

The U.S. Department of Labor Issues New Proposed Regulations on Joint Employer Status

On April 1, 2019, the Wage and Hour Division of the U.S. Department of Labor (“DOL”) [announced](#) a proposed update to its [joint employment regulations](#), which is the first significant revision to the DOL’s joint employment rules since their promulgation in 1958. The proposed updates to the regulations attempt to clarify joint employer status for purposes of wage liability under the Fair Labor Standards Act (“FLSA”).

The FLSA generally requires that employers pay their non-exempt employees at least the federal minimum wage for hours worked, and overtime at a rate of time and a half for hours worked over 40 in a single workweek. The FLSA recognizes that some employers may be “joint employers,” meaning they share control and supervision over an employee’s job functions and are therefore jointly and severally liable to those employees for all wages -- not just the portion of the employee’s wages attributable to work that is performed for that specific employer.

Under the current joint employer standard, if the employee’s employment is not “completely disassociated” from employment by another employer, the employers are considered joint employers under the FLSA. The DOL’s proposed update to the regulations adopts a four-factor balancing test derived from the Ninth Circuit Court of Appeals decision in *Bonnette v. California Health & Welfare Agency* to determine joint employer status. The plurality of Circuit Courts have already adopted the *Bonnette* test, but the proposed amendment to the regulations marks the DOL’s endorsement of the *Bonnette* factors.

The DOL’s proposed framework 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. In adopting the *Bonnette* factors, the DOL modified the first factor so that the theoretical ability to take action with respect to an employee’s terms and conditions of employment is not considered; only the actual exercise of that power is considered.

The *Bonnette* factors, however, are not exhaustive. Other factors may be relevant to the analysis under the proposed regulations if they indicate a potential joint employer’s exercise of significant control over the terms and conditions of an employee’s work or suggest that the potential joint employer is otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The DOL has further elaborated that whether an employee is economically dependent on the potential joint employer is not relevant to the determination of joint employer status under the proposed regulations. Factors that will not be considered under the new standard include, but are not limited to, whether the employee: (1) is in a specialty job or job otherwise requiring special skill, initiative, judgment, or foresight; (2) has the opportunity for profit or loss based on his or her managerial skill; and (3) invests in equipment or materials required for work or for the employment of helpers.

The DOL has emphasized that these proposed revisions should not make any specific business model or practice -- such as franchises, operating multiple businesses on the same premises, or participation in an association health or retirement plan -- any more or less susceptible to a determination of joint employer status. Other contractual arrangements, such as requiring another entity in a business contract to institute sexual harassment policies, also do not make joint employer status more or less likely under the proposed regulations.

The DOL's proposed regulations were published in the Federal Register on April 9. Comments can be submitted or before June 10.

If you have any questions about this Information Memo, please contact [Paul J. Buehler III](#), 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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