# The DOL Issues An Administrator's Interpretation On Joint Employment Under The FLSA And MSPA

## Labor & Employment Law Update

By Julie Proscia on January 20, 2016

The Department of Labor's Wage & Hour Division ("WHD") issued an Administrator's Interpretation today that establishes new standards for determining joint employment under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA") and the Fair Labor Standards Act ("FLSA"). The issue of joint employment and who is the employer, for purposes of liability, is one that has become increasingly more contested and is part of the DOL's crackdown on issues ranging from independent contractor status to the proposed rules regarding exempt/non-exempt status.

A finding of joint employment has significant ramifications on a number of areas of policy and procedure, none more so than to wage and hour practices. The purpose of the Administrator's Interpretation is to expand the statutory coverage of the FLSA to small businesses and collect back wages from larger businesses. As such, the Administrator's Interpretation states that "the concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." While the Administrator's Interpretation is impactful on all industries, it specifically identifies the construction (workers who work for a sub-contractor and possibly a general contractor), staffing, agricultural, janitorial, warehouse and logistics, and hospitality industries.

So what is joint employment and when is it found? Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, for compliance with a statute.

While this definition is not new, the DOL interpretation presents two specific categories or routes for joint employment — vertical and horizontal. A vertical joint employment relationship focuses on the employee's relationship with the employer and another intermediary entity, while the horizontal joint employment is defined as a relationship between or amongst two or more employers that "are sufficiently associated or related with respect to the employee such that they jointly employ the employee."

**Vertical Joint Employment**

The most striking announcement occurred in the Vertical Joint Employment arena where the Administrator's Interpretation adopted the "economic realities" test in lieu of the current evaluation. The crux of the economic realities test is an examination as to who the employee is economically dependent on. There is no hard line rule as to this test but rather multiple factors that can be examined. The MSPA regulations have seven economic reality factors that are examined in this determination. These factors include:

1. *Directing, Controlling, or Supervising the Work Performed*

Who exercises the direction, control and or supervision of the employee, whether directly or indirectly?

2. *Controlling Employment Conditions*

Who controls the employees terms and conditions of employment? This factor looks at which entity or entities have the ability to do such things as set wages, discipline, hire or fire the employee.

3. *Permanency and Duration of Relationship*

How long has the employee worked at the entity? Again, although there is no bright line date for the formation of joint employment a longstanding or permanent, full-time relationship suggests economic dependence.

4. *Repetitive and Rote Nature of Work*

What is the nature of the work? Positions that are viewed as repetitive and require little or no training are more likely to tip in the favor of economically dependent.

5. *Integral to Business*

How important is the work to the business? Conversely, if the employee's work is deemed an integral part of the employer's business then the employee may be deemed economically dependent on the potential joint employer.

6. *Work Performed on Premises*

Where is the work performed? Work performed on the potential joint employer's premises is more likely to be viewed as employment that is economically dependent.

7. *Performing Administrative Functions Commonly Performed by Employers*

Are the functions administrative or creative? Administrative functions like processing payroll, workers' compensation insurance or facilities and transportation are areas that are potentially viewed as dependent and thus could be deemed as joint employment.

As in all factor tests, there is a balance and just because the employee meets one factor does not necessarily mean a finding of economic dependence, and thus joint employment, under the vertical analysis. Rather, the factors will need to be examined as a whole.

**Horizontal Joint Employment**

The horizontal joint employment analysis did not substantially change, rather the DOL will continue to utilize the current joint employment regulations and examine the following non-inclusive factors:

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners)?
- do the potential joint employers have any overlapping officers, directors, executives, or managers?
- do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs)?
- are the potential joint employers' operations inter-mingled? (for example, is there one administrative operation for each employer, or does the same person schedule and pay the employees regardless of which employer they work for?)
- does one potential joint employer supervise the work of the other?
- do the potential joint employers share supervisory authority for the employee?
- do the potential joint employers treat the employees as a pool of employees available to both of them?
- do the potential joint employers share clients or customers?
- are there any agreements between the potential joint employers?

The announcement of the Administrative Interpretation is a continuation of the administration's expansion of the joint employer definition. This expansion is not exclusive to the DOL and was most notably seen in the 2015 *Browning-Ferris* decision, where The National Labor Relations Board, through its General Counsel, filed multiple lawsuits against a franchisor for alleged unfair labor practices committed by its franchisees, and by doing so took the broadest possible interpretation of joint employment.

Whether or not joint employment exists is an issue that is fact and position intensive, and one that is not diminishing in the near future. Employers should work with counsel to assess their relationships, employees, and contracts to

ascertain potential areas of weakness and diminish liability. It is never a good thing to be on the hook for someone else's misdeeds.

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