DOL's New Joint Employer Proposal Brings Clarity and Good News for Businesses

Joint employer status has long been a hot topic and is seemingly a moving target depending on which agency or jurisdiction is evaluating the status. In a move to reduce uncertainty over joint employer status, promote greater uniformity among court decisions, reduce litigation, and encourage innovation in the economy, on April 1, 2019, the U.S. Department of Labor ("DOL") proposed a four-part test to replace existing regulations that determine joint employer status under the Fair Labor Standards Act ("FLSA"). While the proposal was favorably received by managers/employers, it sparked criticism from the plaintiffs' attorneys, who accused the DOL of ignoring precedent that interpreted joint employment broadly.

The DOL's proposal represents the first significant change of joint employer rules since the 1950's, seeking to apply a rule consistent with the test adopted by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470* (9th Cir. 1983). The proposed test would consider four factors in determining whether joint employer status is found:

(1) does the business (alleged employer) hire or fire employees;
(2) does it control employee schedules and working conditions;
(3) does it determine employee pay and method of payment; and
(4) does it maintain employee's employment records.

Unlike *Bonnette*, under the DOL's proposal, only actions actually taken with respect to the employee's terms and conditions of employment are relevant to the joint employer determination. Significantly, the proposed rule would eliminate any risk of a business being deemed a joint employer based only on the possibility that they could exercise control over an employee's working conditions.

The new proposal also leaves room for consideration of additional factors if it appears that the alleged joint employer is either exercising significant control over employees' work or otherwise exercising action directly or indirectly in the interest of the employer in relation to the employee. Particularly, the proposal notes that an employee's purported economic dependence on the business is not a valid consideration in the joint employer analysis. Nor do specific business models (e.g., franchises) or business

arrangements/agreements (e.g., requiring a partner to adopt workplace-safety or sexual-harassment-prevention policies) make joint employer status more or less likely.

While this rule change is good news for employers, keep in mind this is currently only a proposal. There may be many rewrites and legal challenges to overcome before a final version is presented. Also, this proposal, if adopted, is limited to joint employment determinations under the FLSA; it does not apply under other federal or state statutes.