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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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DOL Sends Proposed New Joint Employer Rule to White House for Review

On February 23, 2021, the U.S Department of Labor (DOL) sent a proposed new regulation on joint employment status under the Fair Labor Standards Act (FLSA) to the White House for regulatory review. This action is indicative that new guidance will follow for determining joint employer status when an employee performs work that benefits more than one employer.

By way of background, under certain circumstances, an employee of one company may be found to be a *joint employee* of a second, independent company, depending on the extent of control and supervision the second employer exerts over the employee. If the second company is determined to be a joint employer, both companies could be held jointly responsible for compliance with paying minimum wages and overtime to workers under the FLSA. From a practical perspective, this implicates the instances when a company may be held accountable for the FLSA practices of staffing firms, subcontractors, franchisees, or other affiliated companies when operating in certain shared workforce models.

In March 2020, the DOL released a joint employer rule that adopted a four-factor test outlining a framework to determine when one or more employers could be deemed joint employers when exercising control and supervision over an employee. Specifically, the four-factor balancing test assessed whether the alleged joint employer: (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. No single factor in the assessment was dispositive, and the appropriate weight given to each factor varied based on the circumstances. The test was thought to allow for a simple rule that narrowed the instances in which companies could be deemed joint employers and provide greater clarity and predictability into this issue of determining joint employment.

In September 2020, however, the U.S. District Court for the Southern District of New York struck down the DOL's joint employer rule. The court took the view that the rule conflicted with and unlawfully limited the FLSA's broad definitions of the terms "employer," "employee," and "employ." Additionally, the court found that the DOL did not adequately justify the reasoning behind its departure from its prior interpretations of the joint employment concept. In its opinion, the court also voiced concern the rule did not adequately consider the cost to workers, as the DOL acknowledged the rule might "reduce the amount of back wages that employees [can] collect when their [primary] employer does not comply with the [FLSA]." The DOL along with several franchise and trade associations appealed the decision to the Second Circuit in support of the rule's legality.

Notwithstanding pending litigation, the DOL will release a new proposed joint employer rule once it receives approval from the White House Office of Information and Regulatory Affairs. Due to the contentious nature of

this issue, it is unclear if the newly proposed rule would rescind the March 2020 DOL rule, modify it for clarity or replace it with a broader interpretation of when employers can be held jointly liable under the FLSA.

Upon release, Bond will be sure to provide more information on how employers may navigate these potential joint employer concerns.

If you have any questions about the information presented in this memo, please contact Nihla Sikkander or any attorney in Bond's Labor and Employment practice.

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