FEDERAL APPEALS COURT PUTS FINAL NAIL

IN COFFIN FOR BUSINESS-FRIENDLY JOINT EMPLOYER RULE

BY JOHN M. POLSON, ESQ. AND MARTY HELLER, ESQ.

Laying to rest any doubt that employers would continue to enjoy a business-friendly interpretation of the standard to determine joint employment status, a federal appeals court recently put the final nail in the coffin of the Trump-era attempt to shield businesses from being considered joint employers in a wide spectrum of circumstances. This move clears the way for the current administration to cement into place a broad standard that captures a wide swath of business arrangements into the "joint employer" category. Nothing much is changed in the short term—the business-friendly standard had been on ice since a New York federal judge struck it down in September 2020 and on death watch since the new Department of Labor (DOL) proposed rescinding it altogether in March and formally pulled it in July—and businesses have been operating under the standards previously set by courts around the country since then. Now, you can anticipate that the DOL may take further regulatory action to return to standards similar to the Obama-era approach to joint employer status. What do you need to know about this October 29 court order?

WHERE HAVE WE BEEN?

By way of quick background, many businesses across the country celebrated in March 2020 when the DOL's new joint employer rule took effect. It created a four-part test to determine whether a business is equally liable for obligations under the Fair Labor Standards Act (FLSA), assessing whether the entity in question actually exercises its power to:

- Hire or fire employees;
- Supervise and control work schedules;
- Determine rates and methods of payment; and
- Maintain employment records.

The key to this updated new rule for many businesses was that they must actually exercise—directly or indirectly—one or more of these factors to be considered a joint employer, not just reserve the right to control.

The rule was only in effect for six months before a New York federal court judge struck down nearly all of the effective portions of the rule. He concluded that the DOL's new rule had "major flaws" and did not comport with the FLSA—mostly because it "ignored the statute's broad definitions" and inappropriately narrowed the definition of "joint employer." Specifically, the judge held that the rule's requirement that an entity actually *exercise* control

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over a worker to be deemed a joint employer conflicts with the FLSA, and that control is merely one factor courts and the DOL have and should continue to review.

NEXT BLOWS STRUCK BY THE DOL EARLIER THIS YEAR

With a new administration in the White House, it was no surprise when the DOL proposed formally rescinding the rule in March, indicating it was "unduly narrow" and ran contrary to many judicial decisions from across the country. That announcement from the DOL did not advocate for any specific standard to be applied, nor even describe a possible new standard. Instead, the agency said it would take public comments before determining its next steps. In July, the agency formally rescinded the rule.

WHAT HAPPENED?

Before the DOL unveiled any proposed new standard, the Second Circuit Court of Appeals jumped in. It was assigned the task of hearing the appeal of the September 2020 ruling that struck down the Trump-era version of the rule. The appeal was originally filed by the DOL, but a consortium of business advocacy organizations stepped into the government's shoes once the Biden administration assumed control of the agency to take up the fight.

In a terse one-paragraph order released Friday, the court concluded that the DOL's move to rescind the Trump-era rule was procedurally sufficient to kill off the appeal. It essentially concluded that the legal challenge was moot because the agency no longer supports the business-friendly version of the rule, and that the business consortium could not sufficiently breathe life into it. It ordered the matter to be returned to the lower court and instructed the judge there to formally dismiss the action once and for all.

WHAT'S NEXT?

There appear to be no further steps for the challengers to take, and you can pronounce the business-friendly interpretation dead once and for all. The runway is now cleared for the DOL in the coming months to issue a new proposed joint employer rule—which will undoubtedly have much more in common with the

Obama-era standards than anything we saw from the Trump DOL. In terms of what you can anticipate from the new DOL in the near future, you can look back to a January 2016 interpretation—"Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act"—for an idea of what to expect. This Obama-era guidance signaled that organizations engaged in multi-participant arrangements—such as outside-party management, joint ventures, staffing services, employee leasing, temporary help, subcontracting, certain kinds of "job sharing," and dedicated vendors or suppliers—were directly in the DOL's crosshairs. The agency essentially said that it wanted to put as many of them as possible on the hook for any alleged wage and hour violations filed under the FLSA.

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Again, Friday's court order doesn't result in any specific or immediate changes to the law. PEOs should prepare for coming sea change in enforcement and review current business practices, service agreements, onboarding, and other templates for compliance and potential joint employer issues. ■

This article is designed to give general and timely information about the subjects covered. It is not intended as legal advice or assistance with individual problems. Readers should consult competent counsel of their own choosing about how the matters relate to their own affairs.

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