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# Biden DOL Rescinds Trump-Era FLSA Joint Employment Rule

***UPDATE (10/29/2021): This alert has been updated to reflect the Second Circuit Court of Appeal's October 29 order granting the DOJ's motion to dismiss the appeal of the U.S. District Court for the Southern District of New York's September 8, 2020 decision, which vacated substantial portions of the Trump-Era Rule. The Second Circuit's order was based on mootness grounds following the DOL's formal rescission of Trump-Era Rule in July 2021.***

On July 29, the federal Department of Labor (DOL) released a Final Rule titled "Rescission of Joint Employer Status Under the Fair Labor Standards Act." This Final Rule, which became effective October 5, formalized the DOL's proposal to rescind the Trump Administration DOL's joint employer rule (Trump-Era Rule), which took effect on March 16, 2020, and any accompanying regulations.

## Background

Joint employers are individually and equally responsible for compliance with labor and employment laws. For instance, both joint employers are subject to minimum wage, overtime and recordkeeping requirements under the Fair Labor Standards Act (FLSA). The FLSA does not specifically define "joint employer" or "joint employment"; however, it does define "employer" in section 3(d) to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." Rules relating to joint employers under the FLSA are instead found in accompanying regulations, primarily 29 C.F.R. Part 791.

In January 2020, the Trump Administration's DOL revised the FLSA's rules pertaining to joint employers under 29 C.F.R. Part 791 to create an established standard for joint employer status after various federal circuit courts applied different tests to determine whether an employee is jointly employed by more than one employer. The Trump-Era Rule experienced severe pushback from various states for its approach in determining joint employer status.

## Trump-Era Rule

Under the Trump-Era Rule, the DOL identified section 3(d) of the FLSA, containing the FLSA's definition of "employer," as the sole statutory basis for determining joint employer status under the FLSA. The Trump-Era Rule also addressed both "vertical" and "horizontal" joint employment. Vertical joint employment generally exists when a worker is employed by one employer (such as a staffing agency or subcontractor), but is economically dependent on another employer that actually receives the benefit of the worker's labor. The Trump-Era Rule adopted a four-factor test to determine vertical joint employment status, assessing whether the potential joint employer actually (1) hired or fired the employee; (2) supervised and controlled the employee's work schedule or conditions of employment to a substantial degree; (3) determined the employee's rate and method of payment; and (4) maintained the employee's employment records, and excluded other factors that it found not indicative of a potential joint employer's control. Factors other than the four identified above were to be considered "only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." Any consideration of an employee's economic dependence on a potential joint employer when determining that employer's joint employer status was explicitly prohibited. The four-factor test deviated from previous interpretations of the rule in that it required a potential joint employer to *actually exercise control* over the employee to be considered a joint

employer. Previous interpretations were broader and merely considered whether a right to control existed as opposed to the actual exercise of control over the worker.

Horizontal joint employment exists when two or more entities employ the same worker for separate hours within the same workweek. In such a scenario, the two or more employers must aggregate the worker's hours worked for each respective employer during the workweek for purposes of overtime compensation, and are also jointly liable for any FLSA violations. In addressing horizontal joint employment status, the Trump-Era Rule stated that "if the employers are acting independently of each other and are disassociated with respect to the employment of the employee," they are not horizontal joint employers. If, however, "employers are sufficiently associated with respect to the employment of the employee, they are [horizontal] joint employers and must aggregate the hours worked for each for purposes of determining compliance with the [FLSA]."

## Joint Employer Rule and the Courts

On February 17, 2020, 17 states and the District of Columbia filed suit against the DOL in the U.S. District Court for the Southern District of New York, asserting that the Trump-Era Rule violated the Administrative Procedure Act (APA) because it conflicted with the provisions of the FLSA. Seven months later, on September 8, 2020, the district court vacated substantial portions of the Trump-Era Rule, stating that its standard for joint employer liability was "novel" and its "revisions to [the vertical joint employer analysis] are flawed in just about every respect." The district court ultimately found that the Trump-Era Rule violated the APA because it conflicted with the FLSA in the following ways: 1) its reliance on the FLSA's definition of "employer" as the sole textual basis for joint employment liability; 2) its adoption of a control-based test for determining vertical joint employer liability; and 3) its prohibition against considering additional factors beyond control, such as economic dependence. Additionally, the district court held that the Trump-Era Rule was "arbitrary and capricious," in violation of the APA because it did not adequately explain the reason for its departure from prior interpretations, it failed to consider the conflict between it and other DOL regulations relating to joint employers, and it did not adequately consider its impact on employees. After the Trump Administration and other interested parties filed an appeal of the district court's decision, the Department of Justice (DOJ) under Biden moved to dismiss the appeal following the Biden DOL's formal rescission of the Trump-Era Rule. On October 29, the Court of Appeals for the Second Circuit granted the DOJ's motion, determining that the DOL's formal rescission of the Trump-era Rule rendered the appeal moot. The Second Circuit's decision effectively terminated any challenge to the DOL's rescission of the Trump-Era Rule.

## Biden-Era Rescission

As previously mentioned, the Biden DOL officially decided to rescind the Trump-Era Rule in its entirety. Pursuant to the Final Rule, the DOL determined that the Trump-Era Rule "was inconsistent with the FLSA's text and purpose." The Final Rule concluded that the Trump-Era Rule's "interpretation that section 3(d) is the 'sole' textual basis for determining joint employer status in vertical joint employment scenarios potentially excluded important aspects of joint employment arrangements."

Additionally, the Biden DOL took issue with the Trump-Era Rule's vertical joint employer analysis due to its "exclusive focus on control—and specifically, its mandate for an actual exercise of control." The DOL determined that the four-factor test "was not the most appropriate standard for vertical joint employment scenarios" because it "had never before been applied by [the DOL's Wage and Hour Division], was different from the analyses applied by every court to have considered the issue prior to the [Trump-Era Rule's] issuance, and has generally not been adopted by courts." Accordingly, the DOL found the Trump-Era Rule's "exclusive focus on control" to be "impermissibly narrow." The Final Rule also noted that "all of the circuit courts of appeals to have considered joint employment under the FLSA have looked to the economic realities test as the proper framework."

Although the Final Rule found no issue with the Trump-Era Rule's interpretation on horizontal joint employment, it did find that the Trump-Era Rule "intertwined the horizontal joint employment provision with the vertical joint employment provisions," thereby requiring complete rescission. Overall, the Final Rule makes it more likely that an employer will be considered a joint employer under the FLSA.

## Joint Employer Status Going Forward

Ultimately, it is uncertain how the Biden DOL will interpret joint employer status following its rescission of the Trump-Era Rule. Prior to the Trump-Era Rule, courts implemented a variety of multifactor tests in interpreting joint employer status. Following the rescission of the Trump-Era Rule, courts are now likely to return to applying their previous frameworks, at least until the DOL issues a new rule relating to joint employer status. The DOL, however, is not currently proposing regulatory guidance to replace the Trump-Era Rule and indicated that it would continue to consider legal and policy issues relating to joint employment under the FLSA before determining whether alternative regulatory guidance is appropriate.

## Conclusion

The rescission of the Trump-Era Rule may adversely affect employers that were not considered joint employers under the Trump Administration's interpretation. The Final Rule will likely expand joint employer status to include corporate relationships involving workers at affiliated and franchised businesses that were not previously considered joint employers, resulting in potential liability under the FLSA. In light of the Final Rule, employers should consult with counsel to understand their obligations and exposure as joint employers with respect to their obligations under the FLSA.

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