DOL Provides Helpful Guidance on Joint Employment

Theologians we will never settle "How many angels can dance on the head of a pin?" But human resource professionals know that more than one entity can be an employer of the same employee. Indeed, we wrote about "joint employment" and its perils two years ago. To clear up the ongoing confusion in this area of the law, the Department of Labor ("DOL") recently published a proposed rule that would give employers clear guidance when they might be found liable as "joint employers" under the Fair Labor Standards Act ("FLSA"). The DOL is currently taking comments on this rule.

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First Hypothetical

One example sited by the DOL where an employer might be concerned about being held jointly liable involved a manufacturer that hires a janitorial services company to clean its facility after-hours. Under this scenario there is a contract between the manufacturer and the janitorial company where the manufacturer agrees to pay the janitorial company a fixed fee for the cleaning services, but reserves the right to supervise the janitorial employees in their performance. The manufacturer does not set the janitorial employees' pay rates or individual schedules, and it does not supervise the janitors' work in any way.

This fact pattern begs the question whether the fact that the manufacturer "reserved the right" to supervise the janitorial employees causes it to become a joint employer of those

janitors? Under the new rule proposed by the DOL, the answer is "no."

The DOL Proposes a Four-Part Bright-Line Rule.

There would be no joint employment relationship between the hypothetical manufacturer and the janitorial services provider under the new rule because the scenario did not implicate any of the new four-part test. The DOL proposes the following four-part test where joint employment may be found if any one of the tests is answered "yes:"

- Company has hiring or firing authority;
- Company supervises and control the employee's work schedule or conditions of employment;
- Company determines the employee's rate and method of payment; or
- Company maintains the employee's employment records.

Under this test, the potential joint employer's ability, power, or reserved contract right to act in relation to the employee is not relevant for determining joint employer status. Rather, courts will be instructed to look at the actual powers exercised by the entity which is being considered for joint employment.

Compare and contrast the preceding example with the next example where the DOL says a joint employment relationship does exist.

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Second Hypothetical

Under this second scenario, a country club contracts with a landscaping company to maintain its golf course. The parties' contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice, a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks each workweek. The country club also provides the landscaping employees with periodic instruction during each workday, and keeps intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instruction.

Under this scenario, the golf course and the landscaping company would be "joint employers" of the landscaping company's employees. Accordingly, if the landscaper fails to comply with the FLSA, the country club could also be found liable.

Employer Takeaways

The new four-part test proposed by the DOL is still subject to comment until June 10, 2019. Even if this rule is adopted, employers should remember that the "joint employer" doctrine exists in different forms under different statutes. For example, there is a separate "joint employer" doctrine under the National Labor Relations Act and a different test under Title VII. The various tests for joint employment will never be completely uniform among the various statutes. The new DOL guidance will make this area of the law a bit more navigable.

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