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Department of Labor withdraws informal guidance on joint employment and independent contractor status issued by the Obama Administration

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The Department of Labor announced on Wednesday, June 7, 2017, that it was rescinding two Obama administration rules, one that expanded the "joint employer" doctrine and one regarding independent contractor classification.

What did the prior guidance address?

The joint employer doctrine refers to cases in which a business can be said to effectively control the workplace policies of another company, such as when a company subcontracts to another business. Until 2015, the Department of Labor opined that "joint employment" only applied in cases where the company had "direct control" over the other's workplace. In 2015, the then-Labor Secretary Tom Perez changed that standard to the much more ambiguous "indirect control." Companies, such as franchises and businesses that use Professional Employer Organizations or staffing companies to perform HR and other functions, were concerned under that lesser standard that they may be held liable for workplace violations even if they did not directly oversee it.

In 2016, the Department of Labor also issued guidance relative to independent contractors. This Guidance opined that many workers were being misclassified as independent contractors instead of employees. In so doing, the Guidance abandoned the right of control test and instead, adopted the economics reality test. The guidance further stated that this should be broadly interpreted in favor of finding an employment relationship.

What does this mean to employers?

The withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors will benefit many employers. Returning to the pre-

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Obama administration standards is also seen as a win for many business groups which had opposed the Obama rule.

How does this effect the NLRB's stance on the joint employment relationship?

The National Labor Relations Board was the first agency to adopt the strict "joint employer" standard and has not rescinded its interpretation. However, newly appointed Chair Phil Miscimarra of the NLRB has repeatedly criticized the application of this new joint employer standard. In addition, President Trump still must pick nominees for the five-member board's two open seats. Hopefully, these two factors will cause the NLRB to follow the DOL's lead and abandon the broad joint employer standard proposed under the Obama administration.

What should companies do now?

Generally, most companies will not change its business model according to this recent withdrawal. Employers, however, are encouraged to review whether those classified as independent contractors are properly classified, and to seek legal counsel as to the impact of this revocation on its specific operations, business plans and litigation strategies.

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