

## Fact Sheet: Notice of Proposed Rulemaking on Joint Employer Status under the FLSA

The U.S. Department of Labor is proposing to revise and clarify the responsibilities of employers and joint employers to employees in joint employer arrangements. The Fair Labor Standards Act (FLSA) generally requires employers to pay their employees at least the federal minimum wage for all hours worked and overtime for hours worked over 40 in a workweek. Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers. A joint employer is any additional individual or entity who is jointly and severally liable with the employer for the employee’s wages. This proposal would ensure employers and joint employers clearly understand their responsibilities under the FLSA.

Part 791 of Title 29, Code of Federal Regulations, provides the Department’s official interpretations for determining joint employer status under the FLSA. The Department has not meaningfully revised part 791 in over 60 years. Part 791 currently addresses two joint employer scenarios. In the scenario where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another entity, the Department proposes a clear, four-factor test—based on well-established precedent—that would consider whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee’s work schedules or conditions of employment;
- determine the employee’s rate and method of payment; and
- maintain the employee’s employment records.

The proposal provides guidance on how to apply this multi-factor test; explains what additional factors should and should not be considered; and clarifies that a particular business model, certain business practices, and certain contractual agreements do not make joint employer status more or less likely. Regarding part 791’s guidance for the other joint employer scenario under the FLSA—where the employee works separate sets of hours for multiple employers in the same workweek—the Department is proposing only non-substantive revisions that better reflect the Department’s longstanding practice. The proposal also includes a set of examples that would further assist in clarifying joint employer status. See appendix.

The proposed changes are designed to reduce uncertainty over joint employer status and clarify for workers who is responsible for their employment protections, promote greater uniformity among court decisions, reduce litigation, and encourage innovation in the economy.

### Major Features of the Proposed Rule

The Department proposes a number of revisions to the current regulation, including:

- eliminating the “not completely disassociated” standard for situations where an employee works one set of hours for an employer that simultaneously benefit another person, and replacing it with a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* that assesses whether the other person (that is, the potential joint employer):
  - hires or fires the employee;

- supervises and controls the employee’s work schedules or conditions of employment;
- determines the employee’s rate and method of payment; and
- maintains the employee’s employment records;
- explaining that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is:
  - exercising significant control over the terms and conditions of the employee’s work; or
  - otherwise acting directly or indirectly in the interest of the employer in relation to the employee;
- explaining that the employee’s “economic dependence” on the potential joint employer does not determine the potential joint employer’s liability under the FLSA, and identifying three examples of “economic dependence” factors that are not relevant to the joint employer analysis—including, but not limited to, whether the employee:
  - is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
  - has the opportunity for profit or loss based on managerial skill; and
  - invests in equipment or materials required for work or the employment of helpers;
- explaining that ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status;
- clarifying that indirect action in relation to an employee may establish joint employer status;
- explaining that FLSA section 3(d) only, not section 3(e)(1) or 3(g), determines joint employer status;
- clarifying that a person’s business model—for example, operating as a franchisor—does not make joint employer status more or less likely;
- explaining that certain business practices—for example, providing a sample employee handbook to a franchisee; allowing an employer to operate a facility on one’s premises; jointly participating with an employer in an apprenticeship program; or offering an association health or retirement plan to the employer or participating in such a plan with the employer—do not make joint employer status more or less likely;
- explaining that certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, or sexual harassment policies—do not make joint employer status more or less likely;
- making non-substantive clarifications to the “not completely disassociated” standard for situations where an employee works separate sets of hours for multiple employers in the same workweek;
- providing illustrative examples demonstrating how the Department’s proposed regulation would apply. See appendix.

The Department welcomes comments on the proposed changes to part 791.

More information about the proposed rule is available at [www.dol.gov/whd/flsa/jointemployment2019](http://www.dol.gov/whd/flsa/jointemployment2019).

## Appendix:

(1) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

**Application:** Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

**Application:** Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3) **Example:** An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement with the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

**Application:** Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment does not demonstrate that it is a joint employer.

(4) **Example:** A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions. Is the country club a joint employer of the landscaping employees?

**Application:** Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their

schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

(5) **Example:** A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

**Application:** Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

(6) **Example:** An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

**Application:** Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7) **Example:** Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

**Application:** Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(8) **Example:** Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

**Application:** Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

(9) **Example:** A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

**Application:** Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

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