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DOL Withdraws Guidance on Joint Employers and Independent Contractors

Yesterday, Secretary of Labor Alexander Acosta announced the withdrawal of two Obama-era Administrator's Interpretations concerning independent contracting and joint employment that took an expansive view of who is an employee or employer. Although the guidance no longer represents the DOL's interpretation of the law, its withdrawal does not change the law. While the DOL's action may signal a shift in enforcement priorities, employers must continue to exercise caution when dealing with employee classification and potential joint employment issues to ensure compliance.

Background

The Obama Administration issued informal guidance on independent contractors in 2015, and on joint employment in 2016. Then head of the DOL's Wage and Hour Division (WHD) David Weil issued the guidance in the form of "Administrator's Interpretations," which replaced the DOL's longstanding practice of issuing Opinion Letters.

On July 15, 2015, the WHD issued Administrator's Interpretation No. 2015-1 – "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." Applying an economic realities test to classify workers as employees or independent contractors, the guidance took an expansive view of who is an employee for purposes of the Fair Labor Standards Act (FLSA). It discussed each of the six factors the WHD would use to determine employee status and provided examples to illustrate how it would apply them in making that determination. (See our July 16, 2015 *FYI Alert.*)

Following on the heels of that employee classification guidance, the WHD issued Administrator's Interpretation No. 2016-1 on the scope of "horizontal" and "vertical" joint employment under the FLSA, taking a similarly broad view of who is an employer. The guidance addressed when businesses – particularly those that use

contracting, outsourcing and staffing arrangements – should be classified as joint employers that share responsibility for complying with federal wage and hour laws. (See our February 11, 2016 *For Your Information.*)

Administrator's Interpretations Withdrawn

On June 7, Secretary of Labor Alexander Acosta announced the withdrawal of Administrator's Interpretation Nos. 2015-1 and 2016-1. Full versions of this Obama-era guidance on independent contracting and joint employment have been removed from the DOL's website.

The DOL said that removing the administrator's interpretations "does not change the legal responsibilities of employers" under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act as reflected in the regulations and case law, and the agency "will continue to fully and fairly enforce all laws within its jurisdiction."

In Closing

The withdrawn guidance no longer reflects the DOL's interpretation of the law with respect to joint employment and independent contractors, but its withdrawal does not change the law. Employers must continue to exercise caution when dealing with these issues to ensure compliance.

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