

Insights: Alerts

New York Federal Court Strikes Down Key Provisions of DOL Joint-Employer Rule

September 11, 2020

Written by Kathleen B. Dodd Barton and Christopher M. Caiaccio

On Tuesday, September 8, 2020, Judge Gregory Woods, a federal judge sitting in the Southern District of New York (“SDNY”), struck down, in a [62-page opinion](#), key provisions of the recently released Department of Labor (“DOL”) rule that narrowed when an entity is a “joint employer.” The final rule at issue was released by the DOL on January 12, 2020, and became effective on March 16, 2020. The updated rule altered the framework for analyzing whether two entities employed a worker under the Fair Labor Standards Act (the “FLSA”). When released, the rule was perceived to be employer-friendly and strongly benefited businesses that maintained franchise relationships and/or relied on subcontractors or other independent contractors. Speaking about the final rule when it was issued, Secretary of Labor Eugene Scalia said that the updated rule promoted the administration’s efforts to “address regulations that hinder the American economy and to promote economic growth.” Secretary Scalia believed that the final rule would “promote an entrepreneurial culture” by “giving greater clarity to businesses who want to work together.” However, barely six months later, the efficacy of the rule, and the benefit to employers and franchising, suffered a significant setback based on Tuesday’s decision.

In short, the DOL’s updated final rule narrowed the circumstances under which an entity would be considered to jointly employ a group of workers with another business, with a specific benefit to those entities engaging in franchisee and franchisor relationships. Under the FLSA, any entity considered an employer would be responsible for ensuring its workers were paid minimum wages and overtime under the FLSA. Accordingly, when businesses are deemed to jointly employ a worker, both entities can be held liable for wage violations under the FLSA. A key provision of the new rule centered on the DOL’s adoption of an equally weighted four-part test for assessing joint employer status, which requires a determination of whether the potential joint employer had the right to: (1) hire or fire workers; (2) supervise or control work schedules; (3) set workers’ pay rates; and/or, (4) maintain the workers’ employment records. In the rule, although the DOL stated that a business’s right or ability to exercise any of these four factors is relevant to the inquiry, the primary focus regarding “control” would center on whether a company *actually exercised* control over a worker (as opposed to the company’s mere *ability* to control the worker, which would not be determinative). It is this test and primary focus on the actual exercise of control from which the recent SDNY decision now appears to retreat.

The relevant lawsuit was filed by the attorneys general of 17 states¹ and Washington, D.C., with New York and Pennsylvania taking the lead. The states argued that the new DOL rule would make it significantly harder for employees to hold businesses liable for violations of minimum wage and overtime laws under the FLSA. Finding that the updated rule had “major flaws,” Judge Woods seemed troubled that the rule “ignore[d] the [FLSA’s]

broad definitions,” and specifically varied from the FLSA’s (very broad) definition of “employ” as “to suffer or permit work.” He took specific issue with the requirement that a company *actually exercise* control, finding that this requirement of the DOL’s four-prong analysis conflicted with the FLSA’s focus on whether an entity merely “suffer[s] or permit[s]” the individual to work. The Court found the DOL’s test to be “impermissibly narrow,” and ultimately inconsistent with the FLSA and the DOL’s prior guidance. Judge Woods was clear that “[i]f the [DOL] departs from its prior interpretation of the FLSA, it must explain “why” and “it must make more than a perfunctory attempt to consider important costs, including costs to workers, and explain why the benefits of the new rule outweigh those costs.” Judge Woods held that “[b]ecause the [f]inal [r]ule does none of these things, it is legally infirm.”

Of additional import, the Court did not strike down all aspects of the DOL’s updated final rule. Rather, Judge Woods’s decision only applies to the final rule’s impact on *vertical* employment relationships where workers have relationships with both an employer and another business contracting for their services (commonly occurring in the context of franchising, a staffing agency, subcontractor, labor provider, etc.). The final rule’s changes to the *horizontal* employment relationship (commonly occurring where entities share a common ownership interest like a joint venture) were left in place.

In a statement issued by the DOL after Judge Woods’s opinion, the DOL said it was disappointed with the decision and was considering its options. It is likely that the DOL will appeal; however, it is also possible that the agency will work to revise the updated rule. For now, in light of Tuesday’s decision, all businesses (and especially those who utilize independent contractors, subcontractors, and/or maintain franchise relationships) would be wise to re-evaluate their status as a joint employer with other business entities. And, for any employers who instituted specific changes to their workforce’s organization or modified their franchise agreements or disclosures based directly on the DOL’s updated joint employer rule, it would be prudent to review those changes under the laws and standards applicable prior to March 16, 2020. Although it is too soon to tell the full impact or scope of this decision, it is clear that more change is coming on the question of which entities jointly employ certain workers.

Footnotes

1. Included in this tally of states are New York, Pennsylvania, California, Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Washington, Vermont, and Virginia.

Related People



Kathleen B. Dodd Barton

t 404.815.6158

kbarton@ktslaw.com



Christopher M. Caiaccio

t 404.815.6203

ccaiaccio@ktslaw.com