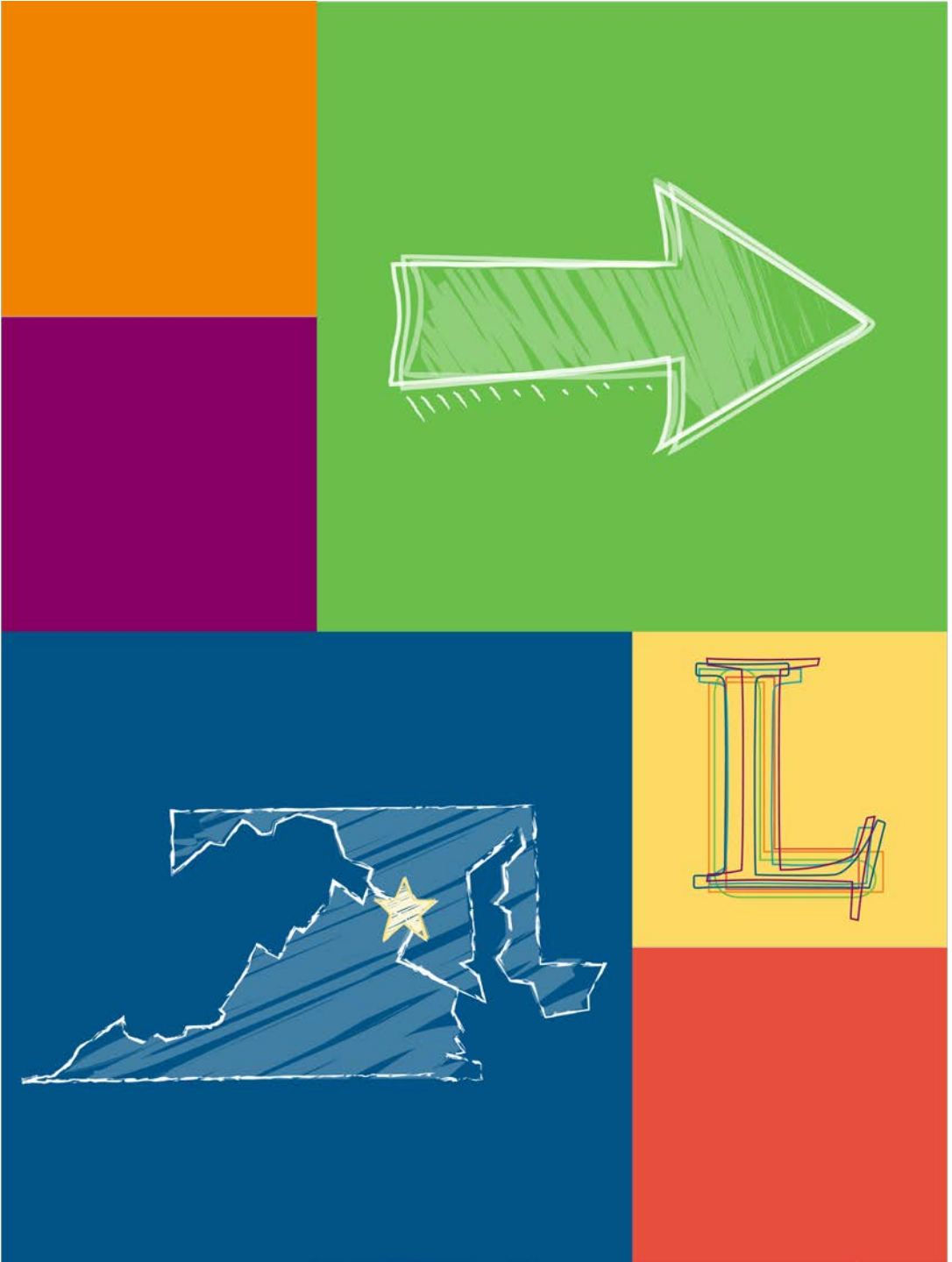

Fall 2020
Labor and Employment Law Update

Littler

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U.S. Department of Labor: Joint Employer Final Rule

Courts and legislatures often confuse the two concepts:

Contractor Status: Is a worker an employee or a contractor?

Joint Employer: If an employee, *whose* employee?

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U.S. Department of Labor: Joint Employer Final Rule

January 13, 2020: DOL's final rule sets forth a four-factor balancing test for determining joint-employer status under the FLSA. In determining whether a second company is a joint employer of a worker, the DOL will examine whether the putative joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

U.S. Department of Labor: Joint Employer Final Rule

- No single factor is dispositive in determining joint-employer status, and the weight of each of the factors may vary based on the facts of each case. The final rule does make clear, however, that ***mere maintenance by one company of employment records of another will not, itself, establish joint-employer status***.
- The final rule further clarifies that to be a joint employer under the FLSA, a second employer must ***actually*** exercise—directly or indirectly—one or more of the four control factors. The reserved right to exercise this control may in some instances be relevant for determining joint-employer status, but such a reserved right, if not actually utilized, will not, without other factors, establish a joint-employer relationship.

U.S. Department of Labor: Joint Employer Final Rule

- The final rule also establishes when additional factors may be relevant to a determination of FLSA joint-employer status, and identifies certain business models and business practices that do *not* make joint-employer status more or less likely.
- If a contracting business requires certain terms and conditions relating to the employees of another company (such as requiring that a subcontractor company institute sexual harassment policies) *does not increase the likelihood of the contracting company's being deemed a joint employer*.
- Includes a number of examples illustrating the application of the four-factor test to these and other business-to-business fact patterns.

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U.S. Department of Labor: ENJOINED

September 8, 2020

New York v. Scalia, 2020 U.S. Dist. Lexis 163498, 1:20-cv-1689-GHW, (S.D.N.Y. September 8, 2020), District Court vacated the portion of the final rule applying to "vertical" employment relationships.

- Not clear if DOL will appeal, publish new rule, or ???
- Reliance now on prior case law, circuit by circuit


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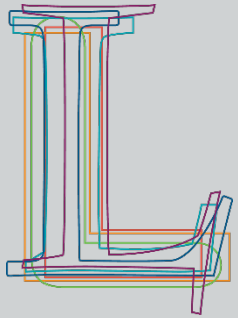

Questions?


This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



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Thank You!

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