DOL Rejects Hypothetical Control in New Joint Employer FLSA Rules

By Stephen R. Gee / Jan 17, 2020

The Department of Labor issued a final rule on January 12, 2020, that makes clear that joint employer status under the Fair Labor Standards Act requires that an entity exercise actual control over the employee; mere hypothetical control, standing alone, is insufficient. The rule takes effect on March 16, 2020. Joint employer status can be very costly as it renders the employer jointly and severally liable with another employer for the jointly-employed employee's wages. As such, this rule change is of particular importance for franchisors and entities that contract out work because they do not typically account for franchisee/sub-contractor wage and hour liability in their pricing or business models.

The New Standard

The DOL describes two possible joint employer scenarios: (1) a worker is nominally employed by one entity, but another entity benefits from the employee's work (e.g., sub-contractor situation); and, (2) two employers that employ the same employee for two separate sets of hours during the workweek. The DOL only made substantive changes to the first scenario, which is the more heavily contested scenario today. For this scenario, the DOL adopted a four-factor balancing test that assesses on a case-by-case basis whether the potential joint employer:

1. Hires or fires the employee
2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. Determines the employee's rate and method of payment; and,
4. Maintains the employee's employment records.

Although each situation is fact-dependent, the DOL clearly stated a potential joint employer maintaining an employee's employment records alone will not lead to a finding of joint employer status. Further, the new rule states that other relevant factors may also be considered, "but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." Nevertheless, the new rule explicitly identified certain factors that are never relevant to the joint employer assessment: (a) economic dependence; (b) operating as a franchisor or similar business model; (c) potential joint employer's contractual agreements with the direct employer requiring the direct employer to comply with its legal obligations; and, (d) potential joint employer's practice of providing the direct employer with a sample employee handbook or any other similar business practice. More detail on the DOL-deemed irrelevant factors can be found in the DOL Fact Sheet. The key takeaway for employers, however, is that an entity only risks joint employer liability if it exercises significant control over the terms and conditions of the supplier/sub-contractor employer employee's work.

Moving Forward

Having said that, many workers' rights groups have already threatened to contest the new regulations before they take effect on March 16th. Employers should stay alert for any news about a district court enjoining the DOL from implementing its new joint employer rule. Further, the DOL's new rule only expressly applies to the FLSA, not to other federal (i.e., FMLA, Title VII, ADA, and ADEA) and state employment laws. As such, employers may want to consider adding an indemnification provision to any agreement they have to contract out work to minimize their exposure joint employer liability.

Should you have any questions concerning labor or employment law matters, please contact Stephen R. Gee at sgee@clarkhill.com or any other member of Clark Hill's Labor and Employment business unit team.