BIG CHANGES ARE COMING TO JOINT EMPLOYER STANDARDS

BY JOHN M. POLSON, ESQ.

Two important federal agencies are re-examining the joint employer standards they use to determine whether a PEO or any other business is a joint employer. The outcome should be good for PEOs. However, PEOs should closely monitor developments.

At the risk of stating the obvious, PEOs do not want joint employer status. In contrast to co-employment, which generally is a foundation for providing PEO services, joint employment has no purpose other than expanding liability. It is never good.

The National Labor Relations Board (NLRB) issued a proposed new joint employer rule in September of 2018. The proposed rule is considered to be very business-friendly, particularly in contrast to recent rulings from the NLRB.

Under the NLRB's proposed rule, joint employment exists only if two employers share or co-determine the essential terms and conditions of employment. Most importantly, as the NLRB states, a putative joint employer must possess and actually exercise substantial direct and immediate control in a manner that is not limited and routine.

The NLRB's proposed rule is a big improvement over a prior NLRB decision stating that merely reserving a right of control is enough to create joint employer status. (*Browning-Ferris Industries of California, Inc.*) If the NLRB's proposed rule is finalized as currently written, it should supersede the *Browning-Ferris* case and significantly reduce the risk of a joint employer ruling involving a PEO.

More recently, the U.S. Department of Labor (DOL) published its very own proposed joint employer rule. Just as the NLRB seeks to unwind the *Browning-Ferris* decision, the DOL seeks to replace prior guidance it issued under the Obama administration. That prior guidance significantly expanded joint employer coverage. It was rescinded in June of 2017 with anticipation that a new rule would be forthcoming shortly thereafter.

The DOL issued its long-anticipated proposed rule nearly two years later, in April of this year, proposing a new four-factor test to determine joint employment. If adopted, the rule likely would result in fewer DOL joint employer rulings from courts that rely on guidance from the DOL. That could mean fewer businesses found jointly liable for minimum wage, overtime, and

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U.S. DEPARTMENT OF LABOR ISSUES GUIDANCE ON PEO FORM 5500 FILINGS

On July 24, the Department of Labor (DOL) Employee Benefits Security Administration (EBSA) issued a Field Assistance Bulletin that provides both guidance and relief on PEO Form 5500 filings:

- The DOL is not going to penalize any PEOs for failing to include complete and accurate participating employer information in accordance with Employee Retirement Income Security Act (ERISA) Section 103(g) for 2015, 2016, and 2017 filings;
- Going forward, beginning with plan year 2018, all reports must comply with the ERISA Section 103(g) requirements; and
- The DOL is granting multiple-employer plans (MEPs) a special filing extension of up to two and a half months from the July 31, 2019, due date for calendar year plans to file their 2018 Form 5500 in compliance with ERISA Section 103(g).

You can view NAPEO's Form 5500 resource page at **www.napeo.org/peo-resources/resources-by-topic/regulations-and-compliance**.

other similar liability under the Fair Labor Standards Act (FLSA).

However, the language of the proposed rule needs refinement to eliminate ambiguity for PEOs. As written, the proposed rule could make it more difficult for PEOs to avoid joint employer status. For example, the proposed rule might allow a finding of joint employer status based solely on the act of maintaining employment records. That would be an absurd outcome and probably not what the DOL intended.

As such, the DOL is expected to revise the proposed rule before it is issued. The public comment period closed in June and now we await the DOL's final rule. However, Secretary of Labor Alexander Acosta resigned

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in July. As of the writing of this article, President Trump has selected Eugene Scalia as the new Secretary of Labor, pending approval by the Senate. If his name sounds familiar, that is because he is the son of the former Supreme Court Justice Antonin Scalia, who passed away in 2016. Regardless of whether it is Scalia or someone else, the next Secretary of Labor will no doubt have an impact on the future of the joint employer standard going forward.

PEOs should follow the progress of these important developments. The final rules could impact a number of PEO procedures and documents, such as the client service agreement (CSA) and worksite employee acknowledgment forms. ■

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