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The U.S. Department of Labor Rolls Back Obama-Era Guidance on Joint Employers and Independent Contractors

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The U.S. Department of Labor ("DOL") announced today that it was rolling back an Obama-era policy that attempted to increase regulatory oversight of joint employer and contractor businesses.

Courts and agencies use the joint employer doctrine to determine whether a business effectively controls the workplace policies of another company, such as a subsidiary or sub-contractor. That control could be over things like wages, the hiring process, or scheduling.

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In a short statement, the DOL signaled that it was returning to a "direct control" standard. "U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors. Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law."

Until 2015, the DOL interpreted the joint employer doctrine to apply only to cases in which a business had "direct control" over another business's workplace. In 2015 and then again in 2016, under then-Labor Secretary Tom Perez (currently the Democratic National Committee Chair), the DOL changed its interpretation to state that a business may be a joint employer even if it exerted "indirect control" over another's workplace. The 2015 and 2016 guidance effectively expanded the conditions for when one business can be held liable for employment and civil rights law violations at another company. Critics of this "indirect control" language argued that it was ambiguous and threatened to throw franchise, parent-subsidiary, and independent contractor relationships between businesses into disarray. Companies, particularly franchises, were particularly concerned that they could face liability at workplaces they did not directly oversee or control.

However, the DOL's announcement today rescinded its guidance on "indirect control" and also rescinded guidance on independent contractors, which essentially stated that the DOL considered most workers to be employees under the Fair Labor Standards Act and that it was likely to apply a broad definition of "employee" and "employer" when investigating a company's practices. This decision is a big win for businesses and business groups.

Despite the DOL's reversal, the Obama-era standard can still be applied to businesses through the National Labor Relations Board ("NLRB"), an independent agency that serves as the government's main labor law enforcer. The NLRB considers a company jointly liable for its contractors' compliance with the National Labor Relations Act if they have "indirect" control over the terms and conditions of employment or have "reserved authority to do so." The NLRB has not rescinded its interpretation. President Trump has yet to pick nominees for the five-member board's two open seats, which will likely affect the NLRB's interpretation of the joint employer doctrine and many other NLRB rules, interpretations, and guidance.

The DOL's guidance does not affect actions taken by other federal agencies.

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