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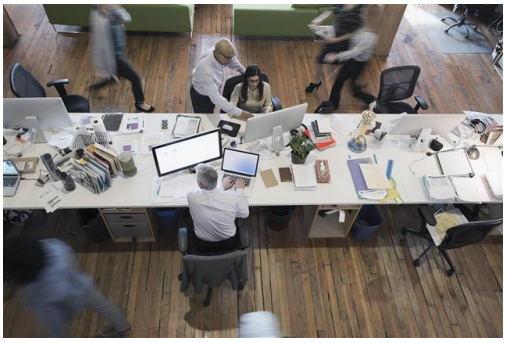
# DOL Takes "As Broad As Possible" View of Joint Employment Under FLSA

On January 20, the DOL issued guidance on when businesses should be classified as joint employers for purposes of the Fair Labor Standards Act. Following on the heels of recent guidance that took an expansive view of who is an employee, the Administrator's Interpretation takes a similarly broad view of who is an employer. Businesses that share employees or rely on subcontracting, outsourcing and staffing agencies will want to review their relationships in light of this guidance.

## Background

The Fair Labor Standards Act (FLSA) establishes minimum wage and overtime pay standards for public and private sector employers. As with other federal statutes — such as the Family and Medical Leave Act — worker protections afforded by the FLSA and a business entity's compliance obligations hinge on the existence of an employment relationship.

As "non-traditional" employment arrangements and new business models evolve, uncertainty surrounding whether a worker is an employee — or a business is an employer — is fueling lawsuits under both federal and state employment laws. In the 21st century "on-demand" economy, joint employment has emerged as a growing concern in contracting, temporary staffing, franchising and other arrangements in which companies use workers but do not directly employ them.



## The Administrator's Interpretation

On January 20, the DOL's Wage and Hour Division (WHD) issued Administrator's Interpretation No. 2016-1 (AI) describing the scope of joint employment under the FLSA, which it enforces. The AI and related FAQs discuss when businesses should be classified as joint employers that share responsibility for complying with federal wage and hour laws and liability for compliance failures. Following on the heels of a 2015 administrator's interpretation

that took an expansive view of who is an employee under the FLSA, the latest guidance takes a similarly broad view of who is an employer. (See our July 16, 2015 *FYI Alert*.)

> **Comment.** Notably, the WHD's guidance on joint employment under the FLSA precedes the release of final overtime rules that are expected to require "employers" to pay overtime to an estimated 5 million more "employees." (See our June 30, 2015 *FYI Alert*.) Highlighting his agency's enforcement agenda, WHD Administrator David Weil blogged, "As the workplace continues to fissure, and as employment relationships continue to become more tenuous and murky, we will continue to identify where joint employment applies and to hold all employers responsible."

The WHD maintains that joint employment has become more commonplace in recent years as the number and variety of business models and non-traditional labor arrangements have grown. While specifically citing the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries, the AI makes clear that increasingly more businesses in all industries could be classified as joint employers.

When joint employment exists, each joint employer is responsible for compliance with the FLSA. Each is individually liable for all wages due (including minimum wage and overtime pay), and the hours worked by an employee for all joint employers would be aggregated for purposes of calculating any overtime due. Although companies can contract out work, in some circumstances, they may still be responsible for ensuring that temporary and contract workers they use are properly paid.

The AI explains how to analyze potential joint employment relationships for FLSA purposes in the two most common scenarios — "horizontal" and "vertical" arrangements. Whether the DOL will employ a horizontal or vertical joint employment analysis, or both, to determine joint employer status will depend on the structure and nature of the relationship at issue.

### Horizontal Joint Employment Arrangements

Horizontal joint employment may exist when the same employee is separately employed by two or more employers that are "sufficiently associated" with or related to each other. The AI cites as examples separate restaurants that are controlled by the same manager and home health care providers that have shared staff and common management. To determine whether horizontal joint employment exists, the analysis focuses on the relationship between the employers. Among the factors relevant to the analysis are whether the potential joint employers:

- Have any common owners
- Have any overlapping officers, directors, executives or managers
- Share control over operations (such as hiring, firing, payroll, advertising or overhead costs)

**NLRB's Joint Employer Standard Differs**

Last August, a sharply divided NLRB replaced its decades-old standard for determining "joint employer" status under the National Labor Relations Act. In *Browning-Ferris Industries of California, Inc.*, the board redefined joint employment to include employers that do not actually control essential employment terms and conditions of a third-party's employees — but may affect them indirectly. (See our *For Your Information* from **September 25 2015**.)

The company has now filed an appeal of joint employer liability with the U.S. Court of Appeals for the D.C. Circuit. In the meantime, businesses that use temporary or contingent worker, franchising, and outsourcing arrangements remain at increased risk of being deemed joint employers for collective bargaining and other purposes by the board.

- Operations are intermingled
- Supervise the work of the other
- Share supervisory authority for the employee
- Treat the employees as a labor pool available to both of them
- Share clients or customers
- Have agreements between them

### Vertical Joint Employment Arrangements

Joint employment may also exist when an employee of one employer performs work for another or one company contracts with an intermediary employer, such as in a staffing agency-client or contractor-subcontractor scenario. Unlike the horizontal joint employment analysis, the vertical joint employment analysis focuses on the economic dependence of the employee and the potential joint employer. In the AI, the WHD signaled its intent to set aside the control test and instead use an economic realities test to evaluate that relationship.

> **Comment.** The DOL's earlier guidance on employee classification also applies an economic realities test to determine whether a worker is an employee or an independent contractor for FLSA purposes.

**Economic Reality Factors.** The FLSA defines "employee" as an individual "employed by an employer" and an "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." The FLSA broadly defines "employ" as including "to suffer or permit to work." Over the years, courts have held that an employer suffers or permits an individual to work if, as a matter of economic reality, the individual is dependent on the employer's business.

**What About Franchise Arrangements?**

The AI is intended to apply to a wide range of industries where a business relies on others to supply necessary labor. The DOL FAQs acknowledge that the existence of a franchise relationship does not create joint employment *per se*. Rather, the DOL will evaluate all potential joint employment relationships using the same analyses discussed in the AI, and determine whether a particular worker is jointly employed by a franchisee on a case-by-case basis.

Rejecting the narrower common law definition of employer that focuses on control, the AI discusses how businesses should evaluate vertical joint employment status using a multi-factor economic realities test. While there is no bright-line test, the WHD offers the following seven factors as indicators of economic dependence to provide a framework for analyzing joint employer status:

- Directing, controlling or supervising the work performed
- Control of employment conditions
- Permanency and duration of the employee's relationship with the potential joint employer
- Repetitive and rote nature of the employee's work
- The extent to which the work performed is an integral part of the potential joint employer's business
- Whether the employee performs the work on premises owned or controlled by the potential joint employer

- The extent to which the potential joint employer performs administrative functions commonly performed by employers (such as payroll processing, or providing workers' compensation insurance, safety equipment, housing, transportation or tools)

In analyzing whether a worker has more than one employer, no one factor will be determinative. Rather, the factors are considered in their totality.

## In Closing

The WHD previously concluded that most workers are employees. Its latest guidance takes a similarly broad view of who is an employer, expanding FLSA protections to more workers and potential joint employer liability to more entities. In light of that, businesses that share employees or utilize third-party management companies, independent contractors, staffing agencies, subcontractors or other labor providers will want to review their relationships with those providers and the economic realities of their working relationships with their employees.

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