Counsel's Advisory

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Vol. 24 No. 1 February 26, 2016

DEPARTMENT OF LABOR ISSUES NEW GUIDANCE ON DETERMINING JOINT-EMPLOYER STATUS

By
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The Wage & Hour Division (WHD) at the U.S. Department of Labor (DOL) has issued an Administrator's Interpretation (AI) establishing new standards for determining joint employment under the federal Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). While it is unknown how much deference court will accord such sub-regulatory guidance, the WHD will likely use the AI as justification for charging a greater number of employers with violations of these statutes on the ground they are joint employers with the offending entity.

The WHD is candid in revealing that the purpose of the AI is to expand statutory coverage of the FLSA to small businesses and collect back wages from larger businesses. To further these goals, the WHD states in the AI: "The concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA."

The AI specifically targets the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries and includes examples from the healthcare, restaurant, and security industries. Although all employers should review their business-to-business relationships in light of these new standards, the targeted industries should be especially concerned.

For the first time the WHD differentiates between "horizontal" joint employment and "vertical" joint employment, and provides guidance on assessing each. Horizontal joint employment involves relationships among two or more employers that "are sufficiently associated or related with respect to the employee such that they jointly employ the employee." To determine whether horizontal joint employment exists, the WHD will apply its current joint-employment regulations and a litany of non-exclusive factors.

Vertical joint employment focuses on the employee's relationship with the employer and another intermediary entity. With respect to vertical joint employment, the AI announces that it will abandon the current FLSA joint-employment regulations, instead applying the "economic realities" test. When applying the economic-realities test to determine vertical joint employment, the WHD will draw from the seven economic-reality factors in the MSPA regulations (which do not, as a legal matter, apply to the FLSA). Hence the agency's reliance on the economic-realities test is not grounded in statutory or regulatory language and it is noticeably absent from the DOL's own regulations on joint employment. The WHD did not pursue the notice-and-comment procedures required under the Administrative Procedure Act to change agency regulations, leaving the AI ripe for challenge.

Although the AI stresses that the test for joint employment under the FLSA differs from the test under other labor statutes, it is unclear whether a finding of joint employment under wage-and-hour laws will carry over in other situations. The National Labor Relations Board has recently taken an expansive view of joint employment in its *Browning-Ferris* decision, and through its General Counsel's filing of multiple lawsuits against a franchisor for alleged unfair labor practices committed by its franchisees.

The issue of joint employment will continue to be a contentious one in 2016. The AI provides some insight into the arguments the WHD may use when pursuing joint-employer liability.

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