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EMPLOYMENT LAW UPDATE

Relationship-Driven Results February 2020

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AGENCY

Federal

DOL Narrows Definition of "Joint Employer" Under FLSA

On January 12, 2020, the U.S. Department of Labor ("DOL") announced a "final rule" that narrows the definition of "joint employer" under the Fair Labor Standards Act ("FLSA"). Prior to this update, the DOL was guided by an interpretive regulation, codified in 29 CFR part 791, which explained that joint employer status depends on whether multiple persons are "not completely disassociated" or "acting entirely independently of each other" with respect to the employee's employment. It provided three situations where two or more employers were generally considered joint employers: (1) where there is an arrangement between them to share the employee's services; (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers in relation to the employee); or (3) where they are not completely disassociated with respect to the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

The new rule, the first significant update in more than 60 years, is the DOL's attempt to clarify the most common joint employer scenario under the FLSA, namely where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work. In this scenario, the DOL adopted a four-factor balancing test, derived from *Bonette v. California Health & Welfare Agency* 704 F.2d 1465 (9th Cir. 1983) to determine whether businesses share liability for federal FLSA wage and hour violations. To determine joint employer status, the DOL will consider whether a business:

(1) Hires and fires employees;

(2) Supervises and controls employees' work schedules or conditions of employment to a substantial degree;

(3) Determines employees' rate and method of payment; and

(4) Maintains employment records.

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In addition to this four-factor balancing test, the new rule provided that the following factors do not influence the DOL when determining joint-employer status:

- Having a franchisor business model;
- Providing a sample employee handbook to a franchisee;
- Allowing an employer to operate a facility on the company grounds;
- Jointly participating with an employer in an apprenticeship program;
- Offering an association health or retirement plan to an employer or participating in a plan with the employer; and
- Requiring a business partner to establish minimum wages and workplace-safety, sexual harassment prevention, and other policies.

If a potential joint employer provides any of the above, it must still also exercise some control over the employees in relation to the above. The new rule provides several examples with various scenarios in the text to provide further clarification with this somewhat delicate analysis.

Even though the abovementioned factors are favorable to employers, the DOL mentions other factors that may also be relevant in determining joint-employer analysis. Therefore, employers working with third parties should engage with counsel to determine whether the new rule creates any joint-employer issues with respect to these relationships. The new rule becomes effective on March 16, 2020.

JUDICIAL

California

Court of Appeal Rejects Bid to Impose Joint Employer Liability on a Service Provider and Dismisses Constructive Discharge Claim Where Employee Accepted a Higher Paying Job

In *St. Myers v. Dignity Health*, a California appellate court rejected an employee's claims of retaliation and constructive discharge, affirming an award of summary judgment in favor of the employer and the putative joint employer. For several years, plaintiff Carla St. Myers ("Plaintiff") worked as a nurse practitioner for a national healthcare system named Dignity Health. During Plaintiff's tenure, Dignity Health began using the services of Optum360 Services, Inc. ("Optum360") for end-to-end revenue cycling services, including medical coding, transcription, billing, and collections. In the last two years of her employment, Plaintiff complained about the inefficiency of the scheduling system (which allegedly compromised her ability to earn productivity bonuses) and about perceived workplace and patient safety concerns. Plaintiff eventually resigned to

accept a higher paying job, explaining to Dignity Health that she wished to pursue "other career opportunities." Subsequently, she sued both Dignity Health and Optum360 as joint employers, alleging violation of various whistleblower protection statutes and that she was forced to resign due to intolerable working conditions.

Both companies challenged Plaintiff's allegations on summary judgment. Hoping to save her claims from dismissal, Plaintiff argued that Optum360's business arrangement with Dignity Health gave rise to a joint employment relationship. In examining whether a contractor like Optum360 could be considered a joint employer, the court of appeal noted that several factors should be considered when determining the nature of an employment relationship. These factors include: payment of salary, benefits, and Social Security taxes; ownership of equipment required for the job; location of work; training obligations; hiring and disciplinary authority; control over schedules and assignments; discretion regarding compensation; the skill required for the work and the extent of supervision; and the length of employment.

The court of appeal concluded that, because Optum360 never paid Plaintiff's wages, did not own the equipment she used, and did not possess the authority to hire, transfer, demote, discipline, or discharge her, Plaintiff failed to establish that she had an employment relationship with Optum360. The court further noted that Optum360 could not be held liable as a "health facility" under Health and Safety Code section 1278.5—one of the many whistleblower statutes allegedly violated—for the mere fact that it provided technical assistance to a healthcare company like Dignity Health. In rejecting that particular claim, the court drew an analogy between Optum360 and a utility company—simply because a hospital needs electricity in order to operate does not mean that the power company qualifies as a "health facility" for purposes of Health and Safety Code section 1278.5.

The court also determined that Plaintiff's constructive discharge claim lacked merit, as Plaintiff could not show that she was subject to an intolerable working environment. A successful claim for constructive discharge requires a showing of "aggravated" conditions that are either "unusually adverse" or "amount to a continuous pattern," thereby creating intolerable working conditions. However, Plaintiff was never disciplined, suspended, or demoted, despite her prior workplace complaints. Rather, she received raises and promotions throughout her employment and was offered the opportunity to assume management duties. Though she was the subject of multiple complaints by others, Dignity Health found those complaints to be unsubstantiated and took no corrective action toward Plaintiff. Finally, Plaintiff *voluntarily* resigned after receiving an offer to work at a higher paying job, and gave two weeks' notice of her intention to quit. These facts did not suggest that Plaintiff's working environment was intolerable. Accordingly, the court rejected her constructive discharge claim.

The *St. Myers* decision signals the importance of clearly defining roles and responsibilities when using the services of subcontractors, software providers, and equipment providers. Employers seeking to outsource certain services or functions should review the factors discussed in *St. Myers* to determine whether a subcontractor may be subject to joint liability. At the same time, companies

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providing services to health care facilities may limit their own liability to an extent by following the guidance provided in this decision. Meanwhile, employers can take comfort in knowing that some courts will dismiss employment claims on summary judgment, even where the employee makes repeated (meritless) complaints.

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