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COMMENTARY

Department of Labor Attempts to Take Broad View of Joint Employment Status

On January 20, 2016, the U.S. Department of Labor's Wage and Hour Division issued Administrator's Interpretation No. 2016-1, which the agency describes as guidance for employers on joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. In a blog post accompanying the new guidance, Dr. David Weil, administrator of the Wage and Hour Division, notes that joint employment "has been a major focus for the Wage and Hour Division in recent years" and the agency "considers joint employment in hundreds of investigations every year." Still, according to Dr. Weil, the new guidance "reflects existing policy." Thus, while the DOL's apparent focus on its enforcement agenda may be a cause for some concern, the guidance also makes clear—at least in the DOL's view—that the joint employer rules of the FLSA and MSPA remain unchanged.

The new guidance emphasizes the DOL's view that "[t]he scope of employment relationships subject to the protections of the FLSA and MPSA is broad," with the two statutes analyzed in tandem because they share an identical definition of the term "employ." That is, the DOL contends that the concepts of employment and joint employment under the FLSA and MSPA are notably broader than the common law concepts of employment and joint employment, which look to the amount of control that an employer exercises over an employee.

Thus, in the DOL's view, the test for joint employment under the FLSA and MSPA is different than the test under other labor statutes, such as the National Labor Relations Act, 29 U.S.C. 151 et seq., and the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.

The guidance then discusses two primary types of joint employment relationships: "horizontal" and "vertical."

Horizontal Joint Employment

Horizontal joint employment focuses on the relationship between the two potential joint employers. According to the guidance, horizontal joint employment "may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee." In this type of joint employment,

"there is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer."

Examples of horizontal joint employment, according to the guidance, may include separate restaurants that share economic ties and have the same manager controlling both restaurants or home health care providers that share staff and have common management. The guidance discusses the legal test for determining whether a horizontal joint employment relationship exists, which focuses on the degree of association between the putative joint employer, and states that the following may be relevant when analyzing this issue:

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners);
- whether the potential joint employers have any overlapping officers, directors, executives, or managers;
- whether the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- if the potential joint employers' operations are inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for?);
- if one potential joint employer supervises the work of the other;
- whether the potential joint employers share supervisory authority for the employee;
- whether the potential joint employers treat the employees as a pool of employees available to both of them;
- if the potential joint employers share clients or customers; and
- whether there are any agreements between the potential joint employers.

Vertical Joint Employment

Vertical joint employment, by contrast, focuses on the employee's relationship with the potential joint employer and whether that employer jointly employs the employee. According to the guidance, such a relationship may exist where the employee, "with regard to the work performed for the intermediary employer, [is] economically dependent on another employer." By way of example, the guidance lists a construction worker who works for a subcontractor but is jointly employed by a general contractor as well as a farm worker who works for a farm labor contractor but is jointly employed by the grower.

The guidance, in its discussion of the legal test to determine whether a vertical joint employment relationship exists, reflects yet again the DOL's position that joint employment should be defined as broadly as possible. The DOL takes the position that an "economic realities" test must apply, and the analysis "cannot focus only on control" (such as the power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records). Rather, the "core question" is whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work. The guidance notes that the following seven factors are probative of the question:

Directing, Controlling, or Supervising the Work Performed. To the extent that the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer.

Controlling Employment Conditions. To the extent that the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer.

Permanency and Duration of Relationship. An indefinite, permanent, full-time, or longterm relationship by the employee with the potential joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue.

Repetitive and Rote Nature of Work. To the extent that the employee's work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training, those facts indicate that the employee is economically dependent on the potential joint employer.

Integral to Business. If the employee's work is an integral part of the potential joint employer's business, that fact indicates that the employee is economically dependent on the potential joint employer.

Work Performed on Premises. The employee's performance of the work on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer.

Performing Administrative Functions Commonly Performed by Employers. To the extent that the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, those facts indicate economic dependence by the employee on the potential joint employer.

The economic realities factors applied vary somewhat, depending on the court, but any formulation must address the "ultimate inquiry" of economic dependence.

The guidance explicitly rejects court decisions—including a decision of the U.S. Court of Appeals for the Third Circuit—analyzing only on a potential joint employer's control over the worker in question, rather than the full picture of the economic relationship among the parties. Not only that, the guidance indicates that a specific "economic realities" test from the MSPA regulations can and should be applied to claims under the FLSA. The test from the MSPA regulations, although specific to determining joint employment status in the "context of a farm labor contractor acting as an intermediary employer for a grower," can serve as "useful guidance" to determine vertical joint employment in FLSA cases. The guidance explains that the MSPA regulations can be applied beyond the particular circumstances of the MSPA because they "are probative of the core question of whether an employee is economically dependent on the potential joint employer who … is benefitting from the work."

Significance for Employers

The timing of the joint employment guidance, issued near the first of the year and only six months after the DOL issued Administrator's Interpretation No. 2015-1, which focused on the classification of "employees" under the FLSA, further demonstrates the DOL's intent to showcase its activism with respect to wage and hour compliance. The guidance and accompanying materials, including the agency's announcement directing readers to a new DOL webpage on joint employment issues, contain numerous references to the need to hold "all responsible employers" accountable.

The agency also signals where its enforcement efforts may be directed in the future. Dr. Weil's blog post lists a number of industries, including construction, agricultural, janitorial, distribution and logistics, hospitality, and staffing, where it is more common for employees to be shared or where there are third-party management companies.

The guidance makes clear that the agency is well-aware of practical as well as legal considerations with respect to joint employment: "[W]here joint employment exists, one employer may be larger and more established, with a greater ability to implement policy or systematic changes to ensure compliance." "Thus," it continues, "WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance." In other words, the DOL should be expected to factor a number of practical considerations into its investigations, including—and perhaps foremost—the ability to pay large monetary settlements or judgments. As the guidance notes, joint employers are jointly and severally liable under both statutes.

Finally, in a footnote, the agency exhibits its skepticism of contractual provisions that purport to disclaim joint employer liability. Many employers, especially those that use staffing agencies or similar third-party entities, regularly include such terms in their contracts. As the guidance highlights, these

clauses may face special scrutiny and are "not relevant to the economic realities of the working relationship." These clauses are often drafted to state that an employer does not direct or control workers provided by a third party. However, in light of the DOL's rejection of the legal tests that look exclusively or primarily to a putative joint employer's control over the worker, companies cannot rely solely on such contract terms to mitigate potential liability. Instead, employers should carefully analyze how these relationships work in practice.

Overall, the guidance is useful insofar as it clearly states the DOL's stance on how to determine joint employment status. However, given the complexity of joint employment doctrine across the spectrum of federal and state employment law, it is unlikely that the guidance will become a primary resource for large and sophisticated employers. Rather, the guidance may best be viewed as further evidence of the DOL's intent to cast its enforcement net as widely as possible. As Dr. Weil stated in his blog post, the agency plans to "continue educating employers about their responsibilities," perhaps indicating that employers should expect additional guidance on other topics to be published in the near future.

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