LIABILITY

Double Trouble

vertical and horizontal liability and the DOL's new proposed rule

By Christopher S. Drewry and Kaylin O. Cook

Since implementation of Fair Labor Standards Act (FLSA or the "Act") in 1938 and later rule promulgation in 1939, the U.S. Department of Labor has recognized that multiple employers may qualify as "joint employers" under the Act, meaning that multiple employers may legally be considered to simultaneously employ the same employee. For example, an employee works for a subcontractor, and a primary contractor hires the subcontractor. If both the primary contractor and the subcontractor meet the FLSA's definition of an "employer," they are "joint employers" and jointly and severally liable for FLSA violations. Jointly and severally liable means, in the event of a FLSA violation, the employee could recover their full amount of damages from either the primary contractor or the subcontractor, regardless of individual percentages of fault.

TWO TYPES OF JOINT EMPLOYMENT

There are two types of joint employment: vertical and horizontal. A horizontal joint employment relationship exists where there is an arrangement between employers to share an employee's services.

A common example of a horizontal joint employment relationship is two separate restaurants that share economic ties and have the same managers controlling both restaurants.

A vertical joint employment relationship exists when an employee is formally employed by one entity but is economically dependent on, and controlled by, another entity. Common examples of vertical joint employment relationships are (i) when a construction worker is hired by a subcontractor, but whose work, training, and safety are controlled by the general contractor; and (ii) when a farmworker is employed by a farm labor contractor but is also an employee of the grower.

Unsurprisingly, courts and the Department of Labor have struggled to define the joint employment relationship. After issuing and withdrawing years of guidance, in 2020, the then-Trump Administration's Department of Labor promulgated a rule attempting to conclusively define the vertical joint employment relationship, suggesting courts use a four-factor balancing test to determine if a vertical joint employment relationship exists. Eighteen states promptly sued, alleging the new rule was illegal, and, in September 2020, the U.S. District Court for the Southern District of New York partially agreed. In turn, in 2021, the Biden Department of Labor formally rescinded the entire rule.

THE PROPOSED NEW RULE

On April 22, 2026, the current Trump Department of Labor proposed a new rule to determine who is a joint employer under the FLSA, as well as the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act. According to the proposed rule's preamble, the rule is intended to "promote clarity and uniformity in the Department's nationwide enforcement of federal wage and hour law" and is "broadly consistent with the commonality among varying approaches to joint employment in the federal circuit courts." As of publication, comments on the proposed rule are due to the Department of Labor by June 22, 2026.

Although implementation of the new rule is not definitive, it is likely the Department of Labor will ultimately issue new guidance in the coming months. Like the 2020 rule, any new rules are likely to be subject to immediate legal challenge. Nevertheless, because the construction industry is particularly exposed due to the common layered business model (owners to general contractors—to subcontractors—to staffing firms), modern contractors should be prepared to confirm their policies are consistent with the changes in the rule, especially since the proposed new rule is more expansive and broader, seeking to potentially increase joint employer liability.

The proposed new rule only applies to "employer" as defined by the FLSA. For construction industry professionals, to be considered an employer under the FLSA, you must have two or more employees and have an annual gross sales volume of $500,000. Even if your business does not satisfy the above test, the FLSA can still apply to individuals if their work regularly involves them in commerce between states, including handling goods that are moving in interstate commerce or work on the expansion of existing facilities of commerce.

If you are an employer under the FLSA and use subcontracting in your daily work, you should assume you will likely be subject to the FLSA. Understanding the joint employer doctrine and the new proposed rule will ensure you do not open yourself up to liability based on an unknown joint employment relationship. Construction professionals should treat any form of shared control as a potential source of liability and review your agreements, day-to-day operations, and internal processes to make sure accountability for workers is clearly established and applied consistently. The proposed new rule suggests the Department of Labor is going to focus on practical realties over formal labels, meaning your internal controls should be realistically implemented. The proposed new rule creates a more flexible standard for determining joint employment, meaning general contractors will likely face increased risk for wage-and-hour claims. Moreover, general contractors could see increased liability because of "reserve control" contract provisions, as the right to remove workers, enforce site rules, and step in if a subcontractor fails to perform could constitute shared control and lead to a determination of joint employment. Under the proposed rule, even if those contractual rights are never used, the mere ability to control is relevant to the joint employment determination.

And while having consistent guidance from the Department of Labor can make implementation easier, consideration to other applicable law, including the joint employer rules promulgated by the NLRB (as applicable) and state laws, must still be given. Finally, construction professionals should note that the Department of Labor has also proposed a separate rule "designed to help workers and employers better understand how to determine when a worker is an employee and when the worker may be classified as an independent contractor under the Fair Labor Standards Act and related federal laws." Public comment on this proposed rule has already closed.

Now is the time to work with legal counsel to review your contracts, vendor agreements, and look for potential joint employer liability. Legal counsel can consider the flexible standards presented by the new proposed rule and assist in developing real world protections that exist outside of formal contractual terms. Competent legal counsel can help keep you apprised of developments and include an independent-contractor analysis in their review of your existing agreements and practices as to potential joint employer exposure. ■

about the authors

Christopher S. Drewry is a partner in the Indianapolis office of the law firm of McCarter & English, LLP (**www.mccarter.com**), where he focuses his practice on construction law and litigation, labor and employment law and litigation, and commercial litigation. Chris is a current member and Past Chair of the Construction Law and Litigation Committee of the International Association of Defense Counsel, and he can be reached at cdrewry@mccarter.com. Kaylin O. Cook is an associate at McCarter & English, where she focuses her practice on business litigation, including construction law and labor and employment law. She can be reached at kcook@mccarter.com.