Department of Labor Rescinds Joint Employer Test Under the FLSA

On July 29, 2021, the U.S. Department of Labor (DOL) rescinded a final rule issued under the Trump administration that had narrowed the definition of a vertical joint employment relationship under the Fair Labor Standards Act (FLSA). There will be a greater likelihood that joint employment relationships will be found after the rescission takes effect on September 28, 2021. The rescinded rule established a four-factor balancing test for determining joint employer status, focusing primarily on whether the potential joint employer (1) hires or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. No single factor was dispositive in determining joint employer status, and the weight of each of the factors could vary based on the facts of each case. This rule diverged from many jurisdictions' approaches to defining joint employment and from the DOL's prior interpretations of the FLSA. In February 2020, a group of state attorneys general filed suit in the U.S. District Court for the Southern District of New York seeking to invalidate the rule, claiming that it was arbitrary and capricious and violated the Administrative Procedure Act. The court ultimately agreed to vacate most of the rule, largely based on the grounds that the rule reflected an impermissibly narrow interpretation of the FLSA, the rule departed from DOL's prior interpretations without adequate explanation, and the DOL had failed to consider the rule's costs to workers. While on the appeal to the Second Circuit Court of Appeals, the DOL under Biden's administration announced that it would rescind the rule altogether. Technically, the litigation before the Second Circuit may continue. While the Biden administration has clearly signaled disagreement with the substance of the rule, the district court's opinion places the administration in a bind should it choose to fashion its own joint employer rule. Many of the defects the district court found in the Trump rule could present headwinds in a Biden rule. While the legal legitimacy of the rescinded rule may have been in dispute, many commentators and practitioners acknowledged that the rule provided consistency and predictability in an area in much need of greater clarity, with the growth of the gig economy and in light of the varying standards that have developed among the courts since the FLSA was first passed. With the rescission of the joint employer rule, effective September 28, employers are left again to grapple with the existing patchwork of court decisions (varying across and even within jurisdictions) to assess whether they might qualify as joint employers under the FLSA.

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