A Simpler Joint Employment Doctrine

The legal doctrine of joint employment bedevils many employers. Reduced to its essence, joint employment means that an employee can look to two different employers for liability purposes if that employee's legal rights are violated. For example, if a manufacturing company hires a staffing agency to supply it with workers for its third shift, that manufacturing company and the staffing agency may potentially both be held liable for wage and hour violations if the third shift employees are paid incorrectly.

Three years ago, we wrote about a six-part test that was used by the Fourth Circuit Court of Appeals to determine joint employment. On January 12, 2020, the Department of Labor announced a final rule updating its regulations regarding joint employment. The effective date of this new rule is March 16, 2020. The advantages of the new test are that it is only four parts and less cumbersome than other tests being used by the courts.

The New Four-Part Test for Joint Employment.

The most common scenario where joint employer liability might arise is where an employee performs work for the employer that simultaneously benefits another individual or entity. Under this scenario, an entity is a joint employer if it:

- 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 of pay and method of payment; and

- maintains the employee's employment records.

The new rule says explicitly that maintenance of an employee's employment records alone, will not lead to a finding of joint employer status.

These Arrangements Do Not Create Joint Employment.

The final rule also says that certain business models do not automatically confer joint employment status. For example, absent more, a franchisor is not a joint employer with its franchisees. Further, just because one company requires another company to conduct background checks on their employees, or engage in harassment training, does not create a joint employment relationship. Other contractual requirements such as requiring another company to maintain certain quality control standards does not create a joint employment relationship.

Perhaps most refreshing is the way the new regulation allows collaboration and economies of scale between businesses without creating joint employment. The following business relationships, absent more, do **not** create a joint employment relationship:

- providing an employee with a copy of the potential joint employer's employee handbook;
- allowing another business to operate on a larger business's premises (store within a store);
- offering an association health insurance plan shared by various businesses;
- jointly participating in an apprenticeship program.

Employer Takeaways.

Employers cannot be expected to memorize the four-part joint employment test. Moreover, the EEOC and the NLRB are likely to issue their own joint employment tests in the next year and many states have additional joint employment tests. Instead, most employers would be prudent to merely: 1) recognize that there is a doctrine of joint employment, and 2) understand that "control" of how an employee goes about performing their job is the most relevant factor in determining whether joint employment exists.

Ross I. Molho
Clingen Callow & McLean, LLC
2300 Cabot Drive, Suite 500
Lisle, Illinois 60532
www.ccmlawyer.com
(630) 871-2614