DOL Issues Administrative Interpretation Addressing Joint Employment

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On January 20, 2016, the United States Department of Labor's Wage and Hour Division (DOL) issued its first Administrator's Interpretation (AI) of 2016, providing guidance on the subject of joint employment under the Fair Labor Standards Act (FLSA). The AI's purpose is to address the realities of the modern workplace as more businesses vary organizational and staffing models by sharing employees, using third party management companies, or relying upon staffing agencies and labor providers.

According to the AI, when two or more employers jointly employ an employee, the employee's hours worked for all joint employers must be taken together for purposes of calculating overtime pay. Also, the DOL may hold all parties accountable for FLSA obligations if joint employment exists.

The AI describes two types of joint employment-horizontal and vertical. The AI includes an analysis of both types of joint employment.

In a horizontal relationship, an employee may be employed by two technically separate entities, but those entities are related or overlap in some manner. For example, an employee may work for two locations of the same restaurant brand. Although the two locations are operated by separate legal entities, the same person is the majority owner, the two employers share payroll processors, and there is an agreement to share the employee's services. This arrangement would be considered a horizontal joint employment relationship, and the employee's hours at both locations in a given work week would be added together to determine any overtime obligations.

In a vertical relationship, the employer typically contracts with an intermediary employer to provide labor services. For example, a nurse may be placed at a hospital by a staffing agency. In such case, the contracting employer and the intermediary employer may be considered joint employers depending on a number of factors, including:

- the direction, control, or supervision by the potential joint employer of the work performed;
- the ability of the potential joint employer to control employment conditions;
- the permanency and duration of the relationship with the potential joint employer;
- the repetitive and rote nature of the work performed;
- the integral nature of the employee's work to the potential joint employer;
- whether the work is performed on premises owned or controlled by the potential joint employer; and

• the extent to which the potential joint employer performs administrative functions, such as handling payroll, providing tools and materials, or other factors indicative of economic dependence.

The DOL will continue to examine the possibility of joint employment to ensure that all potential employers meet their FLSA obligations. Employers must be aware that just because they are not the "technical" employer of an individual does not mean they escape liability for wage and hour violations. For more information about the newly issued AI, or assistance with wage and hour compliance, please contact a member of our Employment Law Group.

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