

Fair Labor Standards Act Joint Employer Status Final Rule

2020

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2020 Final Rule Overview

- The regulations interpreting the joint employer status under the FLSA have remained mostly unchanged over 60 years.
- This Final Rule was published on January 16, 2020 with an effective date of March 16, 2020, revises and updates the regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA).

What is Joint Employment?

What is Joint Employment?

The FLSA requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek.

What is Joint Employment?

- To be liable for paying minimum wage or overtime, an individual or entity must be an “employer”, which the FLSA defines in Section 3(d) to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”

What is Joint Employment

Under the FLSA an employee may have - in addition to his or her employer - one or more joint employers. A joint employer is any additional individual or entity who is jointly and severally liable with the employer for the employee's wages.

Two Joint Employer Scenarios

Types of Joint Employment

Part 791 constitutes the Department's official interpretation of joint employer status under the FLSA. The Final Rule identifies two potential joint employer scenarios:

- where an employee performs work for one employer that simultaneously benefits another person or entity; and
- where an employee works separate hours for two or more employers during the workweek.

Four-Factor Balancing Test Applies in the First Scenario

Four-Factor Balancing Test

In the first scenario, the Final Rule provides a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* to determine whether the potential joint employer is directly or indirectly controlling the employee.

Four-Factor Balancing Test

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

Actual Exercise of Control

The Final Rule states that a person must directly or indirectly exercise control over the employee through at least one of the four factors to be a joint employer under the FLSA.

Indirect Control

- The Final Rule also states that a potential joint employer indirectly controls an employee through mandatory directions to another employer that directly controls the employee.
- Indirect control does not include the direct employer's voluntary decision to accommodate the potential joint employer's request, recommendation, or suggestion.
- Acts that incidentally impact the employee do not indicate joint employer status.

Employment Records

The Final Rule defines the “employment records” referred to in the fourth factor to mean:

- those records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision, and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee.

The potential joint employer’s maintenance of the employee’s employment records alone will not lead to a finding of joint employer status.

Economic Dependence

The Final Rule provides that whether the employee is economically dependent on the potential joint employer is not relevant for determining joint employer status under the FLSA.

Examples of factors that are not relevant for determining joint employer status because they assess the employee's economic dependence include:

- whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
- whether the employee has the opportunity for profit or loss based on their managerial skill;
- whether the employee invests in equipment or materials required for work or the employment of helpers; and
- the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

Factors That Do Not Make Joint
Employer Status More or Less
Likely

A person's business model

Being a franchisor, entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more or less likely.

Contractual agreements

- Certain contractual agreements with an employer do not make joint employer status more or less likely
 - requiring the employer to comply with legal obligations or to meet certain standards to protect the health, safety, or well-being of its employees or the public (for example, establishing workplace safety practices, requiring background checks, or instituting sexual harassment policies)
 - requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation (for example, requiring employees to meet quantity and quality standards, or requiring the use of standardized products or services to maintain brand standards)

Certain contractual agreements

Example 1

- Entity A, a large national company, contracts with multiple other businesses in its supply chain.
- Entity A does not hire, fire, or supervise the employees of its suppliers, and the supply agreements do not grant Entity A the authority to do so. Entity A also does not maintain any employment records of suppliers' employees.
- As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws.
- Employer B contracts with A and signs the code of conduct.

Certain contractual agreements

Example 1: Under these facts, A is not a joint employer of B's employees.

Certain business practices

Providing the employer with optional resources or benefits that the employer can use at its discretion (for example, providing the employer with sample handbooks or forms, allowing the employer to operate on the potential joint employer's premises, or offering a health or retirement plan) does not make joint employer status more or less likely.

Certain business practices

Example 2

- **Franchisor A** is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. **Franchisee B** owns one of these hotels and is a licensee of A's brand, which gives **Franchisee B** access to certain proprietary software for business operation or payroll processing.
- In addition, **A** provides **B** with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise, such as sample operational plans, business plans, and marketing materials.
- **B** is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment.

Certain business practices

Example 2

Under these facts, **Franchisor A** is not a joint employer of **Franchisee B's** employees.

Examples of Joint Employment under the First Scenario

Example #1

- An office park company hires a janitorial services company to clean the office park building after-hours.
- According to a contractual agreement between the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services.
- However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the janitorial employees' performance of their work in any way.

Application

Example 1: Under these facts, the office park is not a joint employer of the janitorial employees.

Example #2

- A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises.
- A restaurant official provides general instructions to the team leader from the cleaning company regarding the tasks that need to be completed each workday, monitors the performance of the company's work, and keeps records tracking the cleaning company's completed assignments. The team leader from the cleaning company provides detailed supervision.
- At the restaurant's request, the cleaning company decides to terminate an individual worker for failure to follow the restaurant's instructions regarding customer safety.

Application

Example 2: Under these facts, the restaurant is not a joint employer of the cleaning company's employees.

Example #3

- A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises.
- However, in practice a restaurant official oversees the work of employees of the cleaning company by assigning them specific tasks throughout each day, providing them with hands-on instructions, and keeping records tracking the work hours of each employee.
- On several occasions, the restaurant requested that the cleaning company hire or terminate individual workers, and the cleaning company agreed without question each time.

Application

Under these facts, the restaurant is a joint employer of the cleaning company's employees.

Example #4

- A packaging company requests workers on a daily basis from a staffing agency.
- Although the staffing agency determines each worker's hourly rate of pay, the packaging company closely supervises their work, providing hands-on instruction on a regular and routine basis.
- The packaging company also uses sophisticated analyses of expected customer demands to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload.

Application

Under these facts, the packaging company is a joint employer of the staffing agency's employees.

Example #5

- A packaging company has unfilled shifts and requests a staffing agency to identify and assign workers to fill those shifts.
- Like other clients, the packaging company pays the staffing agency a fixed fee to obtain each worker for an 8-hour shift.
- The staffing agency determines the hourly rate of pay for each worker, restricts all of its workers from performing more than five shifts in a week, and retains complete discretion over which workers to assign to fill a particular shift.
- Workers perform their shifts for the packaging company at the company's warehouse under limited supervision from the packaging company to ensure that minimal quantity, quality, and workplace safety standards are satisfied, and under more strict supervision from a staffing agency supervisor who is on site at the packaging company.

Application

Under these facts, the packaging company is not a joint employer of the staffing agency's employees.

Second Joint Employer Scenario and Examples

Second Joint Employer Scenario

- If the employers are acting independently of each other and are disassociated with respect to the employment of the employee, they are not joint employers.
- If the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the employee's hours worked.

“Sufficiently Associated”

Employers will generally be sufficiently associated when:

- There is an arrangement between them to share the employee’s services;
- One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
- They share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Second Joint Employer Scenario Examples

Example 1: An individual works 30 hours per week as a cook at one restaurant establishment and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee.

Second Joint Employer Scenario Examples

Example 1: The restaurant establishments are not joint employers of the cook.

Second Joint Employer Scenario Examples

Example 2: An individual works 30 hours per week as a cook at one restaurant establishment and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate.

Second Joint Employer Scenario Examples

Example 2: The restaurant establishments are joint employers of the cook.

Joint Employers' Responsibilities

Joint Employers' Responsibilities

Joint employers are responsible, individually and jointly, for compliance with the FLSA.

Resources

- WHD website at:
www.dol.gov/whd/jointemployment2020/
- The 2020 Final Rule in its entirety can be found at:
<https://www.federalregister.gov/jointemployment>
- Joint Employment Fact Sheet can be found at:
<https://www.dol.gov/whd/fact-sheets-index.htm>

QUESTIONS?