# Department of Labor Issues Final Rule on Joint Employer Status

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The term "joint employer" is often one of grave concern to employers. When, for example, Company A hires Company B, an outside cleaning service, to clean Company A's offices, both companies may be held by a court or administrative agency to be a joint employer, where both companies are liable for the cleaning employees' wages and benefits.

The U.S. Department of Labor (DOL) has just released its Final Rule (the Rule) and updated regulations governing joint employer status under the Fair Labor Standards Act (FLSA), which prescribes wage, overtime and recordkeeping rules for employers. Significantly, these regulations had not been updated in nearly 60 years.

The new joint employer test focuses on whether the proposed joint employer "exercises substantial control over the terms and conditions of the employee's work." This is a big change over the previous interpretation of the rule, which subjected companies to the risk of being liable as joint employers if they were "not completely disassociated" from an employee.

The joint employer test is a four-factor balancing test assessing whether the purported joint employer:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. determines the employee's pay rate and method of payment; and
4. maintains the employee's employment records.

Under this test, not all four factors must be satisfied to prove joint employment, and no single factor is "dispositive." Instead, the standard for determining whether joint employment exists remains dependent on the particular facts of each case. The new test appears to give employers greater certainty and may allow employers to exert greater control over independent contractors without the risk of being held to be a joint employer.

In another change, the DOL makes clear that "actual," not theoretical, exercise of control over the employee is required to show a joint employer relationship. In other words, some actual exercise of control, and not just the reserved right to act, must be shown to establish employment by more than one entity.

Importantly, the new Rule also identifies factors that are explicitly stated to be NOT RELEVANT to a determination of joint employer status under the FLSA. These factors include: (1) the workers' "economic dependence on a potential joint employer"; (2) the potential joint employer requiring the other employer to adhere to certain standards to maintain quality; (3) the potential joint employer providing the other employer with a sample employee handbook; (4) or the potential joint employer requiring the other employer to comply with legal obligations regarding health, safety and non-discrimination. Most of these factors were previously used to find joint employer status.

Lastly, please note that the DOL is not the only federal agency that has adopted rules applying to joint employer determination. Both the Equal Employment Opportunity Commission and the National Labor Relation Board have prepared rules on this subject. The DOL's Rule was published in the Federal Register on January 16, 2020, and, barring any legal challenges, will go into effect on March 16,

2020.

For questions about this or any other topic involving employees, please contact Joseph Paranac (paranacj@whiteandwilliams.com; 201.368.7220) or another member of the Labor and Employment Group.