

# DOL Joint Employer Rule Likely To Look Familiar, Attys Say

By **Max Kutner**

Law360 (March 5, 2026, 6:52 PM EST) -- Attorneys expect the U.S. Department of Labor will seek to return to a Fair Labor Standards Act joint employer test from President Donald Trump's first term, as the National Labor Relations Board has now done for joint employment under federal labor law.



The DOL's joint employer rule is likely to return to the test from the first Trump administration, while tweaking supporting details because a New York federal court largely invalidated the earlier rule, attorneys said. (iStock)

The NLRB **reinstated** on Feb. 27 a 2020 rule regarding when an entity under the National Labor Relations Act is liable for another entity's workers, rescinding and replacing a Biden-era rule that a Texas federal court had vacated before it took effect.

The same day, the DOL took a similar approach, **proposing** an independent contractor rule that uses the same test from a regulation the first Trump administration put forward. Unlike the NLRB rule, the independent contractor proposal will go through a notice and comment period.

Joint employer rulemaking **was** on the DOL's 2025 spring regulatory agenda, with a December 2025 time frame. The DOL's Wage and Hour Division said it was considering the rulemaking to "guide WHD's enforcement of FLSA joint employer liability, and help promote greater uniformity among court decisions nationwide."

As with the NLRB's joint employer rule and the DOL's proposed independent contractor rule, the DOL's joint employer rule is likely to return to the test from the first Trump administration, while tweaking supporting details because a court largely invalidated the earlier rule, attorneys said.

"At a strategic level, I think any new joint employer rule will resemble the previous Trump joint employer rule," said Timothy Taylor of management-side firm Holland & Knight LLP, a former deputy solicitor of labor who was involved with crafting the first Trump-era regulation. "At a tactical level, it may differ."

A DOL spokesperson declined to comment, beyond pointing to the language in the regulatory agenda.

The 2020 joint employer final rule **contained** a four-factor balancing test for determining if two or more unaffiliated businesses jointly employ workers. The factors weighed the economic reality of the potential joint employer's control over the employee, whether direct or indirect, the rule said.

Those factors were whether a business can hire or fire employees, whether it controls their schedules or conditions of employment to a substantial degree, whether it determines workers' pay rates and the methods by which they are paid, and if it maintains workers' employment records.

Attorneys said a new joint employer rule will likely resemble that framework.

Indeed, Project 2025's "Mandate for Leadership" book of policy recommendations said, "DOL and NLRB should return to the long-standing approach to defining joint employers based on direct and immediate control." Jonathan Berry, who is now solicitor of labor, **wrote** that section of the report.

Thomas O'Connell of Buchalter, which represents management, said federal courts analyzing FLSA claims have increasingly applied variations of the economic realities test.

"While there are certainly exceptions and different formulations among circuits, many courts appear to be using that framework to analyze joint employment in the context of modern business models and industry structures," he said by email.

The Ninth Circuit adopted a four-factor joint employer test in 1983 and the Third Circuit did so in 2012.

"There is circuit precedent that bolsters the 2020 joint employer rule, which would also bolster any new proposed rule," said Kyle Winnick of management-side firm Seyfarth Shaw LLP.

Winnick added that he wouldn't be surprised if the DOL proposes a modified version of either of those tests or a hybrid of the two.

However, a new joint employer regulation might not be an identical redo of the 2020 rule because a New York federal court **struck** down most of that rule, finding it conflicted with the FLSA and violated the Administrative Procedure Act.

"It would certainly be ridiculous if they simply republished the original one," said David Weil, a Brandeis University professor and a visiting professor of public policy at Harvard University, who led the Wage and Hour Division under former President Barack Obama. "It misconstrued the FLSA."

Subregulatory guidance on the topic would be more appropriate than a rule, said Weil, who at the DOL **issued** an administrator's interpretation, a form of subregulatory guidance, on joint employment.

"What we simply wanted to say is we don't have the authority to redefine joint employment," he said. "We [were] simply trying to clarify what this complicated idea means and how we will apply it, and we really did base it on decades of decisions."

In light of the New York federal court ruling, a new regulation would probably contain tweaks to the support the agency lays out for its four-factor analysis, attorneys said.

The first Trump administration "used some interesting legal ideas to get to where they wanted to go from a policy direction, in terms of interpreting the text of the statute," Holland & Knight's Taylor said. "I could see them revisiting how they're going to go about interpreting the text of the FLSA and interpreting the surrounding case law."

The 2020 rule relied on the FLSA's Section 3(d), rather than take into account what Taylor said was "the

whole of the statutory tapestry."

Section 3(d) defines "employer" to "include any person acting directly or indirectly in the interest of an employer in relation to an employee." The New York federal court took issue with the rule's reliance on that section.

When crafting a new rule, "I think that they will try to incorporate a broader statutory view to explain why their rule makes sense, rather than a more narrow textualist view of the statute, like they did the first time around," Taylor said.

Seyfarth's Winnick said he expects that instead of focusing on Section 3(d), the DOL could also analyze Sections 3(e), which defines an "employee" as "any individual employed by an employer," and 3(g), which defines "employ" as including "to suffer or permit to work."

"As a result of the Southern District of New York's decision, the department may very well justify any new joint employer rule based on all three sections," he said.

Another change since the 2020 rule is that the U.S. Supreme Court **ended** Chevron deference to federal agencies' interpretations of ambiguous statutes.

The previous joint employer rule was interpretive, rather than legislative, and thus was already subject to less court deference, Taylor said.

But with no more Chevron deference, "this rule, like all other rules, needs to step it up a little bit, because courts are just not going to give agencies that benefit of the doubt that they used to," he said.

Weil said the original rule would not have survived the post-Chevron framework.

He said, "I cannot see how it could possibly pass that much more rigorous and narrow standard."

--Additional reporting by Braden Campbell and Vin Gurrieri. Editing by Bruce Goldman.