

EMPLOYER ALERT - US Department of Labor Issues Final Rules on Joint Employment and “Regular Rate of Pay”

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The DOL finally provided some reasonable guidance as to joint employer status for wage and hour purposes. The DOL explained the stated purpose of this final rule is to "promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy." The final rule states that "when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee. The rule sets forth a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of any employer in relation to the employee. The factors are:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

The Final Rule clarifies that not all four factors must be satisfied and that "[n]o single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances." It also emphasizes that "additional factors may be considered, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."

The Final Rule also clarifies what factors are not relevant when assessing FLSA joint employment:

- the employee's economic dependence on the potential joint employer;

- the potential joint employer's business model, such as operating as a franchisor or entering into a brand and supply agreement;
- the potential joint employer's contractual agreements with employer requiring compliance with legal obligations or standards to protect the health or safety of employees or the public, as well as the monitoring and enforcement of such agreements;
- the potential joint employer's contractual agreements with employer requiring quality control standards to ensure consistent quality of the work product, brand, or business reputation, as well as the monitoring and enforcement of such agreements;
- the potential joint employer's business practices such as: providing the employer a sample of employee handbook or other forms, allowing the employer to operate a business on its premise, offering to the employer or participating in an association health plan or retirement plan with the employer, or jointly participating in an apprenticeship program with the employer.

For more information, about compliance with local, state, and federal wage and hour laws, please contact Timm Schowalter at tschowalter@sandbergphoenix.com, (314) 425-4910 or another member of Sandberg Phoenix & von Contard, P.C.'s Labor and Employment Law Team.