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DOL Broadens Joint Employer-Employee Relationship

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On January 20, 2016, the U.S. Department of Labor (DOL) issued an Administrator's Interpretation (AI) describing the standards it will use to determine joint employment under the federal Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The stated purpose of the DOL guidance is to expand the employer-employee relationship to working arrangements that were traditionally not covered. Companies that utilize shared workers, staffing companies, independent contractors or "labor providers" may now find themselves to be joint employers of those workers – and liable for work performed for other companies.

Obligations of a 'Joint Employer'

When more than one employer jointly employs an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA. The DOL may also consider joint employment to achieve statutory coverage, financial recovery and future compliance when one employer is larger and has a greater ability to implement policy or systemic changes to ensure compliance.

In its guidance, the DOL rejected tests that focus on the amount of "control" that a company exerts on a worker to determine whether a joint employment relationship exists. Instead, the DOL emphasized that the definition of "employ" under the FLSA and the MSPA includes "to suffer or permit to work," which requires that the scope of the joint employment relationship under the FLSA and MSPA be interpreted to be "as broad as possible."

While the guidance applies to employment scenarios in all industries, the AI specifically calls out the construction, agricultural, janitorial, warehouse and logistics, staffing and hospitality industries as areas where the DOL encounters these joint employment relationships. Although the AI lacks the force of law, courts may afford this agency guidance some deference.

Two Theories for Joint Employment

In the AI, the DOL described two scenarios that can result in a finding of joint employment: horizontal joint employment and vertical joint employment. The following summaries excerpt the relevant portions of the AI on this topic.

Horizontal Joint Employment: This type of joint employment exists where the employee has relationships with two or more employers and the employers are sufficiently associated or related to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. Examples of horizontal joint employment may include separate restaurants that share economic ties and have the same managers and home healthcare providers that share staff and have common management.

The DOL will consider the following facts (gathered from the existing FLSA regulations on the issue) to determine whether a horizontal joint employment relationship exists:

Who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners)?

Do the potential joint employers have any overlapping officers, directors, executives or managers?

Do the potential joint employers share control over operations (i.e., hiring, firing, payroll, advertising, overhead costs)?

Are the potential joint employers' operations intermingled (i.e., is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for)?

Does one potential joint employer supervise the work of the other?

Do the potential joint employers share supervisory authority for the employee?

Do the potential joint employers treat the employees as a pool of employees available to both of them?

Do the potential joint employers share clients or customers?

Are there any agreements between the potential joint employers?

It should be noted that a horizontal joint employment relationship will not be found if the employers "are acting entirely independently of each other and are completely disassociated," which will exclude employees who have multiple jobs with multiple (unaffiliated) employers.

Vertical Joint Employment: This type of joint employment exists when an employee of one employer (referred to in the AI as an "intermediary employer") is also, with regard to the work performed for the intermediary employer, economically dependent on another employer (referred to in the AI as a "potential joint employer"). The analysis focuses on the economic realities of the relationships between the parties to determine whether the employees are economically dependent on those potential joint employers and are thus their employees. Examples of situations where vertical joint employment might arise include garment workers who are directly employed by a contractor who contracted with the garment manufacturer to perform a specific function, nurses placed at a hospital by staffing agencies, and warehouse workers whose labor is arranged and overseen by layers of intermediaries between the workers and the owner or operator of the warehouse facility.

A threshold question in a vertical joint employment case is whether the intermediary employer (who may simply be an individual responsible for providing labor) is actually an employee of the potential joint employer. If the intermediary employer is an employee of the potential joint employer, then all of the intermediary employer's employees are employees of the potential joint employer, too, and there is no need to conduct a vertical joint employment analysis.

The DOL borrowed from the MSPA's interpreting regulations to identify the facts it will consider to determine whether a vertical joint employment relationship exists:

Directing, controlling or supervising the work performed

Controlling employment conditions

Permanency and duration of relationship

Repetitive and rote nature of work

Integral to business

Work performed on premises

Performing administrative functions commonly performed by employers

What This Means to You

The DOL's focus on the joint employer issue will likely lead to an increase of lawsuits identifying additional employers responsible for the same employees. Although the AI identifies only a handful of industries, the DOL expects that the broadened standards will influence employers' behaviors in every industry.

Employers should carefully analyze whether they may be considered a joint employer over workers they do not consider to be their employees, including workers over whom they have little control. A determination of joint employment could result in significant exposure under the FLSA, including liability for any failure to pay at least minimum wage for all hours worked, failure to pay overtime and violations of the Family Medical Leave Act.

In some circumstances, the AI may require that entities sharing workers need to end that arrangement – or at least limit hours worked and/or assure compliance with wage and hour laws in other contexts if they intend to continue the arrangement. At a minimum, employers that share employees with other employers or work with third-party service providers to obtain workers will need to secure enforceable indemnification agreements with those other employers or providers to protect against joint employer liability.

Contact Us

For more information on the DOL's guidance, contact Joe Glynias.