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U.S. DEPARTMENT OF LABOR: JOINT EMPLOYER LIABILITY EXPANDED EVEN FURTHER UNDER THE FAIR LABOR STANDARDS ACT (FLSA)

By Phillip H. Wang

On January 20, 2016, the U.S. Department of Labor's (DOL) Wage Hour Division (WHD) escalated its role in the joint employer arena, issuing new guidance in the form of Administrative Interpretation (AI) No. 2016-1.[1] Not surprisingly, the WHD now proclaims that the "concept of joint employment, like employment generally, 'should be defined expansively' under the FLSA" and as "broad as possible." Further, according to the WHD, the definition of "employ" under the FLSA is "the broadest definition that has ever been included in any one act." Such statements, combined with WHD Administrator David Weil's public criticisms of the modern "fissured workplace", should put employers on notice: DOL fully intends to pursue joint employer liability whenever, wherever and as aggressively as possible.

Why does this matter? Simple – increased exposure for employers. For example, if two or more employers "jointly" employ an employee, the employee's hours worked for all of the purported "joint employers" that week are combined and considered as one employment, including for purposes of calculating whether overtime pay is due. Further, all of the purported joint employers are jointly and severally liable – *i.e.*, each employer is responsible for the entire amount of wages due, and if one employer cannot afford to pay, then then other employer must pay the entire amount.

Further confusing matters, the WHD has now enunciated two different forms of joint employment:

1. "Horizontal" joint employment exists where an employee has employment relationships with more than one employer, and the "***employers are sufficiently associated*** or related with respect to the employee such that they jointly employ the employee." Here, the analysis focuses on the "relationship between potential joint employers."
2. "Vertical" joint employment focuses on the relationship between the employee and the potential joint employer. It exists when an employee has an employment relationship with one employer (*e.g.*, subcontractor or staffing agency), but the employee is economically dependent upon, and basically employed by, the purported joint employer. Here, the WHD has announced that the "economic realities" test should be used.

"Horizontal" Joint Employment

A typical horizontal joint employment scenario exists where (i) there is an established employment relationship between the employee and each of the purported joint employers; and (ii) the employee performs separate work for each of those employers. ***The test focuses on the relationship between the employers.***

Thus, a horizontal joint employment relationship will be found where there are arrangements between employers to share or interchange an employee's services; one employer acts directly or indirectly in the interests of another employer regarding an employee; or where employers share direct or indirect control of an employee by virtue of the fact that one employer is controlled by (or under common ownership with) the other employer.

According to the WHD, relevant horizontal joint employment factors include:

- Intermingling of the joint employers' operations, in areas such as sharing of administrative operations staff.
- Sharing of supervisory authority over employees.
- Sharing of clients or customers.
- Common or shared ownership of the potential joint employers, such as where one employer owns part or all of the other or where they have common owners.
- Overlap in the officers, directors, executives, or managers of the potential joint employers.
- Sharing in control over the joint employers' operations, including hiring, firing, payroll, advertising and overhead costs.
- Supervising of one potential joint employer by the other.
- Treating employees as a pool of employees available to both joint employers.
- Agreements between the potential joint employers.

No single factor is determinative, and not all factors need to be present to find horizontal joint employment. Notably, several of the examples provided by the WHD to illustrate horizontal joint employment involve restaurants. For example:

- Where a waitress works for two separate restaurants that are owned or operated by the same entity, the analysis involves whether the two restaurants are sufficiently related to each other enough to be considered joint employers.
- Horizontal joint employment exists where different restaurants "share economic ties and have the same managers controlling both restaurants."
- Separate companies that employed employees at five different restaurants were joint employers due to common ownership, management and control: the same manager owned one entity, was the majority owner and manager of the other entity, and supervised the area director for all five entities.
- An employee that works at two locations of a restaurant brand, operated by separate legal entities, is nonetheless considered to be jointly employed if the separate entities share the employee, jointly coordinate the scheduling of that employee's hours, use the same payroll processor to pay that employee, and share supervisory power over the employee.
- However, where an employee works at two different restaurants, but there is no arrangement to share employees or operations, or common ownership or management, such a scenario is ***not*** indicative of a horizontal joint employment relationship.

Where there is a finding of horizontal joint employment, each of the employers are jointly and severally liable for compliance with the FLSA, including payment for all hours worked over 40 in a workweek. Thus, if an employee works 30 hours at Restaurant A, and 30 hours at Restaurant B, and the restaurants are found to be joint employers, the employee has worked 60 total hours and is owed 20 hours of overtime pay from the joint employers.

"Vertical" Joint Employment

Vertical joint employment focuses on whether the employee of an intermediary employer (such as a staffing agency) is also employed by another entity (the purported joint employer). In the case of a staffing agency, for example, there is usually an established employment relationship with the employee.

However, that employee's work is usually for the benefit of another entity, such as the company where the employee is placed to work. Here, the focus is on the relationship between the employee and the potential joint employer.

The first determination is whether the intermediary employer is an employee of the potential joint employer. If so, then all of the intermediary employer's employees are employees of the potential joint employer, and there is no need to conduct a vertical joint employer analysis. Thus, if a subcontractor is considered to be an employee of a general contractor, then the subcontractor's employees are also jointly employed by the general contractor.

Next, the vertical joint employment analysis proceeds under an "economic realities" test. Here, the WHD analyzes seven different economic-reality factors which it states as follows:

1. **Directing, Controlling or Supervising the Work Performed.** If the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer. The potential joint employer's control can be indirect, and the potential joint employer need not exercise more control than (or the same control as) the intermediary employer to exercise sufficient control to show economic dependence by the employee.
2. **Controlling Employment Conditions.** If the potential joint employer has the power to hire or fire, modify employment conditions or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer. Such control may be exercised indirectly and the joint employer need not exclusively exercise such control.
3. **Permanency and Duration of Relationship.** An indefinite, permanent, full-time or long-term relationship by the employee with the potential joint employer shows economic dependence.
4. **Repetitive and Rote Nature of Work.** If the employee's work for the potential joint employer is repetitive and rote, relatively unskilled and/or requires little or no training, the employee may be economically dependent on the potential joint employer.
5. **Integral to Business.** If the employee's work is an integral part of the potential joint employer's business, then the employee may be economically dependent on the potential joint employer.
6. **Work Performed on Premises.** The employee may be economically dependent on the potential joint employer if he/she performs work on property owned or controlled by the potential joint employer.
7. **Performing Administrative Functions Commonly Performed by Employers.** If the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing or transportation, or providing tools and materials required for the work, then the employee may be economically dependent on the potential joint employer.

Ultimately, the "core question" is whether the employee is "economically dependent" on the potential joint employer. Thus, where a company contracts with staffing agencies to provide temporary staff, the company may become liable as a joint employer if any of the above factors are present.

Conclusion

Based on the new tests enunciated, it is clear that the WHD intends to aggressively pursue its joint employer policies.

Given this development, and the National Labor Relations Board's similarly expansive view on joint employment, employers should contact Fox Rothschild's labor and employment attorneys to discuss proactive and prophylactic defense measures.

For more information about this alert, please contact Phillip H. Wang at pwang@foxrothschild.com or another member of the Fox Rothschild LLP's New York Labor & Employment Group. Visit us on the web at www.foxrothschild.com.

[1] While the AI does not constitute an actual change in DOL standards and remains only guidance, it nonetheless provides insight on how the DOL will pursue joint employer arguments.

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