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DOL Says Joint Employment Under FLSA and MSPA Should Be "As Broad As Possible"

On January 20, 2016, the administrator of the Department of Labor's Wage and Hour Division (WHD), David Weil, issued an "Administrator's Interpretation" (AI) regarding the agency's interpretation of joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The new AI purports to clarify the WHD's position that joint employment under these statutes "should be defined expansively." When considered alongside the National Labor Relations Board's (NLRB or the Board) controversial decision in *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (2015), in which the Board dramatically expanded the definition of "joint employer" under the National Labor Relations Act (NLRA), the AI may be another step in a coordinated federal agency push to expand joint-employer liability under a variety of labor and employment statutes.

Implications of a Joint-Employer Finding

A finding that two employers are "joint employers" of an employee for purposes of the FLSA and MSPA has major implications. For one, all of the hours worked by the employee for both employers within a given workweek must be aggregated for purposes of calculating overtime. In addition, both employers become jointly and severally liable for compliance with and violations of the FLSA and MSPA. These important consequences in mind, it is critical for businesses to understand whether they face joint-employer obligations.

As the new AI notes, the "growing variety and number of business models and labor arrangements" have made traditional employment relationships less common. As more employers vary their organizational and staffing models by sharing employees, engaging independent contractors and utilizing staffing agencies, the question of whether two entities operate as joint employers of specific workers has become more nuanced — and has, according to the WHD's AI, made joint employment more common.

The Expansive Definition of "Employer" and, In Turn, "Joint Employer" Under the FLSA and MSPA

According to the AI, the concepts of employment and joint employment under the FLSA and MSPA are "notably broader" than common law concepts of employment and joint employment. Under common law, an entity is considered an employer if it exercises sufficient control over the worker in question. By contrast, an entity is the employer of a worker under the FLSA and the MSPA if the entity "suffer[s] or permit[s] [the individual] to work." 29 U.S.C. §§ 203(e)(1), 203(g), 1802(5). This definition is broad, as it covers relationships in which an entity directs or even simply *allows* work to take place. This framework in mind, the FLSA and MSPA explicitly recognize the concept of joint employment and explain that a worker may be "an employee of two or more employers at the same time." 29 C.F.R. § 791.2(a); *see also* 29 C.F.R. § 500.20(h)(5).

Horizontal and Vertical Joint Employment Relationships

According to the WHD's AI, joint employment relationships can occur horizontally or vertically. A horizontal joint employment relationship exists when a worker admittedly has an employment relationship with two or more employers and the question is whether the two or more admitted employers are

sufficiently associated with one another to be joint employers. 29 C.F.R. § 791.2. In these instances, the relevant question is whether the two accepted employers operate *jointly*. As such, the focus of a horizontal joint employment analysis is on the relationship or degree of association between the two putative joint employers.

Perhaps more prevalent, and potentially riskier, in today's business world are what the WHD's AI calls "vertical joint employment" relationships. A vertical joint employment relationship exists when an employee has an admitted employment relationship with one entity but is economically dependent upon, and, under certain circumstances, also potentially has an employment relationship with, another entity. 29 C.F.R. § 500.20(h). Vertical joint employment relationships can arise when a staffing agency, subcontractor or other intermediary "provider" employer provides workers to another "user" employer — i.e., a building owner, commercial real estate developer, construction general contractor, outsourcer or manufacturing plant. In these instances, the employment relationship between the worker and the provider employer is typically recognized. Consequently, the AI directs that the relevant question concerns the relationship between the worker and the provider entity, with one of the main focuses being on whether the worker is economically dependent upon the user entity/employer.

In order to determine whether a particular worker is economically dependent upon, and thus the employee of, a putative joint employer, the AI lists the following factors: (1) the extent to which work performed by the worker is directly or indirectly controlled or supervised by the potential joint employer; (2) the power that the potential joint employer has to directly or indirectly hire or fire or otherwise modify the terms and conditions of the worker's employment; (3) the permanency and duration of the worker's relationship with the potential joint employer; (4) the extent to which the work performed by the worker is repetitive and rote and requires little training; (5) whether the worker performs work that is integral to the potential joint employer's business; (6) whether the worker performs work on the potential joint employer's premises; and (7) whether the potential joint employer performs administrative functions in regard to the worker. According to WHD, no one factor is dispositive. In any event, when applying these "economic realities" factors, the ultimate inquiry is whether the worker is economically dependent upon the user entity.

In the AI, the WHD provides several examples of vertical joint employment relationships. According to the AI, a corporate hotel chain that contracts out the management, catering or housekeeping services at one of its hotels to another business may be the joint employer of the other business's employees who perform work at the hotel. Similarly, a grower company that hires a farm labor contractor to pick produce on a farm it owns may arguably be, in the WHD's eyes, the joint employer of the farm labor contractor's employees. The AI suggests that companies across a wide range of industries run a high risk of qualifying as joint employers of the employees of their business partners.

The Federal Push For Joint-Employer Expansion

While the WHD's AI does not claim to change existing law, and whether it is in fact doing so may very well be litigated another day, it should nonetheless be viewed as part of the administration's acknowledged push to expand joint-employer liability under a host of traditional labor and employment law statutes. As we have described in prior client alerts, in August of 2015 the NLRB, through its landmark *Browning-Ferris* decision, set forth a controversial new test for determining if an entity is a "joint employer" of another entity's employees for purposes of the NLRA. Under the Board's new test, an entity will be found to be a joint employer if it merely exercises indirect control over the terms and conditions of certain workers' employment or, even more alarmingly, simply possesses (but never exercises) the ability to control such terms and conditions.

Following *Browning-Ferris*, we suggested that other federal agencies would begin to place more emphasis on joint employer issues. The WHD's AI confirms our suspicions and signals that the WHD — like the Board — believes that joint employer liability should be expanded in today's employment market.

Given the WHD's and NLRB's clear desire to promote a broad view of joint employment, companies that rely on staffing agencies, management companies, independent contractors or other third-party entities to provide services can no longer assume that their use of such arrangements insulates them from employment and labor law obligations vis-à-vis the workers providing services under those arrangements. Instead, companies must be vigilant in how they set up such arrangements, if they choose to use them at all. Every detail and every contractual provision must be scrutinized closely, and businesses must decide whether the benefits from such arrangements (or at least certain features of the arrangements) outweigh the increased joint employment risk. Many of the changes that will be necessary to potentially avoid joint employment under these broader tests could require companies to take a more hands-off approach to their third-party arrangements, an approach that is contrary to the way most companies prefer to structure such arrangements. But those who do not adapt to the new joint employer reality may more frequently find themselves on the hook for a host of potentially unforeseen, and largely uncontrolled, employment liabilities.

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