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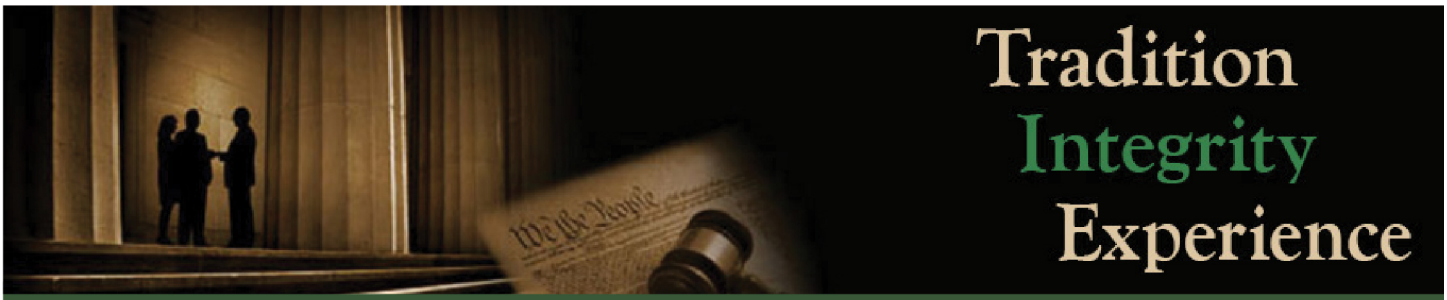

CLIENT UPDATE

September 15, 2020

Federal Court Strikes Down the Department of Labor's Fair Labor Standards Act Joint-Employer Rule

On September 8, 2020 the United States District Court for the Southern District of New York struck down the Department of Labor's Joint-Employer Rule (the "Final Rule"). The Final Rule, issued on January 13, 2020, was regarded as a boon to employers as it limited the scope of the joint-employer rule under the Fair Labor Standards Act ("FLSA"). In response, on February 26, 2020, seventeen states and the District of Columbia filed suit to have the Final Rule blocked. The lawsuit argued that the Final Rule was "arbitrary" and "capricious" in violation of the Administrative Procedure Act, which governs the way federal agencies may make rules and regulations. The District Court vacated the Final Rule, finding that it was in fact arbitrary and capricious, and that the Final Rule's four-factor test was too narrow an interpretation of the FLSA. The Final Rule had been in effect since March 16, 2020.

Background

The FLSA provides that the employee of one employer may also be the *joint employee* of another employer depending on the nature of the work relationship between the second employer and the employee. If the second employer is regarded as *the joint employer* of the employee, it can be held jointly and severally liable for the FLSA obligations owed to the employee including minimum wage and overtime pay. The FLSA definition of joint employer is broad and had not been substantively modified for 60 years prior to the Final Rule's finalization.

The Final Rule set forth a four-factor balancing test for determining joint-employer status under the FLSA. The test, first outlined in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), required an examination of the following:

- Who 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.

While all of these factors were to be considered, no single factor was dispositive. The importance of a factor was contingent upon the specific circumstances of each employment relationship. The Final Rule also outlined factors that should be disregarded in joint-employer assessment because they only assess economic dependence. These excluded factors were:

- Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
- Whether the employee has the opportunity for profit or loss based on his or her managerial skill;
- Whether the employee invests in equipment or materials required for work or the employment of helpers; and
- The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

The Decision

The District Court was unambiguous in its decision, stating plainly, "The Final Rule violates the Administrative Procedure Act (the "APA"). It conflicts with the FLSA because it ignores the statute's broad definitions and the Department failed to adequately justify its departure from its prior interpretations and to account for some of the Final Rule's important costs." In particular, the District Court took issue with the Department of Labor's interpretation of the term employer.

While the FLSA offers a broad and expansive definition of employer and employee, the Department of Labor limited the determination to an inquiry about the degree of control a purported employer exercises over a purported employee. The District Court found that this characterization is more akin to *common law* interpretations of the employer-employee relationship, ignoring well-established view that the FLSA provides for a far broader interpretation of employees. The FLSA includes as employees any person who an employer "suffers" or permits" to work for them.

The District Court also vacated the Final Rule because it excluded economic dependence from the factors that may be considered when assessing the joint employer relationship. Economic dependence, the District Court found, is the very crux of joint-employer assessment as evidenced in *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994). "[T]o determine whether an

employment relationship exists for the purposes of federal welfare legislation, courts look not to the common law conceptions of that relationship, but rather to the 'economic reality' of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer." *Id*.

Finally, the District Court stated that the Department of Labor Decision was arbitrary and capricious for three reasons. First, the Department of Labor failed to explain why it departed from its previous interpretations. Second, the District Court pointed out that the Final Rule created a contradiction in definitions of joint employer under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (the "MSPA"), which are designed to share the same definition. The MSPA Regulations states that its definition of joint-employer is identical to the FLSA's definition of joint-employer. However, the MSPA's definition of joint-employer is based entirely on the employer on which an employee "economically depends" for its compensation. The change in the FLSA definition of joint employer places the two regulations at odds. Third, the District Court found that The Final Rule was arbitrary and capricious because it did not adequately consider the cost of the regulation to employees.

Takeaway

The District Court's decision vacates the Final Rule, which had been in effect since March 2020. The decision may of course be appealed. It is also possible that in the event there is a change in administration in Washington that the Department of Labor will let the Final Rule fall by the wayside. Until this is sorted out, Employers are well advised to exercise diligence to ensure that their franchises and affiliated organizations are fully aware of the FLSA requirements and have polices in place to ensure compliance. We are available to assist in the design and review of any such policies or directives.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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