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A Workplace Law Update

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DOL Issues Proposed Rule on Joint Employer Liability Under FLSA, FMLA, and MSPA

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On April 22, 2026, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking to clarify the standard for determining joint employer status under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). **If finalized, the proposed rule would have significant implications for employers that rely on staffing agencies, subcontractors, professional employer organizations, or other multi-entity labor arrangements.**

According to the DOL, the proposed rule establishes a single nationwide standard to promote clarity, consistency, and predictability for employers, workers, and enforcement personnel in an area of law characterized by divergent judicial tests and circuit splits. This proposed rule is subject to change after the DOL reviews comments submitted. The comment period is open until June 22.

At the heart of the proposed rule is its effort to align joint employer analysis across the FLSA, FMLA, and MSPA by grounding all three frameworks in the FLSA's statutory definition of "employ" and "employee." The DOL explained that because both the FMLA and MSPA expressly incorporate the FLSA's employment definitions, applying a unified analytical framework is necessary to ensure consistent enforcement. The proposed rule addresses both "vertical" and "horizontal" joint employment relationships and how those are established.

The Vertical Joint Employer Test

Vertical joint employment generally arises where a worker is formally employed by one entity, but another entity benefits from the work and may exert control over employment conditions. This scenario is frequent when staffing agencies are involved. The proposed rule establishes a four-factor test but also explains that a single factor is not dispositive. The four factors are whether the entity:

1. has the power to hire or fire the employee;
2. supervises or controls the employee's work schedule or conditions of employment to a substantial degree;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records

The proposed rule also details other factors that "may be relevant" to the analysis, including things such as a continuous relationship or repeated relationship between the entities, work location, and economic dependence. However, these factors carry less weight than the four primary factors.

The Horizontal Joint Employment Test

Horizontal joint employment involves two or more associated employers that separately employ the same worker in the same workweek. The employee's hours must be aggregated for FLSA overtime purposes. The proposed rule states that employers would be "sufficiently associated" if:

- "there is an arrangement between [the employers] to share…employee's services;"
- "one employer is acting directly or in the interest of the other employer in relation to the employee;" or
- "[the employers] 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."

Potential Safe Harbors

The proposed rule also provides a "safe harbor" for particular business models and common business practices. These safe harbors do not make a joint employment relationship more or less existent but require more analysis. Some of the safe harbors include:

- operating as a franchisor;
- requiring certain quality controls to be met; or
- providing sample handbooks or other sample forms to a different employer

However, these safe harbors are not absolute. For example, if a franchisor exercises day-to-day control over a franchisee's employees, it is possible for a joint employer relationship to be established.

Next Steps and Action Items

As noted above, the proposed rule would potentially have significant implications for employers that rely on staffing agencies, subcontractors, professional employer organizations, or other multi-entity labor arrangements. For example, when considering the FMLA, this unified standard could cause an employer in those arrangements that previously was under 50 employees to reach the 50-employee threshold, triggering application of FMLA notice and leave obligations.

During this interim period before the rule is finalized, businesses should assess their potential risk by:

- Auditing contracts and relationships under both the vertical and horizontal tests, particularly if staffing agencies and subcontractors are utilized, to assess whether any terms relating to the control over work, discipline or ability to terminate the other entity's workers falls under any provisions within the proposed rule; and
- Determining if FMLA would now apply and what policies and handbook provisions need to be updated to comply

It is important to note that this proposed rule is different than the recent NLRB guidance that we discussed in our March 3, 2026 Workplace Law Update, "NLRB Revises Joint-Employer Standard."

Please contact the author, Christina Nechiporchik (734-930-2495 | cnechiporchik@bodmanlaw.com) or any member of Bodman's Workplace Law Group if you have questions regarding any of the information above. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

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