



Department of Labor Proposes Update to Joint Employer Regulations

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The Department of Labor (“DOL”) recently announced it is proposing a rule to clarify and revise the regulations interpreting joint employer status under the Fair Labor Standards Act (“FLSA”).

Generally, the FLSA requires employers to pay employees at least the federal minimum wage for all hours worked and overtime for hours worked in excess of 40 hours per workweek. The FLSA recognizes that an employee may have in addition to his or her primary employer – one or more joint employers. A joint employer is jointly and severally liable with the primary employer for all wages due to the employee under the FLSA.

The FLSA regulations interpreting joint employer status have not been significantly revised in more than 60 years. However, over the last few years, the National Labor Relations Board (“NLRB”) and some courts have significantly amended how they interpret a joint employment relationship. This has led to a significant amount of confusion for employers, with different tests for different jurisdictions. The DOL’s proposed rule attempts to clarify the joint employment standard with respect to wage and hour laws – although it does not affect the NLRB’s interpretation of joint employment under the National Labor Relations Act.

The DOL proposes a four-factor test to determine whether a second entity is a joint employer by assessing whether the entity exercises the power to:

- hire or fire the employee;
- supervise and control the employee’s work schedules or conditions of employment;
- determine the employee’s rate and method of payment; and
- maintain the employee’s employment records.

The proposal offers additional guidance on how to apply the four-factor test, and details that certain business models, business

practices, and business agreements do not make joint employer status more or less likely.

The proposed rule also provides several examples to clarify joint employer status. The following are two representative examples provided by the DOL:

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Example: *A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?*

Application: *Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.*

Example: *A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the*

premises. Is the retail company a joint employer of the repair company's employees?

Application: *Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.*

The proposed rule, and the additional examples provided by the DOL [can be found at this link](#).

The proposed rules have been submitted to the Federal Register for publication. Once they are published, the public will have 60 days to provide feedback.

The DOL's proposed rule comes on the heels of other recent rule proposals including [clarification to the regular rate](#) and [a revised salary threshold for the white-collar exemption](#).

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