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Employment Law Note

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DOL Rescinds Trump Administration's Joint Employer Rule

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On July 29, 2021, the Department of Labor ("DOL") rescinded the Trump Administration's Joint Employer Rule under the Fair Labor Standards Act ("FLSA"). The Rescission Final Rule was published on July 30, 2021, and becomes effective on September 28, 2021.

The Rescinded Joint Employer Rule

The rescinded Joint Employer Rule ("the Rule") was published under the Trump Administration and went into effect in March 2020. Seen as a pro-employer regulation, the Rule attempted to clarify the definition of joint employer liability and limit the circumstances under which multiple employers share liability for wage violations. The Rule established the following four-factor balancing test to determine an employer's *actual* exercise of control:

(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.

Shortly after publication of the Rule, seventeen states and the District of Columbia filed suit in the Southern District of New York, alleging the Rule violated the Administrative Procedure Act ("APA"). The district court vacated most of the Rule because it (1) improperly relied on the FLSA's definition of "employer" as the sole basis for joint employer liability; (2) improperly adopted a control-based test for determining vertical joint employer liability; and (3) prohibited consideration of additional factors beyond control, such as economic dependence. Additionally, the district court held that the Rule violated the APA because it conflicted with the FLSA and was arbitrary and capricious. Following the court's ruling, the DOL appealed the decision in November 2020 to the Second Circuit Court of Appeals. Even though the appeal remains pending, the DOL's decision to rescind the Rule may moot the states' challenge to the Rule.

DOL's Reasoning for Rescission

In rescinding the Rule, the DOL cited the holding of the federal district court in New York and the fact that the Rule was a considerable departure from the DOL's previous guidance on joint employment. Additionally, the agency referenced a significant concern with the Rule's "negative effect" on workers' rights by reducing the number of businesses considered "FLSA joint employers" from which employees may be able to collect back wages due to them.

Key Takeaway

By leaning away from the Rule's four-factor balancing test, the DOL effectively expands the scope of who might be liable for wage and hour violations as a joint employer. This change will make it more likely that an employer who hires independent contractors from a

third-party entity will be liable for wage and hour violations as a joint employer.

While the DOL is not proposing to replace the rescinded Rule with new guidance yet, the agency's Rescission Final Rule confirms that "the Department will continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or subregulatory guidance is appropriate." As it stands, the joint employer analyses adopted by federal appellate courts before the Trump-era Joint Employer Rule will remain in effect.

Furthermore, the Rescission Final Rule reiterates that the focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers. The association will be sufficient to demonstrate joint employment where:

(1) There is an arrangement between the employers to share the employee's services;

(2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or

(3) the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Given the constant fluctuation in this murky area of employment law, employers should closely monitor changes at the state and federal levels. If questions or concerns arise regarding this issue or any other wage and hour matter, we would be happy to discuss them with you.

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