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NY federal judge rejects DOL rule regarding vertical joint employment under the FLSA

By Christopher J. Moro and Brian V. Alcala

On September 8, 2020, the Honorable Gregory H. Woods, U.S.D.J. of the United States District Court for the Southern District of New York issued a decision in *New York, et al. v. Scalia, et al.*,¹ which struck down United States Department of Labor (“DOL”) regulations implementing a new test for vertical joint employment under the Fair Labor Standards Act (“FLSA”). The FLSA is a federal law that establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting workers in the private sector and governments.

On April 9, 2019, the DOL issued a final rule implementing a new standard for “vertical joint employer liability,” which addresses situations where an employee is formally employed by an entity, such as a subcontractor or staffing agency, but the economic realities show that the employee is economically dependent upon another entity.

The DOL’s final rule sought to implement one uniform test for vertical joint employment, which is treated differently among the various federal circuit courts. The DOL’s final rule adopted a four-factor balancing test for vertical joint employment, which—unlike the DOL’s previous guidance—focused primarily on whether the would-be joint employer exercised sufficient control over the employee. The four factors are whether the putative joint employer: “(i) hires or fires the employee; (ii) supervises and controls the employee’s work schedule or conditions of employment to a substantial degree; (iii) determines the employee’s rate and method of payment; and (iv) maintains the employee[’]s employment records.” The DOL’s final rule was an about-face from the DOL’s longstanding position that tests that “any vertical joint employment analysis must examine more than the potential joint employer’s control over the employee.”

Ultimately, the court found that the DOL’s final rule was invalid on a number of different grounds and vacated the regulation containing the four-factor vertical joint employer test. For instance, the court held that the final rule’s creation of a joint employer test separate from the test for a direct employment relationship impermissibly conflicted with the text of the FLSA, because the FLSA itself does not separately define “joint employer.” Rather, the court noted that according to the

¹ *New York, et al. v. Scalia, et al.*, No. 20-cv-1689 (GHW).

FLSA, “[j]oint employment arises because multiple entities may simultaneously satisfy the FLSA’s definition of ‘employer.’” As a result, the court found that including an “independent test for joint employment” conflicted with the text of the FLSA.

The court further noted that the final rule contradicted the FLSA’s definition of an “employer” as “any person acting directly *or indirectly* in the interest of an employer in relation to an employee.” According to the court, the DOL’s final rule, by focusing on whether an entity had any control over the employee, impermissibly narrowed the scope of entities that could be deemed a vertical joint employer under the FLSA.

The court’s decision has the immediate effect of broadening the scope of business entities that could be liable as joint employers under the FLSA. Employers should expect that courts nationwide will likely employ their pre-existing joint employer tests in addressing FLSA claims in light of this decision.

Notably, the court appeared to leave the door open for further rulemaking in this area that, according to the court, would be more in line with the text of the FLSA. Specifically, the court noted that it “is sympathetic to the [DOL’s] concern that putative joint employers face uncertainty, and that this uncertainty is costly. This opinion does not imply that the [DOL] cannot engage in rulemaking to try to harmonize joint employer standards.” However, the DOL has not yet indicated whether it intends to appeal the court’s decision or implement new regulations. We will monitor this case and issue further alerts as necessary.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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