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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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U.S. Department of Labor Adopts Joint Employer Regulations

On January 16, 2020, the Wage and Hour Division of the United States Department of Labor ("DOL") published its final rule to revise and update its regulations regarding joint employer status. The final rule largely adopts the proposed rule the DOL published in April of 2019, which we wrote about here. The final regulations become effective March 16, 2020, and mark the first significant revision since they were enacted in 1958. Employers should take note of these new regulations because if an employee is found to be jointly employed by two employers, both employers are jointly and severally liable for all wages owed to that employee, including overtime wages.

The final rules officially adopt the 4-factor test proposed in April of 2019 to determine if two employers exercise enough control and supervision over an employee to be considered joint employers. Under the new framework, the determination of joint employer status hinges on whether the potential joint employer actually exercises power to: (1) hire or fire the employee; (2) supervise and control the employee's work schedules or conditions of employment; (3) determine the employee's rate and method of payment; and (4) maintain the employee's employment records. These factors are derived from the Ninth Circuit Court of Appeals decision in *Bonnette v. California Health & Welfare Agency,* which several other Circuit Courts of Appeals had already adopted.

The factors are balanced and no single one is determinative. Additional factors can be considered, but only when they show that significant control over the terms and conditions of the employee's work is being exercised.

Notably, the DOL received significant comments on its proposed joint employment rules concerning whether certain business models or practices would be more susceptible to a finding of joint employer status (such as franchises, operating multiple businesses on the same premises, and participation in an association health or retirement plan). In consideration of these comments, DOL modified the language of the final rule in an effort to focus on the 4-factor balancing test and make clear that no specific industry is targeted by the new regulations.

DOL also recognized in its joint employer regulations that certain practices -- including contractual provisions that set wage floors, require sexual harassment policies, and set workplace safety standards -- will not generally be indicative of joint employer status. However, such contractual requirements can be relevant to the 4-factor test, particularly where they go above and beyond providing resources and information or maintaining a brand image and instead serve to exercise actual control over the employees of another entity.

The National Labor Relations Board is expected to issue its final rule for determining joint employer status for purposes of coverage under the National Labor Relations Act soon. Similarly, the Equal Employment Opportunity Commission has indicated its intent to publish a rule in the coming months on joint employer status for purposes of liability under the federal employment discrimination laws.

If you have any questions about this Information Memo, please contact Paul J. Buehler, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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