Out with the new, in with the old: FLSA rule rescinded

COMPLIANCE CORNER

Melissa Oakley

COMMENTARY

Employers may be surprised to learn they could be liable for wages for an employee who does not directly work for them. Under the Fair Labor Standards Act (FLSA) and state wage and hour laws, joint employers can be responsible for all wages the employee has earned, including wages the employee appears to earn through another company. Thus, it's critical for employers to understand what may trigger joint employer status and claims as well as what defensive strategies they can implement for greater certainty and predictability.

2020 joint employer rule

Last year, the U.S. Department of Labor (DOL) revised its rules on joint employment for the first time in 60 years with issuance of the "Joint Employer Status Under the Fair Labor Standards Act" rule (joint employer rule). The employer-friendly rule was intended to offer more concrete and predictable guidance on how to determine joint employer status for wage and hour claims. (The previous administration had plans to expand these new rules into other areas of employment law, including Title VII, but they weren't published or finalized in time.)

Perhaps the most notable part of the 2020 joint employer rule was its revision of the standard for determining vertical joint employment. Vertical joint employment exists where an employee has an employment relationship with Employer A, Employer B receives the benefit of the employee's labor, and "the economic realities show that the employee is economically dependent on, and thus employed by," Employer B.

Under the 2020 rule the relevant factors were whether Employer B: 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. To clarify the murky "economic realities" test, the DOL decided to stop relying on vague factors that made the test unpredictable. The DOL's four-factor test emphasized whether there was *substantial* control over the employee, concluding that the control must be substantial to give rise to a joint employer relationship. Excluded from consideration is the employee's economic dependence on the potential joint employer.

The 2020 rule also discussed the other type of joint employment: horizontal joint employment. In these scenarios, an employee works for two companies during the same workweek. If the companies are "sufficiently associated" with each other in respect to employment of the specific employee, they may be joint employers. For horizontal joint employment, the rule simply adopted the long-standing standard articulated in the prior version of the FLSA with non-substantive revisions.

Court challenge

Almost immediately after the rule was proposed, it was challenged in the U.S. District Court for the Southern District of New York by 17 states and the District of Columbia. In September 2020, the court vacated the rule's standard for vertical joint employers, reasoning that its rule impermissibly narrowed FLSA's definition of employer. However, the court left the revisions to the horizontal joint employer analysis in effect. An appeal remains pending before the Court of Appeals for the Second Circuit.

2021 rule rescission

Even while litigation was ongoing, the DOL provided notice earlier this year that it intended to rescind the entire joint employer rule, including the portions on horizontal joint employers. The DOL concluded that the rule's "horizontal joint employment analysis, although consistent with prior guidance, was intertwined with the vertical joint employment analysis." The pre-2020 rules become effective again on Oct. 5, 2021.

Implications

What does rescission of the joint employer rule mean for employers? Courts and the DOL will again apply the broader "economic realities" standard when determining joint employment. With the return of the pre-2020 standard, it's more likely that an employer utilizing certain shared workforce models will be deemed a joint employer. This includes companies using staffing agencies, subcontractors, labor providers, or other intermediary employers. Worse, employers are left with little concrete guidance on reliable ways to reduce risk of joint employer claims. Now would be a good time for employers to review any policies implemented in response to the joint employer rule, re-examine contracts with service contractors, and continue to monitor any changes to the joint employer standard.

Melissa Oakley is an attorney at Barran Liebman LLP. She provides defense in a variety of employment matters. Contact her at 503-276-2122 or moakley@barran.com.