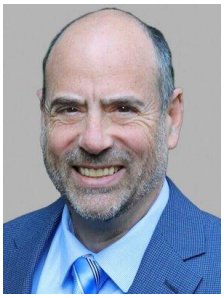
The Leeway And Limits Of DOL's Joint Employer Proposal

By **Todd Lebowitz** (May 26, 2026)



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On April 22, the U.S. Department of Labor proposed a new test for determining whether joint employment exists under the Fair Labor Standards Act, the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act.

Under the FLSA, joint employers are equally responsible for any failure to pay overtime or minimum wage. Under the FMLA, joint employment status expands leave obligations and antiretaliation protections. Under the MSPA, joint employers have dual responsibilities related to employment standards for migrant and seasonal agricultural workers.

If adopted, the DOL's new rule would make joint employment harder to prove, giving employers more flexibility to add nonemployee labor without triggering shared liability.

Joint employment comes in two flavors: vertical and horizontal. The proposed rule addresses both types, but the key changes pertain to vertical joint employment.

Vertical Joint Employment: Unrelated Companies

The Proposed Test

Vertical joint employment can arise when the W-2 employees of one company are providing services for the benefit of a second, unrelated company. The second company could be deemed a joint employer if it meets the applicable joint employment test.

None of the three statutes contains a test for joint employment, and courts have adopted different versions of a multifactor test. However, the DOL has made various efforts over the years to adopt regulations that contain a joint employment test.

The most recent effort was in 2020, when the first Trump administration **adopted** a joint employment regulation.[1] But that regulation was **enjoined** later that year by the U.S. District Court for the Southern District of New York in New York v. Scalia, finding the regulation to be arbitrary and capricious.[2]

In 2021, under the Biden administration, the DOL **rescinded** the 2020 rule and replaced it with ... well, nothing. As such, there is no current joint employment regulation under the FLSA.

The DOL now seeks to fill that gap. The proposed rule is a close relative of the failed 2020 rule, but this version was reengineered to try to plug the leaks that sank the last ship, including remedying the court's finding that portions of the 2020 rule were inconsistent with the FLSA itself.

Under the proposed rule, four factors would be considered when evaluating whether two unrelated entities are joint employers, including 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."

The proposed test is a balancing test, and no single factor would be determinative.

The proposed rule would also clarify that the following factors are not relevant to determining whether there is joint employment under the FLSA, FMLA and MSPA — even though they remain relevant in determining whether someone is an employee or an independent contractor under those laws:

- "Whether the employee is in a job that requires special skill, initiative, judgment, or foresight";

- "Whether the employee has the opportunity for profit or loss based on his or her managerial skill"; and

- "Whether the employee invests in equipment or materials required for work or the employment of helpers."

Key Differences From the 2020 Rule

The court ruling that invalidated the 2020 rule identified several specific flaws with the rule, but the proposed rule is drafted in a way that seeks to avoid these flaws.

One of the reasons the court rejected the 2020 rule was its requirement that control, the second factor, is relevant only if control is actually exercised, not merely reserved. Historically, reserved control could be considered as part of the right-to-control analysis, even if that control was not actually exercised. The proposed rule indicates that actual control is most relevant to the analysis, but reserved control may still be considered.

The court also found fault with the 2020 rule for its edict that Section 3(d) of the FLSA is the only relevant section for assessing the existence of joint employment, disregarding the standards described in Sections 3(e) and 3(g). This is a somewhat technical point, and without getting into detail about these sections, the bottom line is that the new rule would allow consideration of whether the potential joint employer "suffer[s] or permit[s]" the

employee to work, as stated in the FLSA.

The 2020 rule deemed the "suffer or permit" standard only applicable to evaluating whether there is any employment relationship, i.e., employment versus independent contractor, and not to whether there is joint employment. The proposed rule allows consideration of the "suffer or permit" standard, but attempts to frame that consideration in the overall context of the four-factor test.

The 2020 rule also limited consideration of other factors, including those related to economic dependence, saying that other factors could be considered, "but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." The court found fault with this limitation. In contrast, the proposed rule would allow consideration of other factors without limitation, including those related to economic dependence.

Horizontal Joint Employment: Related Companies

Though the test is essentially unchanged from the previous standard, the proposed rule also addresses horizontal joint employment, which exists when two related entities employ the same individual. Entities are sufficiently related, and are therefore joint employers, 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, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

For example, horizontal joint employment would exist if related ownership controlled two restaurants and employees were scheduled to work at both locations during the same workweek. Even if the restaurants operated under separate corporate identities, the hours an employee worked would be aggregated for determining whether they worked enough hours to earn overtime. This means that an employee who worked 20 hours at Restaurant A and 30 hours at Restaurant B would be entitled to 10 hours of overtime, even though they did not work 40 hours for either employer.

Unaffected Business Arrangements

Similar to the 2020 rule, the proposed rule would clarify that certain common business arrangements are not indicative of joint employer status. These include:

- Franchisor-franchisee relationships or brand and supply agreements;

- Contractual requirements to protect the health and safety of employees or to comply with applicable employment laws;

- Contractual obligations setting quality control standards or product specifications;

- Providing a sample employee handbook or other forms; and

- Jointly participating in an association health or retirement plan or an apprenticeship program.

The Timeline for Next Steps

The proposed rule has been published in the Federal Register, and the public may submit comments until June 22. After the comment period closes, the DOL is obligated to review the comments. It can then adopt the proposed rule, revise it and adopt a modified final rule, or abandon the effort entirely.

In all likelihood, the DOL will adopt a final rule that is identical or almost identical to the proposed rule. We can expect to see a final rule sometime in 2027.

If a new rule is adopted, it will likely face court challenges, as we saw with the 2020 rule. But this proposed rule seems more carefully drafted to avoid the earlier problems.

What Potential Joint Employers Should Do

Businesses that receive services directly from other employers' employees run the risk of being deemed joint employers. Regardless of whether the proposed rule is adopted, these businesses should be cognizant of the factors that go into a joint employment analysis and should adjust their business practices accordingly.

The proposed rule sets forth factors to be considered under the FLSA, FMLA and MSPA, but the proposed rule would only bind the DOL. Federal courts would not be bound to apply the rule in cases alleging joint employment under the FLSA, FMLA or MSPA.

The courts have published their own tests in district and appellate court decisions, and a new rule from the DOL is not likely to cause any federal court to reevaluate its prior decisions. Notably, federal courts are not obligated to defer to the DOL's interpretation of a statute.

Relevant factors for determining joint employment can also be found outside both the DOL and federal court decisions that interpret the FLSA, FMLA and MSPA. For instance, the states have a say too, and state law tests for joint employment vary from state to state and from law to law.

Varying tests can be found under states' wage and hour laws, unemployment insurance

laws, and workers' compensation laws. It is possible to be a joint employer under one law and not another. Businesses that are seeking to avoid joint employment should structure their interactions with workers to avoid joint employment under all relevant laws, not just the FLSA, FMLA and MSPA.

If this rule is adopted, it would make it harder to prove joint employment under these three laws in a DOL investigation. However, a new rule would likely have no effect on the standard that a court will use for determining joint employment under these same laws. Likewise, the proposed rule, if adopted, will have no effect on state law tests for joint employment.

Businesses should follow what happens with the proposed DOL rule, but they should also take steps now to avoid joint employment. They should take into consideration the multitude of factors that exist under a multitude of laws, both federal and state. There is no need to wait and see what the final DOL rule says.

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[1] https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

[2] New York v. Scalia, 490 F. Supp. 3d 748, 774-96 (S.D.N.Y. 2020).