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Another One Bites the Dust: You Might Be Your Brother Employer's Keeper (Again)

By Monica L. Frantz

The U.S. Department of Labor (DOL) has announced a final rule rescinding the Trump administration's "Joint Employer Status Under the Fair Labor Standards Act" rule, which took effect in March 2020 and provides guidance for determining when multiple employers are considered joint employers and, therefore, jointly liable for labor law violations. The repeal of the rule will likely result in more workers receiving minimum wage and overtime protections under the Fair Labor Standards Act (FLSA) and, in turn, greater legal and financial exposure for employers.

The FLSA generally requires employers to pay non-exempt workers at least the federal minimum wage for all hours worked and at least time and one half the regular rate of pay for hours worked over 40 in a workweek. Under certain circumstances, an employee of one business may be considered a joint employee of a second business. (The joint employer concept can arise in any context when one company's workers perform work for another company, but most frequently it arises in the context of staffing agency or leased employees). If the second business is deemed a "joint employer," both companies might be liable to the worker for minimum wages and overtime pay under the FLSA.

The joint employer rule that became effective in March 2020 established a four-factor balancing test for determining joint employer status under the FLSA. In determining whether a second company is a joint employer of a worker, the test examines:

1. Whether the company hires and fires the worker;
2. Whether the company supervises and controls the worker's work schedules or conditions of employment to a substantial degree;
3. Whether the company determines the worker's rate and method of payment; and
4. Whether the company maintains the worker's employment records.

In a news release announcing rescission of the rule, the Biden administration's DOL concluded that the rescinded rule "included a description of joint employment contrary to statutory language and Congressional intent" and "failed to take into account the department's prior joint employment guidance."

The final rule repealing the prior rule becomes effective September 28, 2021. The prior rule made it more difficult for companies to be held liable as joint employers and was generally considered a positive development for the business community. Stay tuned for updates on how the Biden administration proceeds regarding joint employer determinations in light of the rescission of the prior rule. For additional guidance regarding joint employment and the FLSA, please contact one of the listed Roetzel attorneys.

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