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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W & L

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XXXXIV, Issue 7 July 2026

DOL ISSUES NEW JOINT EMPLOYER RULE PROPOSAL

The U.S. Department of Labor (DOL) announced on April 22, 2026, a new proposed rule clarifying when multiple employers are jointly liable for wage and hour violations. The proposed rule is titled "Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protect Act." The DOL believes its new standard will help to resolve conflicting court rulings and streamline compliance.

Employment situations can arise under both "vertical" and "horizontal" joint employment situations. The former is when a worker has a direct employment relationship with one employer but is controlled by another, while the latter is when an individual works for two or more regulated employers that jointly control the work. For the proposed rule, "horizontal" joint employment exists when separate employers are related enough when it comes to the employment of a specific employee. However, "horizontal" joint employment does not exist when there are business relationships that have little to do with the employment of specific employees, such as sharing a vendor or being franchisees of the same franchisor. In the proposed rule, employers would generally be related enough if: (1) there is an arrangement between them to share the employee's services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) they share control of 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.

Most of the changes in the new proposed rule address "vertical" joint employment situations. Under the proposed rule, four factors would be considered when evaluating whether two unrelated entities are joint employers, including whether the potential joint employer: "hires or fires the employee;" "supervises and controls the employee's work schedule or conditions or employment to a substantial degree;" "determines the employee's rate and method of payment;" and "maintains the employee's employment records."

The proposed test is a balancing test, and no single factor would be determinative.

The proposed rule also would clarify that the following factors are not relevant to determining whether there is joint employment under the pertinent laws, even though they remain relevant in determining whether someone is an employee or an independent contractor under those laws: "Whether the employee is in a job that requires special skill, initiative, judgment or foresight;" "whether the employee has the opportunity for profit or loss based on his or her managerial skill;" and "whether the employee invests in equipment or materials required for work or the employment of helpers."

The new proposal is the DOL's first attempt at addressing joint employment since the Biden Administration rescinded a rule adopted during the first Trump Administration that required one business to exert "actual" control over another company's workers to be jointly employed. The new rule addresses the consideration of power by a company over another employer's workers, often called "reserved" control. The DOL's new proposal says it should be considered, but it is not as significant as the control that is actually exercised.

The proposed rule would clarify that certain common business arrangements are not indicative of joint employer status, including franchisor/franchisee relationships or brand and supply agreements; contractual requirements to protect the health and safety of employees or to comply with applicable employment laws; contractual obligations setting quality control standards or product specifications; providing a sample employee handbook or other form; and jointly participating in an association health or retirement plan or apprenticeship program.

The proposed rule is open for a sixty (60) day comment period in which comments must be filed by June 22, 2026.

Editor's Note: It should be noted that the federal courts are not obligated to defer to the DOL interpretation of the statute, but the joint employment rule as finalized may nevertheless have some influence on the court resolutions. Further, employers are reminded that state laws apply their own tests for joint employment.

THE SUPREME COURT AGAIN ADDRESSES WHETHER DRIVERS ARE EXEMPT FROM FAA ARBITRATION AGREEMENTS

The Federal Arbitration Act (FAA) encourages the use and enforcement of arbitration agreements, although the Act contains an exception for "transportation workers engaged in interstate commerce." There have been many issues arising as to what type workers are exempt from employment arbitration agreements under the FAA. *Flowers Foods v. Brock*, No. 24-935 (U.S., 5/28/26).

The fact pattern involved a local delivery driver that moved baked goods from a Colorado warehouse to local stores, and it was found that he qualified for the exemption even though he personally never physically crossed state lines. The ruling clarified that local delivery drivers would invoke the interstate exemption so long as they were part of a larger supply chain that crosses state borders. These type local delivery drivers are often referred to as "last mile" local delivery drivers.

The ruling relies on precedent establishing that the transportation of goods entirely within one state remains engaged in interstate commerce if the goods are destined for or brought from outside the state.

The Supreme Court had previously expanded the exemption by ruling that the exemption was not limited to the transportation industry. The current ruling addresses the issue of whether the driver engages in interstate commerce if he only delivers products locally.

Editor's Note: Although this case resolves certain issues as to the scope of the exemption from the Federal Arbitration Act, it does not resolve other issues such as the scope of an "employment" contract where the contract is between two legal entities that has a distribution agreement rather than an employment agreement. Further, employers may still seek to take advantage of state arbitration laws which may allow the enforcement of employment contracts even if coming within the exemption of the FAA.

TRUMP NOMINATES THIRD NLRB MEMBER, WHOSE CONFIRMATION SIGNALS POTENTIAL FOR CHANGE

On April 13, 2026, President Trump nominated James Macy to fill the third vacant Republican seat on the National Labor Relations Board (NLRB). It is unknown how long the confirmation process may take, as the last two Republican NLRB nominees took almost five months to confirm. Macy joined the DOL after more than 40 years in private practice representing employers in labor and employment matters. At the same time, current Democratic NLRB member David Prauty has been nominated by President Trump to serve a second term. Prouty had served as General Counsel for the Service Employees International Union.

If both Macy and Prouty are confirmed, the Board will not only preserve a three-member quorum but also bring about a three-member potential majority in overturning prior NLRB precedence. As of now, this has not been possible during the current Trump Administration because of the historical practice of not overturning existing precedent without a three-member majority.

Some commentators agree on what they feel will be the first NLRB precedents to be addressed and likely overturned by a new Board three-member majority. At the top of the list is probably the 2023 NLRB decision in *Cemex*, which required an employer within two weeks to either accept a union's demand for recognition or file an election petition, and also required recognition if the employer commits an unfair labor practice sufficient to constitute objectionable conduct for an NLRB election. *Cemex* overturned 50 years of precedents.

In second place for a likely NLRB precedent to be overturned is the 2023 decision in *Stericycle*. This case overturned the existing standard for evaluating workplace rules in favor of a much more strict standard of finding workplace rules unlawful in circumstances where a reasonable employee could interpret the rule as coercive. The result of this ruling was to find many common workplace rules unlawful, and to put into question any discipline under such work rules.

Another rule likely to be overturned is the so-called "captive audience" ruling in *Amazon*. This Biden-era NLRB ruling also overturned more than 50 years of precedents in ruling that employers could not require employees to attend meetings during paid working time in which employers advocated union-free status.

There are many other similar precedents that most employers consider adverse, but these three are this writer's "Top Picks" for being overturned in the new NLRB three-member majority.

Editor's Note: It should be noted that in order to overturn adverse precedent, the new Board must have a case presented dealing with facts and issues that would result in an opportunity to reverse the earlier adverse precedent. Further, the current NLRB General Counsel, Crystal Carey, is currently consumed with the task of facing the backlog of cases pending before the Board. Consider that at the end of 2025, the NLRB released a report indicating that in the 2025 fiscal year, the average time to reach a determination at the end of an unfair labor practice charge investigation was about 258 days. The NLRB target is 100 days, and the rate in fiscal year 2022 was roughly 85 days. The Agency is working to expedite the resolution of cases, centralizing some work, and assigning some work from busy regional offices to less busy offices.

DEFENDANT SUES PLAINTIFF OVER "FABRICATED" SEX HARASSMENT CLAIMS

An employer official named in a graphic sexual harassment suit brought a counter-claim against her accuser for defamation, calling his allegation "entirely false" and "malicious." The fact pattern was unusual to say the least. The male plaintiff alleged that his female superior forced him to be her "sex slave." She in turn "categorically and unequivocably" denied his "disgusting" claims, saying they have "ruined her reputation and destroyed her life." The defendant also claimed that plaintiff sought to use his claims as "leverage to extract millions of dollars from the company with no regard whatsoever for the impact such lies would have." The case is *Doe v. JP Morgan Chase* (New York Supreme Court, New York Co. Manhattan).

Editor's Note: It should be noted that bringing a counter-claim against a plaintiff is risky for an employer defendant. The reason is that most plaintiffs contend that such counter-claims constitute retaliation against the filing of the lawsuit. In this case, however, the counter-claim appears to have been filed by an individual employee, rather than a corporate defendant.

FEDERAL WORKERS TO GET NEW AND TOUGHER PERFORMANCE REVIEWS

No personnel issues have been debated longer and more thoroughly than that of the utility of performance reviews. Some argue that such reviews, while intended to provide feedback to encourage better performance, are not well prepared or well received, and tend to rate even poor workers as average or above average. Many efforts have been made to make performance appraisals more effective. The nation's largest employer, the federal government, has just announced a change in a performance review proposal dated February 23, 2026. It would create a forced distribution system, or a bell curve, limiting how many workers get top ratings while rating most at lower levels. The top ratings are 4s and 5s, while the rest are 3s or lower. Trump Administration officials said the change seeks to correct overly lenient reviews.

Editor's Note: It is very discouraging to an employment defense lawyer to defend a legal claim for poor performance, when the employee's personnel file indicates excellent performance reviews.

COULD AI HIRING ASSESSMENTS CONSTITUTE A POLYGRAPH TEST UNDER APPLICABLE LAW?

This newsletter has written many articles about challenges and questions raised by the use of AI by employers. The latest comes from a lawsuit filed in a federal district court in Massachusetts in which a federal judge ruled in February 2026 that a Workstyle Assessment qualified as a lie detector under Massachusetts law. *Korn v. Amazon Inc.*, No. 1:25-cv-10802 (D. Mass., 2/18/26). According to the complaint, Amazon uses the AI tool to spot suspicious behavior like plagiarism, fabrications, or the use of outside assistance, and in its initial ruling, the judge rejected Amazon's argument that the tool was simply a personality test for applicants. In a similar lawsuit, another federal judge in Massachusetts had allowed a challenge to CVS Health Corp's use of a "lie detector tool" because of a lack of appropriate advance legal notice. The pharmacy allegedly used video interview technology to detect whether a candidate had lied or embellished a job application. This particular case was settled in 2024.

Editor's Note: Whether this legal rationale will be adopted by other courts is uncertain, but the case is another warning to employers to seek employment counsel review in the use of AI technology in making employment decisions.

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