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DOL "SUFFERS AND PERMITS" BROAD INTERPRETATION OF "JOINT EMPLOYMENT"

On January 20, 2016, the Wage and Hour Division of the U.S. Department of Labor ("DOL") released Administrator's Interpretation an concerning joint employment under the Fair Labor Standards Act ("FLSA"). The interpretation identifies common scenarios in which two or more employers jointly employ an employee and are thus jointly and severally liable for compliance. It provides a comprehensive guide to understanding the concept of joint employment under FLSA that employers can properly analyze a potential joint employment scenario.

JOINT EMPLOYMENT IS COMMON

Joint employment exists when a person is employed by two or more employers such that the employers are responsible, both individually and jointly, for compliance with a statute. In recent years, the issue of joint employment has arisen in many contexts that are becoming more and more common. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third party management companies, independent contractors, staffing agencies or labor providers. Industries where joint employment is common include: staffing (providing labor to multiple industries); home health care agencies that share staff and common management; construction (workers who work for a sub-contractor and possibly a general contractor); warehousing and logistics; and hospitality. Joint employment carries significant risks for entities that are found to be joint employers because under many employment statutes both employers will be jointly and severally liable for employment law violations.

"SUFFER OR PERMIT TO WORK"

The definition of "employ" under the FLSA is intended to have as broad an application as possible. The FLSA defines the term employ to include the words "suffer or permit to work." Suffer or permit to work means that if an employer requires or allows employees to work, then they are employed, and the time spent is probably hours worked. Under this definition, it is possible for a worker to be jointly employed by two or more employers who are both responsible, simultaneously, for compliance. It is a longstanding principle under the FLSA that an employee can have two or more employers for the work that he or she is performing. The concepts of employment and joint employment under the FLSA are notably broader than the common law concepts of employment and joint employment, which look to the amount of control that an employer exercises over an employee. Unlike the common law control test, which analyzes whether a worker is an employee based on the employer's control over the worker and not the broader economic realities of the working relationship, the "suffer or permit" standard broadens the scope of employment relationships covered by the FLSA.

HORIZONTAL AND VERTICAL JOINT RELATIONSHIPS

There are two ways an employment relationship can be structured that can lead to a joint employment finding – horizontal and vertical.

HORIZONTAL

A horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. The DOL will consider these 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 both employers, 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; and
- Are there any agreements between the potential joint employers.

VERTICAL

A vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider or other intermediary employer) and the *economic realities* show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. The DOL will consider these factors:

- Directing, controlling or supervising the work performed;
- Controlling employment conditions;
- Permanency and duration of relationship;
- Repetitive and rote nature of work;
- Integral to business;
- Work performed on premises; and
- Performing administrative functions commonly performed by employers.

IMPLICATIONS FOR EMPLOYERS

In cases where joint employment is established, the employee's work for the joint employers during the workweek "is considered as one employment," and the joint employers are jointly and severally liable for compliance, including paying overtime compensation for all hours worked over 40 during the workweek. For example, a Registered Nurse ("RN") works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week. If Springfield and Riverside are joint employers, the RN's hours for the week are added together, and both nursing homes are jointly and severally liable for paying the RN for 40 hours at the RN's regular rate and for 10 hours at the overtime rate. The RN should receive 10 hours of overtime compensation in total, not 10 hours from each employer. The employers may, and often do, allocate among themselves responsibility for overtime; however, contractual arrangements among joint employers will not defeat the joint and several liability for compliance. The same goes for joint employer relationships under the FMLA, which uses the same broad definition of employ. And, while the concept of joint employment has been recently addressed by the NLRB (see our analysis here), the DOL makes a point that the statutory definitions are not the same, and one agency's approach does not control the other.

The concept of joint and several liability of joint employers has been around for decades and is not new. What is new is the enhanced scrutiny placed on the relationships by the DOL. Indeed, the DOL expressly states that it may be going after the "deep pockets" when it says:

> *Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.*

The DOL's Administrative Interpretation follows on the heels of its interpretation setting out the criteria for determining independent contractor status where it stated that "most workers are employees and not independent contractors." We discussed that interpretation here.

All of this recent activity by the DOL and the NLRB suggests that employers need to be very careful in structuring their relationships with other entities that provide workers to the organization.

Reference: Administrator's Interpretation No. 2016-1, Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.