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Labor and Employment Alert

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If you read one thing...

- The Department of Labor's Wage and Hour Division issued new guidance emphasizing the broad standards it will apply to determine whether an employer is a "joint employer" under the FLSA.
- Under these standards, companies can be liable for the wage and hour violations of their subcontractors and labor providers.
- Companies should evaluate both their "vertical" (subcontractor) and "horizontal" (related entity) business relationships to assess their risk of being a "joint employer."

Wage and Hour Division Issues Interpretation Confirming Expansive Standards for Joint Employment Under FLSA

On January 20, 2016, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued Administrative Interpretation No. 2016-1 (the "Interpretation") discussing the expansive interpretation it will apply when assessing whether companies are joint employers under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Although many of the standards discussed in the Interpretation are not new, the DOL's action confirms its intent to vigorously investigate and prosecute claims of joint employment. It also signals to employees (and their attorneys) that joint employment issues are often overlooked and should receive additional scrutiny. Because joint employment determinations can result in significant liability, companies should review all aspects of their business relationships involving shared workers or workers with third parties in light of this Interpretation.

Background

Since becoming the WHD Administrator in 2014, Dr. David Weil has made it an enforcement priority to address what he describes as the "fissuring" workplace: the increasingly common practice of companies outsourcing work through "sharing employees or using third-party management companies, independent contractors, staffing agencies, and labor providers." The Interpretation is the latest in a string of recent WHD actions aimed at addressing this evolving employment landscape, including WHD's guidance last July underscoring its position that many employees are misclassified as independent contractors.

The Interpretation is consistent with other recent agency actions that have revealed the Obama administration's ongoing efforts to expand and enforce the standards for finding that companies are joint employers. Last August, the National Labor Relations Board took an expansive view of the joint employer

doctrine in *Browning-Ferris Industries of California, Inc.*,[1] finding that two businesses could be joint employers even if one company did not exert control over the terms and conditions of the other business's employees. Similarly, an internal Occupational Safety and Health Administration (OSHA) memorandum showed that OSHA is directing inspectors to assess during inspections whether franchisors are joint employers.

The Interpretation

The Interpretation largely restates existing law regarding the legal standards for evaluating joint employment relationships. It reaffirms the principle that "joint employment" under the FLSA is a broader concept than under the common law. Rather than focusing on the amount of control a potential joint employer exerts over a worker to determine whether two separate companies are joint employers, the WHD will apply the broader "economic reality" test to assess whether the worker is economically dependent on the potential joint employer.

The "economic reality" test has been the most common standard for assessing joint employment relationships under the FLSA for decades. However, courts differ in the factors they use to assess the economic reality of the relationship between a worker and a principal. In the Interpretation, the WHD specifically challenges the 3rdCircuit's decisions in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*[2] and the 1st Circuit's decision in *Baystate Alternative Staffing, Inc. v. Herman*,[3] where those courts primarily focused on the amount of control over conditions of employment to determine whether companies were joint employers. The WHD finds these decisions "inconsistent with the breadth of employment under the FLSA."

Instead, the Interpretation references its regulations and various court decisions to identify the factors it believes should be applied to the joint employment analysis. In doing so, the WHD clarifies two scenarios in which joint employment may exist—"vertical" and "horizontal" joint employment:

- **Vertical Joint Employment:** This occurs where a business shares an employee with an unrelated 3rd party or intermediary, such as a staffing firm or subcontractor. The WHD will 1st look to see if the intermediary employer is an employee of the potential joint employer. If the intermediary employer is an employee, then all of the intermediary's employees will be considered employees of the potential joint employer. However, if the intermediary employer is not an employee, then the WHD will apply the "economic reality" test under the MSPA, which focuses on whether the employee is economically dependent on the potential employer.

  Factors that the WHD will review to determine whether a vertical joint employment relationship exists include, but are not limited to:

[1] NLRB, 32-RC-109684 (Aug. 27, 2015).
[2] 683 F.3d 462 (3d Cir. 2012)
[3] 163 F.3d 688 (1 Cir. 1998)

- the extent that the potential employer is directing, controlling, or supervising the employee's work, even if indirectly (e.g., through the intermediary employer)
- the extent that the potential employer can control the terms and conditions of employment (e.g., hire, fire, set rates of pay)
- the duration of the relationship with the potential employer
- the extent that the employee's work is repetitive or rote, unskilled, or requires little training
- whether the employee's work is integral to the business of the potential employer
- whether the employee performs work on premises owned or leased by the potential employer
- the extent that the potential employer performs administrative functions for the employee (e.g., providing workers' compensation insurance, tools, safety equipment).

For years, courts have applied many of these factors when assessing joint employment relationships. However, they have consistently emphasized, as the Interpretation acknowledges, that these factors are not exclusive, and the economic reality of the parties' relationship dictates which factors should be examined and the relative weight to be given each of them.

- **Horizontal Joint Employment:** This occurs where two or more interrelated companies (e.g., parent and subsidiary or affiliates) share workers. To determine whether horizontal joint employment exists between two employers, the WHD will examine the following non-exhaustive factors in assessing the degree of association and control by the potential joint employer:
  - Who owns the potential joint employers (e.g., is there common ownership)?
  - Are there overlapping officers, directors, executives, or managers?
  - Do the employers share control over operations (e.g., hiring, firing, payroll, overhead costs)?
  - Are the employers' operations intermingled (e.g., share administrative functions)?
  - Does one employer supervise the work of the other?
  - Do the employers share supervisory authority for the employee?
  - Do the employers treat employees as a pool available to them both?
  - Are there any agreements between the employers concerning the employees?

Companies found to be joint employers under these standards can face significant liability. Joint employers will be jointly and severally liable for all wage and hour violations of either employer (including overtime, minimum wage, and off-the-clock violations under the FLSA). In addition, for overtime violations, each joint employer may be liable for the combined hours worked each week by an employee at both employers. For example, assume a worker works 30 hours for his or her primary employer in a week and 20 hours for the potential joint employer that same week. In a joint employment situation, the

worker would be considered to have worked 50 hours that week and would be due overtime compensation for the 10 hours over 40.

Practical Implications

The Interpretation is not binding law and courts are not required to give it deference, although they may adopt the DOL's positions to the extent that they find them persuasive. Nonetheless, companies should expect WHD to focus on joint employment issues when investigating FLSA violations and be more active in educating courts and the public regarding joint employment standards.

Given this new focus, companies should review their relationships with shared or third-party labor providers, including staffing firms, subcontractors, and other third-party providers, and consider how the potential risks posed by these relationships can be mitigated. Such review is particularly important in the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries, since the WHD specifically identified these industries as commonly having joint employment relationships.

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