Federal Law Alerts - January 2020

Joint Employer Final Rule

On January 12, 2020, the U.S. Department of Labor announced its final rule revising joint employer status under the Fair Labor Standards Act (FLSA) and adoption of a four-factor balancing test to determine joint employer status when another person benefits from an employee's work. A ***joint employer*** situation occurs when an employee has two or more employers who are jointly and severally (separately) liable for wages due to the employee under the FLSA.

Under the following four-factor balancing test, to be jointly liable the potential joint employer must actually exercise — directly or indirectly — one or more of the following control factors:

1. Hire or fire the employee;
2. Supervise and control the employee's work schedule or conditions of employment to a substantial degree;
3. Determine the employee's rate and method of payment; and
4. Maintain the employee's employment records. (However, satisfaction of the maintenance of employment records factor alone does not demonstrate joint employer status.)

No single factor alone may determine whether an entity is a joint employer. Instead, the appropriate weight is given to each factor and varies depending on the circumstances.

The final rule also:

- Clarifies that an employee's economic dependence on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- Provides additional guidance on how to apply the four-factor test. For example, the other person's ability, power, or reserved right (ability) to act in relation to the employee may be relevant for determining joint employer status, but such ability alone does not demonstrate joint employer status without some actual exercise of control (to be a joint employer the other person must actually exercise — directly or indirectly — one or more of the four control factors); and
- Specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely.

The final rule publishes in the *Federal Register* on January 16, 2020 and is effective March 16, 2020.

Read more about the final rule

Federal Minimum Wage for Contractors Poster

In January 2020, the *Federal Minimum Wage for Contractors* poster was updated to reflect the minimum wage increase to $10.80 per hour that became effective on January 1, 2020. This minimum wage rate, established under Executive Order 13658, must be paid to workers performing work on or in connection with covered contracts. The poster also shows the rate, established January 1, 2019, for tipped employees performing work on or in connection with covered contracts, which is $7.55 per hour.

Employers must display this poster where employees may easily see it.

See the poster

DOL Releases New FLSA and FMLA Opinion Letters

On January 7, 2020, the U.S. Department of Labor (DOL) announced that it issued the following three new opinion letters that address compliance issues related to the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA):

- FLSA2020-1: Addressing calculating overtime pay for a nondiscretionary lump sum bonus paid at the end of a multi-week training period.
- FMLA2020-1-A: Addressing whether a combined general health district must count the employees of the county in which the health district is located for the purpose of determining FMLA eligibility for its employees.
- FLSA2020-2: Addressing whether per-project payments satisfy the salary basis test for exemption.

An opinion letter is an official, written opinion by the DOL's Wage and Hour Division (WHD) on how a particular law applies in specific circumstances presented by the person or entity that requested the letter.

Read about opinion letters

Fair Chance to Compete for Jobs Act of 2019

On December 20, 2019, President Trump signed legislation (S. 1790) enacting the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act). Under the act, federal contractors are prohibited from requiring that an applicant for an appointment to a position in the civil service disclose their criminal history record information before the appointing authority extends a conditional employment offer. This does not apply if consideration of an applicant's criminal history is otherwise required by law. The act also provides other exceptions, for example, if the applicant is applying to a federal law enforcement officer position.

The act is effective December 20, 2021.

Read US S. 1790