Joint Employment

Joint employment under the Fair Labor Standards Act (FLSA) exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, to the employee for compliance including paying overtime compensation for all hours worked over 40 during the workweek.

On September 28, 2021, the Department of Labor (DOL) rescinded the March 2020 Final Rule that had outlined guidance provided to employers to determine if employees could be considered joint employers under the FLSA. In the absence of specific guidance in the FLSA for joint employment, a common law test known as the economic realities test should be applied to evaluate whether a joint employment relationship exists. This test evaluates how much control an alleged employer exercises over the working conditions of the employee.

One useful evaluation considers whether the alleged employer:

1. Had the power to hire and fire employees;
2. Supervised and controlled the employee work schedules or conditions of payments;
3. Determined the rate and method of payment; and
4. Maintained employment records.

Although these factors are listed, these are not the only relevant factors. These factors can be helpful in evaluating how much independent control one alleged employer has over an employee. The more independent control any one alleged employer has over these factors, the less likely that there is a joint employment relationship. For example, if both alleged employers have the power to hire and fire the employee it is more likely that a joint-employer relationship exists whereas if only one alleged employer has this authority it is less likely that a joint employer relationship exists. However, this is not the only situation where a joint employment relationship may exist. For example, a joint employment relationship may also exist where one employer controls the day-to-day work activities of the employees while the other performs human resources functions such as hiring, discipline and termination.

The DOL Salary Threshold applies in Joint Employment situations which means the total salary between the two employers (both of whom are eligible for compliance with the FLSA) must be considered. To establish the total salary, we must know how much the other employer is paying our employee. Some employers may be reluctant to provide salary information. Without the additional salary information to establish whether the employee's joint employment salary meets the threshold, the employee must be treated as nonexempt.

Possible examples of Joint Employment at UW-Madison:

1. **Foreign Government:** Employee receives a paycheck from UW-Madison and some form of salary payment from a foreign government (not paid through UW-Madison payroll).

   If the salary payment or funding is being received as a direct result of the work being performed for us at UW-Madison and the foreign government is receiving a direct benefit from the work being performed, a joint employment relationship may exist and the salary payments received from both institutions can be considered for compliance with the DOL FLSA Salary Threshold.

2. **Outside Organization:** Employees receives a paycheck from UW-Madison and another paycheck from an outside organization (ex. Morgridge Institute for Research, UW Medical Foundation).

   If the work being performed by the employee simultaneously benefits both employers at the same time, a joint employment relationship may exist and the salary payments received from both institutions can be considered for compliance with the DOL FLSA Salary Threshold.

3. **Higher Education Institution or Government Agency:** Employee is employed by UW-Madison and another institution of higher education (outside UW System) or a government agency.

   If the employee is working on a research program that is of mutual interest and benefit to UW-Madison and another University or government agency, a joint employment relationship may exist and the salary payments received from both institutions can be considered for compliance with the DOL FLSA Salary Threshold.

4. **Working Abroad:** Employee is working abroad (not in a territory or possession of the United States) and receiving salary from UW-Madison.

   The FLSA applies to employment within any state of the United States, the District of Columbia or any territory or possession of the United States. An employee working in a foreign country is not covered by the FLSA even though the employer has its main office in the United States, so the individual is not subject to the threshold. However, if an employee works in the United States, the District of Columbia or any territory or possession of the United States for any portion of the workweek, all hours worked over 40 must be compensated regardless of whether that work occurred in the United States or in a foreign country.

References:

Higgins v. Catalyst Exhibits, inc., 2022 WL 356019 (E.D. Wis. 2022)
Flecha v. Metal Systems, LLC, 2017 WL 4621634
Bridge v. New Holland Logansport, Inc., 815 F.3d 356, 363 (7th Cir. 2016)
Espenscheid v. DirectSat USC, LLC 2011 WL 10069108 (W.D. Wis. 2011)
Karr v. Strong Detective Agency, Inc., 787 F.2d 1205, 1206-1207 (7th Cir. 1985)
U.S. Department of Labor FLSA Advisor