

Department of Labor

Small Entity Compliance Guide

Joint Employer Status under the Fair Labor Standards Act

This guide is prepared in accordance with the requirements of section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities comply with the revised rules related to joint employer status under the Fair Labor Standards Act (FLSA). This guide is not intended to supersede or replace the rules, but rather, to facilitate compliance with the rules. You may review the rule at www.regulations.gov at: <https://www.regulations.gov/document?D=WHD-2019-0003-12829>.

Copies of this guide may be obtained in alternative formats (Large Print, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD District and Area offices at <https://www.dol.gov/agencies/whd/contact/local-offices>

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This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

I. Rulemaking

In April 2019, the Department published a Notice of Proposed Rulemaking (NPRM) explaining that section 3(d) provides the basis for determining joint employer status under the Fair Labor Standards Act (FLSA), proposing a four-factor balancing test for determining joint employer status in the scenario where another person in addition to the employer simultaneously benefits from an employee's work, and proposing additional guidance regarding how to apply that test. In addition, the NPRM recognized that part 791's focus on the association between the potential joint employers is useful for determining joint employer status in a second scenario—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. The issue in this scenario is whether those separate sets of hours should be combined in the workweek when determining compliance with the FLSA. The Department proposed that the multiple employers are joint employers in this scenario if they are sufficiently associated with respect to the employment of the employee. Finally, the NPRM provided examples describing how the Department's proposal would apply in a number of factual situations involving multiple employers. On January 16, 2020, the Department published a final rule (85 FR 2820) that updated and revised the Department's interpretation of joint employer status under the FLSA.

II. Overview of Joint Employer Status under the FLSA

The FLSA requires covered employers to pay their non-exempt employees at least the federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek. To be liable for paying minimum wage or overtime pay, 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[.]”

Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers. A joint employer can be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization. For each workweek that a person or entity is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the FLSA, including the minimum wage and overtime pay provisions, for all of the hours worked by the employee in that workweek.

In the final rule, the Department discussed two scenarios where an employee may have one or more joint employers. An explanation and examples of each scenario follow.

III. Two Joint Employer Status Scenarios: First Scenario

In the first scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, and another individual or entity simultaneously benefits from that work. In this scenario, a four-factor balancing test helps assess whether the potential joint employer is directly or indirectly controlling the employee.

IV. Four-Factor Balancing Test under the First Scenario

The balancing test examines whether the potential joint employer:

- 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.

Whether a person is a joint employer will depend on all the facts in a particular case. No single factor is controlling in determining the potential joint employer's status, and the appropriate weight to give each factor will vary depending on the circumstances.

Application of the four factors should determine joint employer status in most cases.

Nonetheless, additional factors may be relevant for determining joint employer status in the first scenario, but only if they indicate whether the potential joint employer exercises significant control over the terms and conditions of the employee's work.

a. Actual Control

The potential joint employer 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. Although a potential joint employer's ability, power, or reserved right to exercise control through one of these factors may be relevant to a determination of joint employer status, such an ability, power, or reserved right is not by itself sufficient to determine that a person is a joint employer without some actual exercise of control.

1) Direct Control

A potential joint employer may exercise direct control by, for instance, hiring or firing an employee; setting an employee's schedule; or determining an employee's pay. In each case,

the inquiry focuses on the relationship between the potential joint employer and the employee.

2) Indirect Control

A potential joint employer may exercise indirect control over an employee through another, intermediary employer. For example, the potential joint employer may exercise indirect control by directing the intermediary employer to fire or hire an employee, schedule an employee for certain shifts, or pay an employee at a specific rate. In other words, indirect control refers to control that flows from the potential joint employer through the intermediary employer to the employee.

Indirect control is exercised by the potential joint employer through mandatory directions to another employer that directly controls the employee. However, the direct employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status.

b. Employment Records

"Employment records" means 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.

V. Facts That Do Not Make Joint Employer Status More or Less Likely

An employee's economic dependence on the potential joint employer is not relevant for determining whether the potential joint employer is liable as a joint employer. Examples of such factors include:

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

There are also other facts that do *not* make joint employer status more or less likely under the FLSA, such as:

- Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model.
- Contractual agreements with an employer requiring quality control standards to ensure consistent quality of the work product, brand, or business reputation. Examples of such contractual agreements include requiring the employer to meet quantity and quality standards, morality clauses, or requiring the use of standardized products, services, or advertising to maintain brand standards.
- Contractual agreements with an employer requiring the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of its employees or the public. Examples of such contractual agreements include mandating that employers comply with their obligations under the FLSA or other similar laws, institute sexual harassment policies, require background checks, establish workplace safety practices and protocols, or require that workers receive training regarding matters such as health, safety, or legal compliance.
- Providing the employer a sample employee handbook, or other forms; allowing the employer to operate a business on its premises (including “store within a store” arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer; jointly participating in an apprenticeship program with the employer; or any other similar business practice.

VI. First Scenario Examples

a. First Example

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.

Is the office park a joint employer of the janitorial employees?

Under these facts, the office park is not a joint employer of the janitorial employees. The office park company does not hire or fire the employees, determine their rate or method of payment, or exercise actual control over their conditions of employment. The office park’s

reserved contractual right to supervise the employees' performance alone is not enough to establish that it is a joint employer.

b. Second Example

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.

Is the restaurant a joint employer of the cleaning company's employees?

Under these facts, the restaurant is a joint employer of the cleaning company's employees. The restaurant exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The restaurant directly supervises the cleaning company's employees' work on a regular basis and keeps employment records. And the cleaning company's repeated and unquestioned acquiescence to the restaurant's hiring and firing requests indicates that the restaurant exercised indirect control over the cleaning company's hiring and firing decisions.

VII. Two Joint Employer Status Scenarios: Second Scenario

In the second joint employer scenario, if the employers are acting independently of one another and are disassociated with respect to the employment of the employee, they are not joint employers. If, on the other hand, multiple employers are sufficiently associated with respect to the employment of the employee, they are joint employers. If the multiple employers are joint employers, they must total the hours worked for each for purposes of determining compliance with the Act.

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.

VIII. Second Scenario Examples

a. First Example

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.

Are the restaurant establishments joint employers of the cook?

Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

b. Second Example

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.

Are the restaurant establishments joint employers of the cook?

Under these different set of facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must combine the cook's hours worked at both restaurants for purposes of complying with the Act, including the payment of overtime.

IX. Additional Guidance

The Department has issued additional compliance assistance materials to help employers, including small entities, understand the changes to the Joint Employer Part 791 regulations. These materials are available at:

<https://www.dol.gov/agencies/whd/flsa/2020-joint-employment>.