

DOL Issues Guidance on Joint Employment Standard

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On January 20, 2015, the Department of Labor Wage and Hour Division (WHD) published Administrator's Interpretation No. 2016-1, guidance intended to clarify the scope and definition of "joint employment" under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), as well as identify scenarios where joint employment may be deemed to exist.

As the guidance explains, joint employment relationships—*i.e.*, situations in which "two or more employers jointly employ an employee" or a group of employees—can give rise to a number of consequences under the FLSA and/or the MSPA, including:

- An employee's hours worked for all joint employers during a workweek must be aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due;
- Joint employers are jointly and severally liable for compliance with the FLSA and MSPA; and
- WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, as well as to hold all responsible parties accountable for legal obligations. This may particularly be the case in joint employment situations where one employer is considered to have a greater ability to implement policy or systemic changes to ensure statutory compliance.

As a starting point, the WHD guidance emphasizes that as a general proposition, the concept of joint employment under the FLSA and/or the MSPA is broad. Thus, under both the FLSA and the MSPA, the definition of "employ" as "to suffer or permit to work" is the "broadest definition that has ever been included in any one act." Consequently, the WHD guidance instructs that the concept of joint employment likewise, "should be defined expansively" under these laws.

From that general proposition, the WHD guidance goes on to discuss two distinct analyses that serve to establish a joint employer relationship under the FLSA and/or the MSPA: "horizontal" and "vertical joint" employment. Horizontal joint employment exists 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." This type of joint employment scenario is more likely to exist where an employee is employed by "technically separate but related or overlapping employers." The focus of the analysis is the degree of association and shared control between the employers. In this regard, the

WHD's guidance offers a number of non-exhaustive factors that the agency will consider in determining whether a horizontal joint employer exists:

- 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);
- Do the potential joint employers have overlapping officers, directors, executives, or managers;
- Do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- Are the potential joint employers' operations inter-mingled (e.g., is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless for which employer they work);
- Does one potential joint employer supervise the work of the other;
- Do the potential joint employers share supervisory authority for the employees;
- Do the potential joint employers treat the employees as a pool of employees available to both employers;
- Do the potential joint employers share clients or customers; and
- Are there agreements between the potential joint employers.

Examples of horizontal joint employment scenarios include home health care providers that share staff and have common management, or separate restaurants with economic ties and shared managers.

In contrast, vertical joint employment relationships may be found to exist when the employee of one employer is nevertheless "economically dependent" on another employer. Vertical joint employment situations commonly are found when one employer has contracted with another employer for the provision of labor, or the performance of other employer functions, such as hiring or payroll. Thus, when evaluating potential vertical joint employment issues, the WHD's analysis looks at the "economic realities" and does not solely focus on control. The factors considered include:

- Direction, control, or supervision of work performed;
- Control of employment conditions;
- Permanency and duration of relationship;
- Repetitive and rote nature of work;
- Integrality to business;
- Work performed on premises; and
- Performance of administrative functions commonly performed by employers.

Examples of vertical joint employment scenarios include temporary or supplemental nurses working at a hospital pursuant a contractual arrangement between the hospital and a nurse staffing agency, and construction employees performing work for both a subcontractor and the general contractor on a particular job site.

Significantly, as the guidance points out, the joint-employment test under the FLSA and the MSPA is not necessarily the same as that utilized by the National Labor Relations Board (which we previously covered [here](#)). The NLRB's standard focuses on an employer's control (whether actual, implied, or even reserved control) over terms and conditions of employment. In contrast, the WHD guidance emphasizes that its standard, which is to be construed "as broad[ly] as possible," can be satisfied even where the alleged joint employer exercises little or no control over putative employees.

Given the WHD's expansive position that as many workers as possible should be protected, and the increase in organizational and staffing models that may establish joint employment relationships, employers should review their

workforce practices to determine whether joint employment relationships exist as these relationships may give rise to increased legal obligations and potential liability under the FLSA and the MSPA.

The full text of the Administrative Interpretation can be found [here](#).
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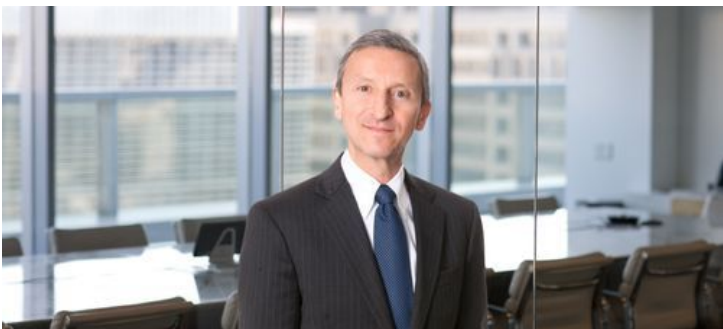
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