Labor and Employment Alert

June 8, 2017

DOL Withdraws Classification Guidance

On June 7, 2017, the U.S. Department of Labor (DOL) announced that it was withdrawing its 2015 and 2016 Administrative Interpretations regarding independent contractors and joint employment. Both interpretations were designed to combat the so-called "fissured workplace" phenomenon targeted by the Obama administration–where businesses purportedly avoid responsibility for federal wage and hour and other legal obligations by contracting with third parties, like independent contractors, staffing agencies and other providers, to perform core parts of the company's business. While the interpretations lacked the independent rule of law, the DOL had issued them in an effort to influence court decisions on the topics and expand the range of workers to which they were required to provide overtime and minimum wage under the Fair Labor Standards Act (FLSA).

DOL Administrative Interpretation No. 2015-1, issued on July 15, 2015, provided guidance on the classification of employees as independent contractors under the FLSA. It offered a detailed discussion of the DOL's interpretation of six factors that are used when applying the "economic reality" test to determine whether a worker is an employee entitled to the protections of the FLSA or an independent contractor. These factors are as follows: whether the individual's work is integral to the business; whether the worker's skill affects the opportunity for the individual's profit or loss; the relative investment of the worker and the principal; the skill required for the work; the permanence of the relationship; and the nature and degree of the principal's control.

On the issue of joint employment status, DOL Administrative Interpretation No. 2016-1, issued on January 20, 2016, identified two types of joint employment that should be subject to federal wage and hour laws: (i) "vertical" joint employment (when a worker is directly employed by a third party or intermediary, such as a staffing firm, but may also be employed by a client or other entity that utilizes the employee); and (ii) "horizontal" joint employment (when a worker is directly employed by a company that is interrelated with another company that may also employ the worker, such as between a parent and subsidiary).

The DOL's interpretations of its own regulations can have a persuasive impact on courts applying those regulations. The DOL's rescission of this guidance removes the interpretations as authority on which courts might rely in the future. While the DOL emphasized in announcing the change that "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law," the rescission does potentially a signal a change in enforcement policy on the two topics. Although no circuit court explicitly adopted the DOL's interpretations as persuasive guidance while they were in effect, employers should note that existing DOL regulations and other case authority may still allow courts to broadly apply the FLSA to workers. For example, earlier this year, the 4th Circuit Court of Appeals relied upon DOL regulations and case authority to develop an

arguably broader test of joint employment in *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017). In *Salinas*, the 4th Circuit relied upon existing DOL regulations and other case authority to hold that two entities may qualify as joint employers if they are "not completely disassociated" with respect to the terms and conditions of employment of workers of one of the entities.

Following the DOL's action, employers should consult the DOL's regulations regarding joint employment and the employer-employee relationship, as well as relevant circuit court authority, to determine their obligations to workers under the FLSA. As noted in our prior alerts discussing the interpretations, companies with shared or third-party labor providers should still attempt to mitigate any potential joint employment issues. Employers should also continue to review and assess their employee classifications to ensure compliance under the FLSA.

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