

Shaking Up the Workplace: USDOL's Proposed Joint Employment Rule and Its Impact on Employers

The U.S. Department of Labor (DOL) recently announced a significant proposed rule that would redefine the criteria for determining joint employer status under key federal employment statutes, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). This proposal represents an effort to establish a clear, consistent and nationwide framework for assessing when multiple entities share legal responsibility for employment obligations, addressing longstanding ambiguities and regional disparities in joint employer determinations.

Background and Context

Historically, the concept of joint employment has varied, with different agencies, courts and jurisdictions applying different standards. The prior Trump-era rule of 2020 emphasized a strict "actual control" test, requiring direct and substantial control over workers—such as hiring, firing, scheduling and recordkeeping—to establish joint liability. This approach made it more challenging for third-party contractors or franchises to hold businesses liable for employment law violations.

However, that rule was struck down by the courts in 2021, leading to inconsistent application of joint employment standards. The Biden administration rescinded the 2020 rule and implemented a "totality of the circumstances" test, which allowed for variability in approach across jurisdictions. This 2026 proposal seeks to provide a unified, principle-based framework rooted in the "economic realities" doctrine, emphasizing actual control and influence over employment conditions in determining the existence of joint employment.

Key Features of the Proposed Rule – Vertical vs. Horizontal Joint Employment

The proposal explicitly differentiates between two types of joint employment—vertical joint employment and horizontal joint employment—each with its own analysis.

Vertical Joint Employment

Vertical joint employment exists where two or more employers simultaneously benefit from one employee's work. Such a scenario might arise in, say, a contractor-subcontractor relationship. For example, take an electrician at a construction site who is clearly the employee of a subcontractor, but the contractor who hired the subcontractor directly benefits from the electrician's work in that the work moves the construction project closer to the finish line. Under what circumstances might the contractor join the subcontractor as a joint employer of the electrician? The proposed rule offers four factors which, when assessed on balance, determine this question. These factors ask whether the potential employer:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. Sets or influences pay rates and methods of payment; and,
4. Maintains the employee's personnel records.

Importantly, the rule emphasizes that actual exercise of control is more significant than merely possessing the legal right to control. The presence of reserved rights without exercise is considered less relevant, aligning with the "economic realities" approach. While the four primary factors are

central, the proposal notes that other circumstances—such as a worker’s dependence on a particular employer or the nature of the work—may be considered but are generally less decisive. Conversely, factors traditionally associated with independent contractor status—like specialized skills, opportunity for profit or loss or investment in equipment—are explicitly deemed irrelevant to joint employer determinations.

Horizontal Joint Employment

Horizontal joint employment, on the other hand, exists where an individual works for two or more separate but associated employers who are “sufficiently associated” with each other with respect to the employment of the employee. Whether two employers are sufficiently associated depends on whether:

1. There exists an arrangement to share employee services;
2. One employer acts in the interest of another employer concerning that worker; or,
3. The employers share control over the employee, whether directly or indirectly, including common ownership or control structures with respect to the employers.

With respect to horizontal joint employment, the proposed rule clarifies that the mere existence of contractual relationships—such as franchise agreements, vendor relationships or supply contracts—are insufficient on their own to establish joint employment. Instead, the focus is on the actual exercise of control and shared responsibilities.

Practical Implications for Businesses and Next Steps

By chiefly focusing on actual control rather than contractual formalities, the proposed rule should reduce uncertainty and litigation risk for companies operating within multi-entity relationships. With that said, employers may benefit by taking the following practical steps:

- Review existing contracts and operational practices: Ensure that contractual language and day-to-day management reflect the intended level of control and influence.
- Limit direct involvement in employment decisions: Avoid intervening in hiring, firing, scheduling or pay-setting for third-party workers unless necessary.
- Document control and oversight practices: Maintain records that demonstrate a lack of direct control over employment terms to mitigate joint liability risks.
- Train supervisory staff: Educate managers and supervisors on appropriate interactions with third-party workers to prevent inadvertent assumptions of employment authority.

The public comment period remains open until June 22, 2026, allowing stakeholders to submit feedback, raise concerns suggest modifications. Following this, the DOL will review comments and issue a final rule, which may incorporate revisions. Legal challenges are anticipated, especially given the history of prior regulations and court rulings. Notably, recent Supreme Court decisions have increased judicial scrutiny of agency interpretations, potentially affecting the enforceability of new rules. However, recent jurisprudence limiting nationwide injunctions may influence the scope and application of the final regulation.

Conclusion

The proposed rule represents a significant step toward clarifying and standardizing the criteria for joint employer status under key federal employment statutes. By emphasizing actual control and influence over employment conditions and distinguishing between vertical and horizontal joint employment, the rule aims to reduce ambiguity and promote fairer enforcement practices across industries.

Employers are encouraged to review the proposed provisions carefully and consider submitting comments before the June 22, 2026 deadline. Engaging with the DOL during this comment period offers an opportunity to influence the final regulation, ensuring that practical concerns and industry-specific considerations are adequately addressed.

Buchanan’s attorneys and government relations professionals are prepared to assist employers in crafting comprehensive comments or providing guidance to ensure compliance with the forthcoming rule. Please contact us to discuss how we can support your organization in submitting feedback or implementing necessary adjustments to ensure compliance should the rule be adopted.

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