

## New Guidance Cements DOL's Tough Joint Employment Stance

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On Jan. 20, the Wage and Hour Division of the U.S. Department of Labor issued an administrator's interpretation providing guidance on "joint employment" under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. While framed broadly, there is no mistaking that the AI targets certain industries more than others, with hospitality (which is mentioned three times on just the first page), health care, construction, janitorial, warehouse and logistics, agricultural, and satellite television installers firmly in the crosshairs.

The growth and proliferation of the contingent workforce has drawn attracted regulatory focus in the wage and hour context as well as other areas, and expansion of the "joint employment" doctrine — literally, where an individual is deemed "employed" by two (or more) business entities — continues apace. The National Labor Relations Board, for example, issued a decision in August 2015, in which it determined for the first time that "indirect control" was a key factor in determining whether a joint employment relationship existed under the National Labor Relations Act. That decision followed on the heels of an internal memorandum from the Occupational Safety and Health Administration, which suggested that it would broaden its own joint employment standard. Employers should take note, because liability in the joint employment context is joint and several.

Building on the principles contained in last July's AI regarding independent contractor misclassification, the DOL continues its focus on so-called "fissured workplaces," which is a phrase coined by WHD Administrator David Weil in reference to workplaces that "have increasingly contracted out or otherwise shed activities to be performed by other entities through, for example, the use of subcontractors, temporary agencies, labor brokers, franchising, licensing and third-party management." In his book, titled "The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done," Weil advocates for "public agencies to change the way workplace policies are implemented" by "realigning the incentives driving businesses at the lead of industries." The DOL's stated rationale for the newly

issued AI (as found in Weil's blog post released the same day as the AI) reflects wholesale adoption of Weil's views:

Economic forces and technological advancements have been changing the nature of work for a long time. As a result, more and more businesses are changing their organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or other labor providers. We often see these ... arrangements in the construction, agricultural, janitorial, distribution and logistics, staffing, and hospitality industries. The growing variety and number of business models and labor arrangements have made joint employment more common and our need to address it more pressing.

With that introduction, you would expect the DOL to stake out a decidedly aggressive position in the joint employment debate. And you would be correct.

The DOL's AI continues to advance the position (as it did in its 2015 AI) that the concept of joint employment under the FLSA is notably broader than the common law concept of joint employment applied under other labor statutes, which typically turns on the degree of control exercised by the employer. Instead, the DOL's analysis is guided by principles of economic reality and dependence. The AI divides the analysis into horizontal and vertical joint employment, and provides a unique set of factors to be considered in evaluating whether joint employment exists under each framework:

1. The horizontal joint employment analysis is focused on whether two different businesses share control of an individual worker. The DOL recognizes that an individual may simply hold two jobs at entirely separate employers, but states that where those entities are sufficiently related a joint employment relationship may exist such that the worker's hours must be combined to calculate overtime obligations: e.g., if the employee works 25 hours at one restaurant and 25 hours at the other, the employee would be entitled to compensation for 40 hours at his or her regular rate of pay and 10 hours at his or her overtime rate. The AI cites several factors relevant to an evaluation of the economic ties between two (or more) entities, including the following:

- a. Common ownership and overlapping officers, directors, executives or managers;
- b. Shared operational control (e.g., hiring, firing, payroll, advertising, overhead costs) and supervisory responsibilities over workers;
- c. Commingled operations, such as centralized scheduling, payroll, policies, etc.; and
- d. Whether workers are shared between entities and whether they serve the same customers or client base.

2. The vertical joint employment analysis, much like the DOL's 2015 AI on independent contractor misclassification, focuses on the worker's degree of economic dependence. Typically, an arrangement the DOL might view as vertical joint employment involves outsourced services or temporary workers (for example, where an employee of a staffing agency works at a hotel chain in an outsourced function such as cleaning or maintenance). The AI cites several factors relevant to an evaluation of an individual's economic dependence, including the following:

- a. The potential joint employer's right to direct, control or supervise the work performed "beyond a reasonable degree of contract performance oversight";

- b. The potential joint employer's ability to control employment conditions (such as hiring, firing, determining rates of pay, etc.);
- c. The permanency and duration of the relationship, considered in the context of the industry, in which an indefinite, permanent, full-time or long-term relationship "suggests" economic dependence;
- d. The extent to which the nature of the work is repetitive, rote, relatively unskilled or requires no training, all of which weigh in favor of economic dependence;
- e. Whether the work is an integral part of the potential joint employer's business, which has "long been a hallmark of determining whether an employment relationship exists as a matter of economic reality";
- f. Whether the work is performed off-site or on the potential joint employer's premises (regardless of whether those premises are owned or leased); and
- g. The extent to which the potential joint employer assumes administrative functions commonly associated with an employment relationship (handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, etc.).

In analyzing the question of horizontal joint employment, the DOL cites to the joint employment regulation under the FLSA, 29 C.F.R. § 791.2. Implicitly recognizing that no FLSA regulation addresses the question of vertical joint employment, the DOL seeks to rely upon an MSPA regulation as a "useful guidance," which was developed in the context of migrant and agricultural workers. See 29 C.F.R. § 500.20(h)(4). The vertical joint employment factors in particular seem an imperfect fit for the task at hand. For example, the specific function performed by a worker, and whether it is "skilled" or "unskilled," does not speak to whether the worker is economically dependent (rather, the underlying assumption seems to be that less skilled workers are de facto more economically dependent and therefore are more likely to be jointly employed by more than one entity).

Neither list of factors was intended to be all-inclusive, and the DOL was very clear that only some factors need be satisfied for joint employment to exist. Accordingly, the AI could be read to suggest that at least some degree of vertical joint employment risk may exist under the FLSA and MSPA unless an employer can avoid all (or almost all) "joint employment" criteria — for example, where a contractor is hired to perform relatively skilled work, that is "not integral" to the employer's business, off-site, for a finite period of time, and where the employer does not assume administrative functions or supervise and control the work performed. Short of retaining a sculptor to create a miniature likeness of the Venus de Milo outside corporate headquarters (assuming statues are "not integral" to the core business, of course), it is difficult to envision a temporary employment arrangement that would check off all these criteria. In other words, the circumstances in which none of the DOL's indicia of vertical joint employment exist are extraordinarily few and far between.

The DOL's focus on economic dependence of the workers fails to provide an outer boundary on joint employment, and its literal application could sweep within its ambit all but the one lonely example (and those nearly identical to it) provided by the DOL on the last page of the AI of a situation where joint employment was not present (a subcontractor fixing an HVAC system at a condominium). Fundamentally, employers that contract out certain functions (like a corporate cafeteria, for instance) seek to outsource those functions. Yet, application of the DOL's criteria to unskilled cafeteria workers

would most likely result in a finding of joint employment. By taking the position that joint employer liability may be imposed based solely on “economic dependence,” the DOL has adopted a very aggressive stance and imposed on employers precisely the type of potential liabilities that they sought to eliminate by outsourcing in the first place.

The DOL acknowledges the discrepancy between its AI, and the tests applied by some circuit courts of appeal. In fact, the DOL criticizes several decisions that used traditional common law right-to-control factors, while noting that no court has ever relied on the MSPA’s joint-employer test in the FLSA context and even acknowledging that one circuit court has expressly declined to do so. The DOL’s disapproval of a particular test, however, does not change the fact that district courts in any given circuit are bound to follow binding appellate precedent in that circuit. Indeed, the DOL’s AI lacks even the binding effect of a DOL regulation. The DOL’s standard, however, would apply in any DOL investigation.

Although it remains to be seen whether courts will defer to the AI, the AI will govern how the DOL carries out what Weil recently referred to as the DOL’s “nationwide, data-driven strategic enforcement initiative.” Accordingly, employers should assess temporary services and outsourcing arrangements in light of the DOL’s AI to mitigate against the potentially significant financial impact of joint employer liability under the DOL’s “economic realities” test.

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