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Who's The boss?: DOL Expands Joint Employer Liability

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As previously reported, recent National Labor Relations Board decisions, as well as Occupational, Safety and Health Act (OSHA) actions have significantly expanded the potential for "joint employer" liability. Employers that rely on placement agencies or subcontractors, as well as franchisors, have been placed on notice that they could be responsible for compliance with and violations of the National Labor Relations Act and OSHA, even if they are not an individual's direct employer.

On January 20, 2016, David Weil, the Wage and Hour Division Administrator, issued an Administrator's Interpretation affirmatively communicating that the ***Department of Labor (DOL)*** will likewise take an aggressive approach in pursuing "joint employers" for violations of the ***Fair Labor Standards Act (FLSA)*** and the ***Migrant and Seasonal Agricultural Worker Protection Act (MSPA)***. In a concurrently issued blog post, Administrator Weil stated that joint employment has been and will continue to be a "major focus" for the Wage and Hour Division.

Here are the highlights:

- The Administrator's Interpretation provides the definition of joint employer under the FLSA/MSPA.

- The DOL distinguishes between "vertical employment" and "horizontal employment" when determining which factors to consider.

- Vertical employment focuses on whether the employee of one employer (intermediary employer) is employed by another entity. Vertical relationships typically arise when a company has contracted with an intermediary employer to provide it with labor or to cover certain functions, such as hiring and payroll.

- Assuming the intermediary employer is not itself an employee of the entity, the DOL may consider multiple factors, including one or more of the following factors to determine if the entity is also an "employer" subject to the FLSA/MSPA:

    - The entity's ability to direct, control, or supervise the work performed;

- The entity's control of employment conditions;
- The permanency and duration of relationship between the worker and the entity;
- Whether the individual's work for the entity is repetitive and routine;
- Whether the individual's work is integral to the business of the entity;
- Whether the individual's work is performed on the entity's premises; and
- Whether the entity performs administrative functions commonly performed by employers.

- Horizontal employment occurs when a worker is directly employed by two or more separate but overlapping employers, and the employers are sufficiently related to be considered joint employers. For example, two separate hotels may be considered joint employers of the housekeeping employees who are hired by both hotels and work part-time at both hotels if the hotels share management, have overlapping owners and centralize administrative functions.

- Multiple factors, including one or more of the following factors, may be considered by the DOL to determine if there is a horizontal employment relationship:
  - 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 any 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 (for example, is there one administrative operation for both employers, or does the same person schedule and pay workers regardless of which employer they work for);
  - Does one potential joint employer supervise the work of the other;
  - Do the potential joint employers share supervisory authority for the worker;
  - Do the potential joint employers treat the workers as a pool of workers available to both of them;
  - Do the potential joint employers share clients or customers; and
  - Are there any agreements between the potential joint employers?

What does this mean for you? While the Administrator's Interpretation does not have the force of

a regulation or statute, and it is not binding on the courts, it does provide employers guidance on how the DOL will review claims filed against companies who use contingent workforces or who may be interrelated. The DOL will likely continue to ramp up efforts to target businesses that rely upon staffing service companies and subcontractors if those workers are not being paid in accordance with the FLSA/MSPA. In addition, the Administrator's Interpretation may embolden plaintiff's attorneys to bring claims on behalf of contingent and shared workers.

Employers should begin evaluating whether they will continue to rely on intermediate employers to provide workers. Employer's need to be vigilant in addressing claims by contingent staff about unfair wage practices.

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