Labor and Employment Alert: Department of Labor Seeks to Make Most Employers into Joint Employers

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Michael C. Griffaton

Allen S. Kinzer

Mark A. Knueve

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CLIENT ALERT | 2.4.2016

Update: DOL Withdraws Guidance

Since this *Labor and Employment Alert* was published there has been a development. On June 7, 2017, DOL announced that it will withdraw "recent guidance on independent contractors and joint employers." To learn more read this Labor and Employment Alert.

Original Alert:

On January 20, 2016, the U.S. Department of Labor Wage & Hour Division (WHD) issued an Administrator's Interpretation on joint employment under the Fair Labor Standards Act (FLSA) and the Migrant Worker Protection Act (MWPA). The WHD believes that joint employment is "more common" and joint employment "should be defined expansively." Consequently, "WHD may consider joint employment to achieve statutory coverage, financial recovery [i.e., the deep pocket], and future compliance, and to hold all responsible parties accountable for their legal obligations."

Whether two or more employers are joint employers highlights two important issues. First, the hours worked by an employee for all of his or her joint employers during the workweek are aggregated and considered one employment – including for calculating whether overtime is due. This means that an individual who is jointly employed working 25 hours for one employer and 25 hours for another in the same week would be owed 10 hours of overtime. This fact raises the second issue: all of the joint employers are jointly and severally liable for FLSA compliance. The Administrator's Interpretation identifies two theories by which the WHD will seek to establish joint employment – horizontal joint employment and vertical joint employment – one or both of which may be applicable in any particular case.

In horizontal joint employment, the employee has an employment relationship with two or more employers and the employers are sufficiently related to each other that they jointly employ the employee.

This analysis focuses on the relationship of the employers to each other. For example, when a nurse who works at two separate hospitals operated by the same entity, the question is whether the hospitals are "sufficiently associated" with respect to the nurse; if so, the hospitals are joint employers as to the nurse. The Administrator's Interpretation lays out the following facts as potentially relevant when analyzing whether a horizontal joint employment relationship exists:

- Who owns the potential joint employers?
- Do the potential joint employers have any overlapping officers, directors, executives, or managers?
- Do the potential joint employers share control over operations?
- Are the potential joint employers' operations inter-mingled?
- Does one potential joint employer supervise the work of the other?
- Do the potential joint employers share supervisory authority for the employee?
- Do the potential joint employers treat the employees as a pool of employees available to both of them?
- Do the potential joint employers share clients or customers?
- Are there any agreements between the potential joint employers?

These facts will be used in conjunction with the Department of Labor's existing regulations on joint employment, which focus primarily on employer control. *See* 29 C.F.R. 791.2.

In vertical joint employment, the employee has an employment relationship with one employer (like a staffing agency, subcontractor, or labor provider) and the "economic realities" show that he or she is "economically dependent on, and thus employed by, another entity involved in the work." For example, a business that contracts with a staffing agency (the intermediary employer) to provide the employee could potentially be a joint employer with the staffing agency. In determining whether vertical joint employment exists, the WHD first asks whether the intermediary employer itself is actually the employee of the potential joint employer. If so, all of the employees of the intermediary employer are also the employees of the potential joint employer. (This situation may occur when the intermediary employer is not actually an independent contractor.) If not, the WHD turns to its new vertical joint employer analysis.

This analysis "focuses on the economic realities of the working relationship between the employee and the potential joint employer." This analytical framework abandons the control test and focuses instead on the "economic realities" and the "ultimate inquiry of economic dependence." The Administrator's Interpretation adopts seven economic reality factors from the MWPA for use in determining whether the vertical joint employment relationship exists under the FLSA:

- Who directs, controls, or supervises the work being performed?
- Who controls the employment conditions?
- Is the employment relationship indefinite, permanent, full-time, or long-term?
- Is the employee's work repetitive and rote?
- Is the employee's work an integral part of the potential joint employer's business?
- Is the employee's work performed on the premises of the potential joint employer?

- Is the employee performing administrative functions commonly performed by employers?

WHD intends to expand the FLSA's statutory coverage to as many employees as possible, and so "the possibility of joint employment should be regularly considered." Employers can expect that their operations will be closely scrutinized by the WHD to determine whether such joint employment relationships exist. And the Administrator's Interpretation specifically points to the construction, agricultural, janitorial, warehouse and logistics, staffing, hospitality industries, health care, restaurant, and security industries as those where joint employment may be found. Contact your Vorys lawyer if you have questions on how the WHD's focus on horizontal and vertical joint employment may affect your business.