JUNE 30, 2017

OPINION LETTERS, JOINT EMPLOYMENT AND OTHER CHANGES AT THE DEPARTMENT OF LABOR

On June 27, in an anticipated move, the U.S. Secretary of Labor Alexander Acosta announced that the Department of Labor ("DOL") will reinstate the issuance of opinion letters. The letters were a practice of the DOL for more than 70 years until 2010 when they were eliminated during President Obama's administration in favor of broader Administrator Interpretations. The opinion letter process allows a requester to submit a request to the Wage and Hour Division of the DOL asking for an opinion regarding how the law applies to a given set of facts. The resulting opinion letters are useful tools for employers because compliance with an opinion letter may form the basis for a "good faith" defense under the Fair Labor Standards Act ("FLSA"). Alexander Acosta has made other recent announcements that are favorable for employers including the withdrawal of Administrator Interpretations on joint employment and independent contractors.

During President Obama's administration, the DOL took steps to broaden the standards governing joint employment. For example, on January 20, 2016, the DOL issued an Administrator Interpretation of joint employment under the FLSA that many considered to be a broad interpretation of the principle and expressly noted that the concept of joint employment "should be defined expansively under the FLSA." The Administrator Interpretation was also a clear signal from the administration of its intention to increase enforcement efforts under the FLSA.

Under President Trump's administration, we have seen the expansion of the joint employment standards begin to change course. On June 7, 2017, Alexander Acosta announced the withdrawal of the DOL's 2016 Administrator Interpretation of joint employment under the FLSA. While the courts will still have the final say, the withdrawal of the Administrator Interpretation means the DOL will revert back to the previous (more relaxed) approach to joint employment under the FLSA. It may also signal relaxed enforcement efforts under the current administration.

Also on June 7, Alexander Acosta announced the withdrawal of a 2015 Administrator Interpretation regarding the misclassification of employees as independent contractors under the FLSA. The Administrator Interpretation adopted a broad and expansive definition of "employee" such that employers attempting to comply with the interpretation could rarely find that the individuals who work for them could be classified as independent contractors. The withdrawal of the Administrator Interpretation is likely a signal that the DOL intends to relax its focus and enforcement actions regarding the misclassification of workers as well.

PRACTICAL TAKEAWAYS

Joint employment standards and independent contractor status are important considerations for employers when utilizing or analyzing various organization and staffing models. The reinstatement of opinion letters and the withdrawal of the Administrator Interpretations are welcomed announcements for employers, but the courts are not bound by the DOL's changes, and some uncertainty remains regarding the current DOL's enforcement efforts. In the meantime, employers are well advised to consider these implications and continue to monitor developments regarding these issues.

If you have any questions or would like additional information about this topic, please contact Brad Taormina at (248) 457-7895 or btaormina@hallrender.com or your regular Hall Render attorney.