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DOL Rescinds Trump-Era Joint Employer Rule

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The U.S. Department of Labor announced on July 29 that it will rescind the March 2020 rule on Joint Employer Status under the Fair Labor Standards Act (the "2020 Rule"). The DOL's action removes the regulations established by the 2020 Rule and will become effective on September 28, 2021.

2020 Joint Employer Rule

The 2020 Rule contained standards for both "vertical" joint employment, in which an employee works for only one employer but depends on another business entity with respect to their work, and "horizontal" joint employment, in which an employee is employed by more than one distinct employer. If an entity is considered either a vertical or horizontal joint employer, it is jointly and severally liable (with any other joint employer of the employees at issue) for complying with the wage and hour provisions of the FLSA.

The 2020 Rule established four factors relevant to determining whether an employer is a vertical joint employer. The factors, which focus on the employer's *actual* exercise of control, were whether the employer:

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

Notably, the 2020 Rule specifically excluded consideration of the employee's economic dependence on the potential joint employer.

With regards to horizontal joint employment, the 2020 Rule noted that "if the employers are acting

independently of each other and are disassociated with respect to the employment of the employee," they are not joint employers, but "if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the [FLSA]."

SDNY Vacates 2020 Rule in Part

In February 2020, seventeen states and the District of Columbia sued the DOL in the Southern District of New York, alleging the 2020 Rule violated the Administrative Procedure Act (APA). In September 2020, the district court vacated the 2020 Rule's vertical joint employer standard, finding it violated the APA because it conflicted with the FLSA and was arbitrary and capricious. The court concluded the horizontal joint employer standard was also unlawful under the APA, but allowed the severable non-substantive revisions to the horizontal joint employer standard to remain in effect.

The DOL appealed the decision in November 2020. The appeal remains pending, though the DOL noted in a brief to the court that its rulemaking proposing to rescind the 2020 Rule may moot the appeal.

Farewell, 2020 Rule

On March 21, 2021, the DOL issued a notice of proposed rulemaking to rescind the 2020 Rule. The agency received more than 290 public comments in response to the notice.

In its final rule this week, the DOL concluded that the 2020 Rule is inconsistent with the FLSA's text and purpose. The agency noted that the vertical joint employment standard in the 2020 Rule was based on an unduly narrow reading of the statute, and contrary to both case law and legislative intent. With respect to horizontal joint employment, the DOL noted that the focus on actual control in the 2020 Rule's four-factor test was inconsistent with the totality-of-the-circumstances "economic realities" test used by the courts and the DOL to determine joint employment.

Takeaways

The overall motivation for the regulatory change is consistent with the Biden administration's commitment to strengthen wage protections, particularly for low-wage and vulnerable workers. The 2020 Rule, in the agency's view, made it easier for certain businesses to disclaim responsibility under the FLSA for workers not directly employed (or paid) by them. The Trump-era rule will now be short-lived, similar to the January 2021 independent contractor rule and the DOL's 2020 move away from seeking liquidated damages in FLSA investigations and settlements.

It's a new era at DOL, for sure. Employers that benefitted from the DOL's more business-minded, laissez-faire approach to regulation and enforcement over the last four years should keep a close watch on what the agency continues to do in the coming months to implement President Biden's openly pro-worker agenda.

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