BusinessManagement DAILY

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Does joint employer status apply to you? 3 scenarios to help you decide

A new Department of Labor rule tightens the definition of what constitutes a joint employer under the Fair Labor Standards Act, making it less likely that more than one entity can be held liable for the same federal wage-and-hour violations.

The upshot: Businesses can sidestep joint-employer status by avoiding day-to-day oversight of their partners' employment decisions. The final rule, issued Jan. 12, states that determining joint-employer status depends on balancing whether an entity:

- Hires or fires an 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
- Maintains the employee's employment records.

The less an entity engages in those activities, the less likely it will be considered a joint employer along with some other entity. It's rare that more than one employer would simultaneously have that kind of control over a worker.

Joint employment has traditionally been understood to potentially include franchisor/franchisee arrangements, subcontractor status and the relationships between staffing firms and their clients. The DOL rule specifies that those factors do not necessarily signal joint-employer status.

The effective date of the final rule is March 16, 2020.

Here are three scenarios that illustrate how the rule will apply:

Restaurant and cleaning company

A restaurant contracts an outside cleaning service instead of employing its own cleaning crew. The contract does not give the restaurant authority to hire or fire members of the cleaning crew, nor does the contract let the restaurant supervise the cleaning crew.

Instead, a restaurant manager provides general instructions to the cleaning team leader about what tasks need to be completed each day, monitors the cleaning company's performance and keeps track of completed assignments. The cleaning company team leader provides detailed supervision of the cleaning crew.

The restaurant does, however, request that a member of the cleaning crew be fired for not following the restaurant's instructions about customer safety. The cleaning company decides to terminate the crew member. Is the restaurant the cleaning crew's joint employer?

Answer: No. According to the DOL, the restaurant isn't exercising significant control over the cleaning crew.

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The restaurant's instructions are general and directed to the cleaning crew team leader, not the cleaning crew itself. Plus, the firing is voluntary.

Packaging company, staffing firm

A packaging company asks a staffing agency to continuously adjust the number of workers it sends every day based on expected customer demand. The staffing company sets the hourly rate of pay, but the packaging company regularly and routinely provides hands-on instruction to staffing company workers. Are the two entities joint employers?

Answer: Yes. Because the packaging company closely supervises the work and controls the schedules, it is a joint employer. That's true even though it does not set hourly rates.

Franchisor and franchise

A global hospitality brand has several thousand hotels under franchise agreements. A franchisee licenses the brand, which gives it access to proprietary software for business operations. The brand provides sample employment applications, a sample employee handbook and other sample documents such as operational plans, marketing materials, and business plans.

Day-to-day operations are within the franchisee's control, including hiring and firing, setting the rate and method of pay and supervising employees. Are the entities joint employers?

Answer: No. According to the DOL, providing optional samples, forms or documents is not enough when the franchisee has direct control over employees and does not have to use the samples.

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