

DOL SET TO LIMIT JOINT EMPLOYER LIABILITY

Under the Fair Labor Standards Act (“FLSA”), two or more employers can be jointly and severally liable for a single employee’s wages. On April 1, 2019, the U.S. Department of Labor (“DOL”) issued a Notice of Proposed Rulemaking (“NPRM”) regarding rules for determining joint employer status. The NPRM represents the first substantial proposed change to the FLSA’s joint employer regulations since 1958. In short, the changes proposed in the NPRM are expected to limit instances under which employers are considered joint employers for purposes of evaluating liability under the FLSA.

The NPRM proposes a four-factor test taken from a Ninth Circuit decision issued in 1983: whether the alleged employer: 1) hires or fires the employee in question; 2) supervises and controls the employee’s work schedule or conditions of employment; 3) determines the employee’s rate and method of employment; and 4) maintains the employee’s employment records. Importantly, the NPRM states that the alleged joint employer “must actually exercise” one or more of these indicia. In other words, a person or entity’s ability, power or right to act with respect to the employee’s terms and conditions of employment would no longer be relevant. “Only actions taken with respect to an employee’s terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act.”

Under the current regulations, which would be replaced by the four-factor test, multiple persons or entities can be considered joint employers of an employee if they are “not completely disassociated” with respect to the employment of the employee. Historically, courts applying this rule have considered the extent of the alleged employer’s theoretical power to control employees or their terms and conditions of employment in determining joint employer status.

The intention of the NPRM is to clarify the standard for determining joint liability. According to the DOL, this new proposal will make it easier for workers and employers to understand joint employer status, and will clarify who is responsible for employment protections. While employers approve of this rule, it will make it more difficult for exploited workers to establish joint employer liability.

A copy of the NPRM can be obtained from the DOL’s website at:

<https://www.dol.gov/whd/flsa/jointemployment2019/>

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