Courts' Deference To DOL Joint Employer Rule Is Up In The Air

By **Alexander Passantino and Kevin Young**

Alexander Passantino

On Jan. 12, the U.S. Department of Labor announced its final rule clarifying the issue of joint employment under the Fair Labor Standards Act. The final rule adopts a four-factor balancing test and rejects various factors that have fueled recent litigation, such as the potential employer's business model or its unexercised power over the worker.

While not a panacea for businesses facing the threat of joint employment litigation, the final rule, which takes effect on March 16, presents an opportunity to assess and mitigate joint employment risk.

Recent History

Kevin Young

The final rule marks the latest development in a period of intense debate and administrative focus over the proper scope of the joint employment inquiry.

Until the final rule, the DOL's joint employment interpretation had not been subject to formal, substantive change in the 60 years since it was issued. And it is likely because of that lull, not in spite of it, that there have been so many battles, both in courts across the country and at the agency level, regarding the proper test and scope for the joint employment inquiry.

The most recent debate kicked off in January 2016, when David Weil, then the administrator of the DOL's Wage and Hour Division, issued an administrator's interpretation regarding joint employment under the FLSA. Joint employment, the administrator's interpretation declared, "should be defined expansively."

The administrator's interpretation focuses the inquiry, in part, on a worker's economic dependence on the potential joint employer, a factor more commonly associated with the analysis of whether a worker is an employee or an independent contractor. This standard was intended to be as broad as possible, presumably to find joint employment in a wide variety of circumstances.

The new administration arrived in 2017, and with it sounded the death knell of the broad-as-possible approach to defining joint employment under the administrator's interpretation. In June 2017, then-DOL Secretary Alexander Acosta withdrew the AI, which had grown to be seen by many in the business community as an unjustified overreach in defining the employment relationship.

Four-Factor Test

The final rule narrows and clarifies the test that will guide the Wage and Hour Division's analysis of joint employment under the FLSA.

As a threshold matter, the new rule provides the first regulatory framework explaining when the joint employment test should be applied — namely, when an employee performs work

for an employer that simultaneously benefits another entity. That other entity will be considered a joint employer only if and when it acts directly or indirectly in the interest of the employer in relation to the employee.

To conduct that inquiry, the final rule adopts the four-factor test from the DOL's April 2019 proposal. Where an employee performs work for the employer that simultaneously benefits another entity, the determination of whether the potential joint employer is directly or indirectly controlling the employee looks to whether the potential joint employer:

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.

Importantly, actual control is necessary to establish joint employment. Contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status.

In addition, the final rule sets forth several factors that do not make joint employer status more or less likely under the FLSA. For one, the worker's economic dependence on a potential joint employer is not determinative of the inquiry. Other factors that are not relevant include:

- Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model;

- The potential joint employer's contractual agreements with the employer requiring the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of its employees or customers;

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

- The potential joint employer's practice of providing the employer with a sample employee handbook, allowing the employer to operate a business on its premises (e.g., store-within-a-store arrangements), offering or participating in an association health or retirement plan to or with the employer, jointly participating in an apprenticeship program with the employer, and similar business practices.

As with the proposed rule, the final rule provides several examples applying the department's guidance for determining FLSA joint employer status in a variety of different factual situations, including the use of janitorial services companies and staffing companies, participation in association health plans, and use of the franchise model.

The final rule will be effective on March 16.

Practical Pointers

The final rule provides greater clarity regarding joint employment status and business practices that will (and will not) factor into the joint employer calculus. The rule will have a concrete impact on investigations conducted by the Wage and Hour Division: WHD investigators (and the DOL's Office of the Solicitor) will be bound by the final rule.

Federal courts, however, will need to address whether and to what extent to defer to the new rule. For that reason, it would not be surprising to see the rule lead to a short-term uptick in joint employment litigation as plaintiffs attorneys look to force questions on the proper standard in courts across the country.

As a result, the final rule provides an ideal and opportune moment for businesses to examine their relationships with workers from whom they receive beneficial services but do not employ directly. The new guidance provides a road map for risk-mitigating measures.

It also helps insulate from liability potential joint employers who include contractual provisions requiring, for example, compliance with the FLSA and who monitor those contractual provisions. Presumably, requiring the businesses with whom a company does business to comply with the law is a good thing, and the final rule removes one of the disincentives for doing so.

In examining potential joint relationships under the new guidance, businesses must bear in mind that the deference the final rule will enjoy in federal courts remains unknown. Thus, the final rule should be used as a set of guideposts for a joint employment analysis, but not to the abrogation of prior judicial precedent.

For example, the provision of handbooks to another entity's employees will not invoke risk in the context of a Wage and Hour Division investigation, but some courts might land differently. Thus, additional safeguards (e.g., express disclaimers that the provision of those materials does not create an employment relationship) will remain prudent.

Moreover, businesses must be mindful of the fact that the final rule applies only to the FLSA. Interpretations of joint employment under state wage and hour laws need to be considered as well. Moreover, different tests will apply for different federal laws, such as the Occupational Safety and Health Act and the National Labor Relations Act.

Parting Shot

The DOL's final rule should be welcomed as positive news for a business community that has until now been forced to deal with a joint employment standard that is expansive and murky at the same time. The new standard is narrower and more concrete.

It will take time (and litigation) to see whether and to what extent federal courts endorse the new rule, and that period provides an opportune time for businesses wary of joint employment issues to work with legal counsel to assess their business practices and, where necessary, take steps to mitigate risk.

Alexander Passantino is a partner at Seyfarth Shaw LLP. He previously served as acting administrator of the DOL's Wage and Hour Division.

Kevin Young is a partner at the firm.