by relying only on the definition of "employer" as the foundation for its control test, while ignoring the FLSA's definitions of "employee" and "employ." While the FLSA's definition of "employer" focuses on a putative employer's control over the worker, the FLSA's definitions of "employee" and "employ" focus on whether the putative employer suffers or permits the worker to work. It has been well settled for nearly a century that the "suffer or permit to work" test is employment-friendly and leads to a finding of employment more often than traditional control tests.

According to the court, the DOL's final rule conflicts with the FLSA by creating different standards for employment and joint employment. The FLSA does not separately define, or specify a different standard for determining, joint employment. Instead, the FLSA simply defines the employment; it says nothing about joint employment. If more than one company fits within the FLSA's definition of employment as to a worker, then joint employment is established.

The court explained that the DOL's final rule conflicts with the FLSA by adopting a "control" test that Congress rejected when it passed the FLSA. The court further determined the DOL's final rule was arbitrary and capricious, in violation of the APA, because the DOL failed to explain why its interpretations of joint employment suddenly changed for no apparent reason. Previously, the DOL's interpretations and regulations had consistently held that employment and joint employment were based on the economic realities test. Nothing about the FLSA changed that should have caused the DOL to change its definition of joint employment.

It is unclear at this time whether the DOL will appeal the court's decision. We will monitor this matter for further developments. In the meantime, if you have questions about joint employment or how this decision may impact your organization's relationships with other business entities, please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#).

