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Labor and Employment Alert

The Department of Labor Issues Guidance on Joint Employment

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On January 20, 2016, the U.S. Department of Labor (DOL) issued an Administrator Interpretation regarding what arrangements will constitute joint employment under the Fair Labor Standards Act (FLSA). Under the FLSA, when an employee is employed by two or more joint employers, each entity can be liable for wage and hour violations. The new DOL guidance makes clear that the agency intends to interpret broadly who is a "joint employer" for the purpose of compliance with the FLSA. Indeed, the guidance states that the DOL "may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations."

Under the guidance, the DOL intends to assess whether either of two types of joint employment exists: horizontal joint employment and vertical joint employment. In a horizontal joint employment scenario, the DOL considers the relationship between the two *employers*, rather than the employee's relationship with the employers. For example, the DOL notes that a horizontal joint employment relationship may exist when a waitress works for two different restaurants both owned by the same entity or when a nurse works for two different nursing homes that are under common ownership and management. In these types of scenarios, the DOL determines whether joint employment exists by examining a number of criteria such as: ownership of the employers; shared officers, directors, executives, or managers; intermingling of the employers' operations; shared supervisory authority over employees; and shared clients or customers.

The DOL seems particularly interested in horizontal joint employment because of the potential overtime pay liability that can arise. Thus, for example, in the case of a nurse working for two nursing homes with common ownership, treating the two entities as joint employers could mean that the nurse's combined hours per week trigger overtime liability.

In a vertical joint employment scenario, the DOL considers the relationship between the potential joint employers and the employee. In vertical joint employment relationships, one employer typically has a contract arrangement with an intermediary employer to provide it with labor and/or to control some employer obligations such as hiring and payroll. The employee generally has an admitted employment relationship with the intermediary employer, but often works directly for the benefit of the other employer. This arrangement commonly arises when an employer uses a staffing agency to provide it with workers or when an employer subcontracts with another employer to provide it with labor.

In these situations, the DOL will first assess whether the intermediary employer is an employee of the other employer. If the intermediary employer is an employee, then all of its employees will also be employees of the other employer. If the intermediary is not an employee, then the DOL relies on the "economic realities test" to determine whether the intermediary's employees are nonetheless jointly employed by the other employer.

In applying the "economic realities test," the DOL weighs seven factors:

1. Whether the joint employer is directing, controlling, or supervising the work performed;
2. Whether the joint employer is controlling employment conditions, such as hiring and firing or the rate of pay;
3. The permanency and duration of relationship (an indefinite, permanent, full-time, or long-term relationship by the employee with the potential joint employer suggests that joint employment exists);
4. Whether the work performed is repetitive and rote, which indicates that the employee is economically dependent on the potential joint employer;
5. Whether the employee's work is integral to the business of the potential joint employer;
6. Whether the work is performed on premises of the joint employer; and

7. Whether the employee is performing administrative functions commonly performed by employers.

If the DOL determines that these factors suggest economic dependency between the potential joint employer and the employee, it will find that joint employment exists.

The obvious purpose of the new guidance is to expand the scope of who can be liable under the federal wage and hours laws. This is consistent with the National Labor Relations Board's recent decision to change its test for joint employment. The bottom line is that a company cannot utilize workers from a staffing company with the expectation that only the staffing company is responsible for legal compliance. Companies that utilize staffing companies need to ensure that the workers are paid correctly to avoid potential liability. Further, employers must consider the potential overtime implications when an employee works for two related but nominally separate entities.

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