Published on *The National Law Review* https://natlawreview.com

The Updated Rules on Joint Employment: A More Direct Approach and With Less Worry for Pharmaceutical Companies

Article By:

David S. Blatteis

Patrick T. Collins

On January 12, 2020, the Department of Labor ("DOL") issued a rule updating the test for determining joint employment under the Fair Labor Standards Act ("FLSA"). The updated rule goes into effect 60 days from the date of publication of the rule, which means that the rule will likely go into effect on March 16, 2020. The National Labor Relations Board ("NLRB") issued its own updated rule for determining joint employment status on February 26, 2020, which will become effective on April 27, 2020.

Background

Over the years, we have represented companies that deploy contract employees to work for other companies, such as contract sales organizations ("CSO") which are prevalent in the pharmaceutical sales field. For years, the law has recognized that an employee can have two or more employers who are jointly and severally liable for the wages due to the employee. For example, the employees of a subcontractor perform work that also benefits a general contractor may be employees of both contractors if certain facts exist.

Courts have recognized that an individual may be an employee of multiple employers under various statutes. For example, the DOL considers whether joint employers are responsible for the wages and/or overtime of their shared employees. The Equal Employment Opportunity Commission ("EEOC") considers both a temporary staffing agency and its client company as sharing responsibility as joint employers under Title VII. The NLRB has applied a joint employer test to determine whether a potential joint employer has committed unfair labor practices or has bargaining obligations. Over the years, a variety of tests have been developed by Courts and Federal agencies to determine whether joint employment exists.

The New Joint Employer Tests

According to the updated DOL rule, the simplified test to determine whether an employer can be

considered jointly liable with another employer is now streamlined to the following four factors. Does the potential joint employer:

- hire or fire the employees;
- supervise and control the employee's work schedule or conditions of employment to a substantial degree;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records?

No single factor is dispositive and the weight to be given each factor will vary depending on the facts of each case and how the factors suggests or does not suggest that an employer is controlling an employee.

Under the new NLRB rule, there must be "substantial direct and immediate control over one or more essential terms or conditions of [a shared employee's] employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." The essential terms and conditions identified by the rule are wages, benefits, hours of work, hiring discharge, discipline, supervision, and direction. "Limited and routine" control over such conditions will not be sufficient to establish joint employment.

Under prior law and the updated DOL rule, the degree to which an employer exercises control was and remains the most critical factor in determining joint-employer status. The DOL's discussion of the comments received on the rule is replete with reference to "substantial" or "significant" control and an "extensive degree of supervision" needed to find joint employment. The DOL specifies that an employer may be found to be a joint employer if it indirectly controls the employee through another employer by initiating mandatory direction to the other employer that directly controls the employee. However, an employer's voluntary compliance with a suggestion of another employer to take a direction that directly controls the employee does not constitute indirect control over that employee. The updated rule also addresses actual control versus the potential to control an employee. Contract language which reserves a right to exercise control, is insufficient to determine joint employment status. In the updated rule, the potential joint employer must actually exercise such control; having the potential or ability to do so alone will no longer trigger joint-employer status. The rule also specifies that the economic dependence of the employee to the alleged joint employer is not to be used in the analysis because it is irrelevant.

The rule further specifies that economic dependence of the employee to the alleged joint employer is not to be used in the analysis because it is irrelevant. In the comment's discussion, the DOL explains that [e]conomic dependence determines whether the worker is an employee or an independent contractor and has no bearing on joint employment. Similarly, the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services has no bearing on the issue of joint employment. "Whether a business needs only one vendor or supplier or many to provide a particular product or service at a time does not indicate whether that business is exercising significant control over the employees of any particular vendor or supplier."

Factors Not Relevant to Joint Employment

To provide further clarity, the DOL offers several common scenarios that "[do] not make joint employer status more [or less] likely under the [FLSA]. These factors are also identified as irrelevant under the NLRB's discussion of the comments on the proposed rule. None of these address the duration of the relationship between the employer and potential joint employer. The factors deemed irrelevant to joint employer analysis are:

The duration of the agreement, like the form of the agreement, has no bearing on joint employment. For example, parties in franchise agreements remain in business together for years. This factor is irrelevant to the issue of joint employment. (Duration of the agreement is not even mentioned as a factor under the NLRB Rule.)

The potential joint employer's contractual agreements with the employer requiring the employer to comply with specific legal obligations or to meet certain standards to protect the health and safety of its employees, and the monitoring and enforcement of such agreements.

The potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand or business reputation.

The potential joint employer's practice of providing the employer a sample employee handbook, or other forms, to the employer, allowing the employer to operate a business on its premises (including "store within a store arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer, jointly participating in an apprenticeship program with the employer, or offering benefits or resources that the other business can use at its discretion, or any other similar business practice.

Length of Service – Also Not Relevant to the Analysis

Another factor completely absent from both the DOL and NLRB rules is the duration of the working relationship between an employer and the potential joint employer. While this is a factor routinely examined to determine independent contractor status, it is irrelevant for joint employment under either rule. Confusion on the applicability of this factor has existed for years. In the now well-known case of Vizcaino v. Microsoft, 120 F.3d 1006 (9th Cir. 1997), cert. denied, 522 U.S. 1098 (1998) the Court held that "free lancers" were covered under various Microsoft benefit plans, such as the 401K and stock purchase plans. The "free lancers" had signed independent contractor agreements which stated that they were not entitled to Microsoft benefits. The IRS and the Court, however, ruled that the "free lancers" were common-law employees.

Following the Vizciano decision, Microsoft announced that it would only employ "temporary workers" for a maximum of one year at a time in an effort to "provide clarity" as to which workers are true Microsoft employees. BNA LRR Vol. 15 No. 20 March 7, 2000 p. 78-9. However, given the case law decided since Microsoft, it is clear that this attempted precaution is unnecessary and ineffectual, and would provide little protection against independent contractors claiming benefits as employees.

While the length of service had been a factor in the independent contractor analysis, courts have found that classifying an employee as "temporary" based on a one-year limitation on service could be considered "arbitrary and capricious", and that such a limitation standing alone could not prove that a worker was not a "company employee". Thomas v. SmithKline Beecham Corporation, 291 F.Supp. 2d 773 (2003). The factors that do weigh more heavily for finding independent contractor status focus more on the nature of the employer-employee relationship, and more specifically, who controls the employee's actions. Focusing on the "length of service" factor ignores the more

relevant and significant factors that determine whether a worker is a common-law employee.

Our experience working with many CSOs for over twenty years reflects a growing industry trend to now structure programs with a contract term designed to address the business goals and needs of clients, as opposed to a contract term limited by fear of being embroiled in a co-employment battle with the government. For years, certain large pharmaceutical companies had taken a stand requiring shorter contract terms (including one-year limits) with its external sales teams. There has been no proof that structuring a contract with a one year term helped mitigate or prevent co-employment risks or claims; however, business leaders have consistently advised that having to train and deploy a qualified team of sales representatives, implement field learnings and then wind the sales team down within a one year period was counter-intuitive and counter-productive to CSOs and the business of pharmaceutical companies. As such, the undeniable industry trend among small, medium and large pharmaceutical companies today is to structure programs with contract terms designed to address health needs and business goals.

Joint Employment Best Practices

Given these updated rules and our experience representing CSO's, we advise such companies to adhere to the following "best practices:"

- Ensure the contracts with your pharmaceutical clients contain clear and unequivocal language detailing with specificity the fact that the CSO has the obligation to discipline, compensate and hire/fire employees, and maintain employee records.

- Have employees sign personnel employment policy statements pursuant to which the CSO employees confirm and memorialize their understanding of who their employer is, where they should raise human resource concerns, and who is responsible for payment of their compensation and benefits.

- Look beyond the terms in the contract and personnel employment policy statements. Make sure employees are rigorously trained on joint employment and ensure such training policies are provided annually and are acknowledged in writing by the CSO employees.

- Beyond training, ensure that all operational aspects of the program comply with the contractual language discussed above. Importantly, pursuant to the new DOL rule, make sure that in practice, only the CSO has the ability to hire or fire its employees, to determine the employee's rate and method of payment, and to maintain such employee's employment records.

- While a certain degree of supervision and control of a sales representative's work schedule or conditions of employment may be mingled with the pharmaceutical company client, a CSO should ensure there are supervisors assigned to the program who are primarily responsible for supervising and controlling the employees work schedule and conditions of employment.

The updated rules have been described as "employer-friendly," which will greatly reduce joint employer liability, and which will make such liability less likely. Department of Labor Secretary Eugene Scalia is quoted as saying: "The new rule also gives companies in traditional contracting and franchising relationships confidence that they can demand certain basic standards from suppliers or franchisees-like effective anti-harassment policies and compliance with employment laws-without

themselves being deemed the employer of the other company's workers. That will help companies promote fair working conditions without facing unwarranted regulatory costs." NLRB Chairman John F. Ring issued a statement that "employers will now have certainty in structuring their business relationships, employees will have clarity regarding their employment relationships, and unions will have clarity regarding with whom they have a collective-bargaining relationship."

The application of the update rule by the Courts remains to be seen, although the rule should be viewed as persuasive authority on how to analyze the issue of joint employment. What is certain, is that this is not the last word on the issue. Following the NLRB and the DOL, the EEOC has announced their intention to update their respective positions and guidance on the issue of joint employment. Hopefully, this pronouncement will provide even further clarity on this issue.

National Law Review, Volume X, Number 80