

July 2019

Federal Updates

DOL Plans on Clarifying Joint Employer Relationship

On April 1, 2019, the Department of Labor (DOL) issued a proposal to clarify Joint Employer Regulation. Once published, the proposal will be open to public comment.

It's only taken 60 years for the DOL to begin to update these regulations. And as you know, a lot has happened since then.

Why is This Important?

Joint Employer Relationship is relevant when an employer has more than one business or entity, which is legally separate from one another; for example, each may have its own Federal ID, but employees are shared by these entities.

Employers commonly misinterpret the current guidelines, subjecting them to potential overtime wage claims.

A common misconception is that if each business location has a separate Federal ID, they will be treated as different companies.

Not necessarily. The DOL will evaluate each case to determine whether the two entities are actually one. If found to be one entity, the next step is to determine if all hours worked between multiple establishments were counted to properly calculate overtime under the FLSA provisions.

Keep in mind, the law is not changing. Currently, the DOL offers substantial guidance on Joint Employer Relationship; unfortunately, it is clear as mud.

Now, the Department proposes a four-factor test to make it easier for employers and employees to understand if multiple entities are considered one employer. The test would consider whether the potential joint employer actually exercises the power to:

- Hire or fire the employee;
- Supervise and control the employee's work schedules or conditions of employment;
- Determine the employee's rate and method of payment; and
- Maintain the employee's employment records.

The proposal offers practical examples to help discern what constitutes Joint Employer Relationship.

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 they joint employers of the cook?

Application: 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.

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 they joint employers of the cook?

Application: Under these 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 aggregate the cook's hours worked across the two restaurants for purposes of complying with the act.

We are hopeful that these new guidelines will clarify the issue for employers, so they can avoid potential overtime claims.

Take Away For Employers

If you have two or more entities where employees work at all locations during the week, most likely the employee will be owed overtime for any hours over 40 in a week, combining hours worked at all locations.