BrothersSmith LLP
Attorneys at Law

EMPLOYMENT LAW ALERT

NEW YORK COURT STRIKES DOWN THE ADMINISTRATION'S JOINT EMPLOYER REGULATION

The issue of "joint employer" liability is an ongoing concern for franchisors and other businesses. The Fair Labor Standards Act ("FLSA") makes "employers" liable for violations of federal wage hour laws. The recurrent issue is the extent to which the law considers franchisors, contractors, companies that use staffing agencies, and companies that contract with other companies (such as businesses that hire janitorial services companies) to be "employers" of workers that they do not hire directly. The Department of Labor describes the issue as one in which one business employs the worker, and another business benefits from the employee's work. The joint employer issue arises under two factual scenarios: a business hires a contractor which has its own employees ("vertical" joint employment); or an employee performs job functions directly for two or more related employers ("horizontal" joint employment).

There are essentially two (2) different theories regarding when a company is considered a "joint employer" of such workers. One theory holds that a business is a "joint employer" if the business has, and exercises, some form of direct control over the employee, including but not limited to the power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and/or maintenance of employment records. The alternative theory is that a business is a "joint employer" if the employee is "economically dependent" on the business. As the DOL has previously noted, this test "requires a court to examine the relationships among the employee and the putative employer to determine upon whom the employee is economically dependent."

The Obama Administration issued guidance that adopted the broader "economic dependence" test in addressing employment of home health care workers (Administrator's Interpretation No. 2014-2) and of migrant and seasonal agricultural workers (A.I. No. 2016-1). However, the Trump Administration issued a revision to the federal joint employer rule in March 2020. The Final Rule adopts a four (4) part balancing test to determine whether a company is a joint employer:

- Whether the company hires or fires the employee;
- Whether the company supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Whether the company determines the employee's rate and method of payment; and/or
- Whether the company maintains the employee's records. (29 C.F.R. § 791.2(a)(1)(i)-(v)).

The appropriate weight to be given to each factor varies depending on how that factor suggests control in a given case. This is a reversion to the "direct control" standard. The DOL stated that the rule as previously drafted resulted in inconsistent determinations, and that the revision would promote uniformity across jurisdictions, thereby reducing litigation and encouraging innovation.

Seventeen states sued to vacate the Final Rule and to enjoin its implementation. Five trade associations sought and received leave to intervene. In September 2020, a judge in the United States District Court for the Southern District of New York held that the Final Rule's joint employer test as applied to "vertical" joint employment is unenforceable. [The Court upheld the Final Rule's revisions with respect to "horizontal" joint employment.] The Court held that the Final Rule was (i) inconsistent with the text and legislative history of the FLSA; (ii) inconsistent with the definition of "employer" in the Migrant and Seasonal Workers Protection Act; (iii) unsupported by existing case law; (iv) impermissibly limited with respect to the factors to be considered in determining whether

an employment relationship exists; (v) unclear as to the reasons why it departed from prior guidance; and (vi) arbitrary and capricious because it failed to consider the additional costs to workers.

This Court's opinion is not binding on California employers, but it does provide insight into how a federal judge in a California district court is likely to rule. In addition, California has its own joint employer laws, which apply to areas such as wage and hour liability, sexual harassment claims, and/or coverage under the California Family Rights Act. In each of these situations, California law applies broader liability than the Final Rule. Accordingly, if you have any questions regarding potential liability as a joint employer please contact one of the Firm's employment attorneys.

Author

Horace W. Green
T 925.944.9700
hgreen@brotherssmithlaw.com

BROTHERS SMITH LLP provides its clients, professional advisors and its friends with up-to-date reports on recent developments in business, real estate, employment, estate planning and taxation.

2033 North Main Street, Suite 720
Walnut Creek, California 94596
T 925.944.9700 F 925.944.9701

www.brotherssmithlaw.com