New Insights into the Joint Employer Relationship from the Department of Labor

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Businesses who share employees or who rely on independent contractors, third-party managers, or staffing agencies should pay attention to an opinion letter recently released by the U.S. Department of Labor ("DOL"). The opinion letter potentially impacts companies such as home health care agencies that share staff and common management, construction companies who rely on subcontractors, agricultural companies who utilize farm labor contractors, restaurants that employ the same staff at different locations, and companies who rely on staffing agencies, among others, and explains how the DOL will apply the Fair Labor Standards Act to joint employer relationships.

ANALYSIS

In January, the Wage and Hour Division of the DOL released Administrator's Interpretation No. 2016-1 ("AI"), which provides guidance regarding the DOL's analysis of the joint employer relationship under the Fair Labor Standard Act ("FLSA") and the Migrant and Seasonal Agricultural Workers Protection Act. The FLSA applies to employers engaged in interstate commerce whose annual gross volume of sales totals $500,000 or more. Similar to recent decision from the National Labor Relations Board with respect to franchisors, the AI opines that the joint employment relationship should be defined as broadly as possible.

The AI distinguishes between horizontal employment relationships and vertical employment relationships and provides factors relevant to determining whether a joint employer relationship exists under each. If a joint employment relationship exists, the employers are jointly and severally liable for compliance with wage and hour laws including paying overtime compensation for all hours worked over 40 during the workweek based on the combined hours worked by the employee for each employer.

According to the AI, the **horizontal employment relationship** exists when an employee is employed by two (or more) technically separate but related or overlapping employers. For example, a horizontal employment relationship

exists where a waitress works for two separate restaurants that are operated by the same entity, or where a farm worker picks produce at two separate orchards and the orchards have an arrangement to share farmworkers. The AI provides 9 factors relevant to determining whether a horizontal relationships results in a joint employer relationship—focusing on the relationship between the employers. Some of these factors include: who owns the employers (i.e., do the companies have common owners); do the employers have any overlapping officers, directors, executives, or managers; do the employers share control over operations (firing, hiring, payroll); are the employers' operations intermingled; do the employers treat the employees as a pool of employees available to both; do the employers share clients or customers; etc.

The AI defines **vertical employment relationships** as situations where an employer contracts or makes arrangements with an intermediary employer to provide it with labor and/or perform for it some employer functions, such as hiring or payroll. Examples of vertical employment relationships are situations where an employee works for a staffing agency and is assigned to work for a company. The AI provides 7 factors relevant to determining whether a vertical relationship results in a joint employer relationship—focusing on whether the employee is economically dependent on both employers. Some of these factors include: who directs and controls the work; who directs and controls the employment conditions; what is the permanency of the relationship; how repetitive and rote the work is; whether the work is integral to the employer's business; etc.

CONSEQUENCES

The AI is not legally binding on the courts, and California has yet to adopt the broader test advocated by the DOL in the AI (California currently uses the economic realities test—similar to the vertical employment factors set forth above). However, plaintiffs' attorneys seeking to find additional and deeper pocketed employers will likely try to rely on the AI to support liability under the FLSA. Companies who potentially fall under the horizontal and vertical employer relationships should consider the factors outlined above and in the AI when defining their business relationships and negotiating contracts. Companies should familiarize themselves with the various factors and take steps to limit or fully assess potential liability under the FLSA.

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