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3 Tips Now That DOL's Joint Employer Rule Is Struck Down

By **Jon Steingart**

Law360 (September 16, 2020, 8:30 PM EDT) -- A federal judge created questions for employment lawyers when he threw out a new U.S. Department of Labor rule that aimed to more clearly spell out when one worker can sue multiple companies for unpaid wages.

U.S. District Judge Gregory Woods of the Southern District of New York held Sept. 8 that the DOL strayed too far from court interpretations of what it takes to be considered a joint employer under the Fair Labor Standards Act. Employment attorneys told Law360 that the issue is likely to be resolved in an appeals court, making it more important than ever for employers to be mindful of how they structure their businesses.

The joint employer rule listed four factors for examining whether one company had a strong enough role in directing another's operations that it could be seen, in essence, as its workers' employer.

"We have gone back and forth on this several times over the last few years," said Brian Schnell, a Minneapolis-based partner at Faegre Drinker Biddle & Reath LLP who counsels franchise companies on how to structure their business operations.

Joint employment is a major concern for the franchise business model, he said, because the bigger company wants to be able to advise a franchisee on best practices for running the business but doesn't want to be named a co-defendant in employment lawsuits.

Here, Law360 provides three tips in light of the joint employer ruling.

Make Sure You Vet Your Partners

The uncertainty created by the rule being struck down means employers should "be darn careful," said Andrew Bagley, who counsels management and litigates out of the Washington office of Crowell & Moring LLP.

He recommends companies undertake due diligence to check out a potential business partner because of the possibility of being pulled into an employment lawsuit as a joint employer.

"You've got to be really careful and choose those entities with which you are associated in a way that reduces risk if there is a chance of a joint employer finding," Bagley told Law360.

"What I tell clients if they're thinking about retaining a staffing agency, for example, or a company that provides them personnel by one mechanism or another, is: Don't necessarily go with the cheapest source of labor," he said. "Have they been sued? How are they doing at the Better Business Bureau? How are they doing in front of the commissioner of labor if they're in California, or the state Department of Labor? You're going to have to rely on them to do it right."

Heidi Shierholz, senior economist and policy director at the worker advocacy group Economic Policy Institute, said the ruling should be a wake-up call to companies that they need to take a broad view of to whom they owe employment law protections.

"If you control a worker's conditions of work, then you are their joint employer and you actually have to put things in place to make sure they are getting minimum wage, overtime, safe workplaces and healthy workplaces," she said. "It affirms responsibility to the people who do work for them, even if they're not the ones who are directly signing the paychecks."

Some attorneys who represent employers have raised questions about the ruling's scope, such as whether it applies only in the judicial district where the case was heard or in the 17 states plus the District of Columbia that filed the suit. They compared it to a judge's Aug. 3 ruling that struck down DOL rules implementing leave provisions in recently enacted coronavirus response legislation.

"It's very likely that the department will appeal the decision," said Susan Harthill, a partner in Morgan Lewis & Bockius LLP's Washington office who left her post as the DOL's No. 2 lawyer for national operations in October 2018. "The judge, of course, did not address the scope of his order in terms of the geographic reach."

The DOL, for its part, seems to be eyeing an appeal in the joint-employer case.

"The ruling vacates the test for vertical employment, i.e. the scenario under which the employee has an employer who suffers, permits, or otherwise employs the employee to work but another person simultaneously benefits from that work," DOL Wage and Hour Division Administrator Cheryl Stanton wrote in an all-staff email on Sept. 10 that was obtained by Law360. "We are disappointed in the district court's decision regarding the joint employer rule. We stand by the rule and are weighing all options."

The U.S. Department of Justice, which is representing the DOL in court, declined to comment.

Keep an Eye on the NLRB and EEOC

The Department of Labor's rule isn't the only joint employer rule employers need to keep in mind.

The National Labor Relations Board enacted one that took effect in April, and the Equal Employment Opportunity Commission signaled in the federal government's November 2019 regulatory agenda that it planned to initiate its own rule. The EEOC hasn't done it yet, and the proposal didn't appear on the next agenda, in June.

Like the DOL test, the NLRB's also scrutinizes whether one company exercises control over another's operations, but it examines eight "essential terms and conditions of employment" rather than the DOL's four factors.

Forcing employers to mind one rule with respect to the FLSA's minimum wage and overtime requirements, another rule for the National Labor Relations Act and potentially a third rule for the discrimination laws that the EEOC enforces adds layers of complexity for employment law compliance, according to Nixon Peabody LLP attorney Jade Butman, who represents employers and is based in the firm's San Francisco office.

"They're trying to have clear standards and clear lines," Butman told Law360. "It's not helpful for employers when they have to deal with different standards coming out of different agencies. That said, it's also not unusual."

Employers should pay greater attention to joint employer issues under the FLSA than discrimination laws enforced by the EEOC because they can mean large exposure for the parent company, said Justin Swartz, a New York-based partner at Outten & Golden LLP who represents workers as co-chair of its class action practice group.

"A joint employer doesn't benefit from discrimination in the way they benefit from unpaid wages," Swartz told Law360. "A purported joint employer could and should take steps to ensure that subsidiaries, related companies, or franchisees don't discriminate. But if they discriminate anyway, that's not to the benefit of the joint employer."

Don't Read Too Much Into Encino Motorcars

Employers shouldn't too heavily rely on a recent U.S. Supreme Court holding that lifted a thumb that sometimes tilted the scale in FLSA cases in employees' favor, worker- and management-side attorneys told Law360. One plaintiffs' attorney noted that Judge Woods' opinion shows that courts will still follow decades of precedent that say the law should be interpreted in ways that maximize worker protection.

In his ruling, Judge Woods shut down a DOL argument that the high court's 2018 holding in Encino Motorcars v. Navarro, which scaled back a worker-friendly interpretation of the FLSA's overtime pay rules, applies to the law's joint employer principles too. The justices threw out the overtime approach that courts had been applying for decades, finding that nothing in the text of the FLSA calls for it.

But there is still good case law from the Supreme Court and lower appeals courts that say the law's "remedial purpose" means that it should be interpreted in ways that provide expansive coverage, Judge

Woods said. Encino doesn't support the DOL's argument that all interpretations of the FLSA deserve to be reevaluated, he said.

"That decision cannot bear the weight the department puts on it," as Encino dealt only with the narrow question of how to apply exemptions from the FLSA's general rule that employers must pay overtime and not with interpreting the entire law, he said.

Encino made one aspect of the FLSA a little more employer-friendly, but that doesn't undercut decades of rulings that it's a worker-friendly law, said Swartz, the worker-side attorney.

"The FLSA is still a remedial statute that was passed for the purpose of trying to protect workers from abuse and exploitation," Swartz said. "Encino doesn't say anything to the contrary. All it does is talk about how to interpret a particular legal question."

Butman, the management attorney, expressed a similar view of Judge Woods' rejecting the DOL's Encino argument.

"He was basically saying that this is apples and oranges," she said.

--Additional reporting by Vin Gurrieri. Editing by Brian Baresch and Jill Coffey.