Alert
January 22, 2016

Labor & Employment Alert
News Concerning Recent Labor and Employment Issues

COZEN O'CONNOR

DOL Sets Its Sights on Small Businesses in Recent Joint Employer Guidance

The NLRB made a splash when it laid out a new standard to capture employers previously thought to be outside the "joint employer" net with its *Browning-Ferris* decision in April 2015, and now the Department of Labor is making waves of its own. In an Administrator's Interpretation (AI) released January 20, 2016, Wage and Hour Division (WHD) Administrator David Weil outlined two new standards for determining joint employer status under both the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), with a clear aim to bring as many employers as possible within the coverage of those statutes.

Why Joint Employer Status Is a Big Deal

As discussed in more detail below, the AI explains that joint employment may exist where two or more employers separately employ an individual, but are sufficiently related to each other, through that employee, so as to be considered to employ the individual jointly. Alternatively, joint employment may be found where only one entity formally employs an individual, but the individual is economically dependent upon one or more other entities (which typically have a contractual relationship with the actual employer, as is often the case where a staffing agency contracts to supply workers to a third-party client).

Joint employment carries significant ramifications for all employers involved and should not be taken lightly. For example, when an employee is jointly employed by two or more entities, the employee's hours worked are totaled across both or all of the entities for purposes of calculating hours worked in a workweek and resulting overtime pay. This raises a significant operational issue for the employers, who must work together to ensure compliance with the law.

For example, say John Doe works for Employer A for 30 hours between Monday and Thursday in a given week, and then works for Employer B for 15 hours between Friday and Saturday. Must either or both employers pay some or all of the five hours of overtime accumulated for the week, even though each benefitted from less than 40 hours of work by that employee? The likelihood is increased given the expanded test explained in the AI.

While it is up to joint employers to decide between and among themselves how such costs will be allocated, it is in their collective interest to ensure that the employee is paid correctly, because "when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA." This is true regardless of any "disclaimer" or indemnity language in any contract between or among the potential joint employers (in fact, contractor agreements between potential joint employers are often used as evidence to prove a joint employment relationship). The WHD guidance makes clear that joint employment is analyzed using the same rubric under both the FLSA and the MSPA, and that "the concept of joint employment, like employment generally, should be defined expansively" under both statutes and is "notably broader" than it is under common law principles.

WHD Lays Out "Horizontal" and "Vertical" Joint Employment Tests

Look to your left. Look to your right. If you don't see a joint employer there, look up, and then look down. Those are the lengths WHD intends to go to in order to find a joint employer relationship.

A "horizontal" joint employer relationship exists, the AI says, when two or more employers "each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee" to be considered joint employers. In this scenario, the employee has a clear employee-employer relationship with each individual employer, and the focus is on the

Jeremy J. Glenn
Member
jglenn@cozen.com
Phone: (312) 474-7981
Fax: (312) 706-9791

George A. Voegele, Jr.
Member
gvoegele@cozen.com
Phone: (215) 665-5595
Fax: (215) 701-2443

Related Practice Areas

- Labor & Employment

employers' relationship **with each other**. "Examples of horizontal joint employment may include separate restaurants that share economic ties and have the same managers controlling both restaurants," the guidance posits.

The guidance offers the following factors as potentially relevant when analyzing whether a horizontal joint employer relationship exists:

- Who controls the potential joint employers (i.e., does one employer own part of 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, or overhead costs);
- Are the potential joint employers' operations inter-mingled (e.g., 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?

The AI makes clear that this is an illustrative list only, and that not all of the foregoing factors must weigh in favor of joint employment for such a relationship to be found. "Rather, these facts can help determine if there is sufficient indication that the potential joint employers are associated with respect to the employee and thus share control of the employee."

A "vertical" joint employer relationship exists, according to the AI, where an employee of one employer is economically dependent on another employer. In this scenario, typically only one of the employers has a clear employee-employer relationship with the employee, and the focus is on the potential joint employer's relationship with the employee. As the AI makes clear, this conundrum can arise when a staffing company, which employs workers, sends those workers to a third-party client where they perform work for the benefit of the third-party client. The AI also points out that "[t]he vertical joint employment analysis is used to determine, for example, whether a construction worker who works for a subcontractor is also employed by the general contractor, or whether a farmworker who works for a farm labor contractor is also employed by the grower."

When conducting a vertical joint employment analysis, the threshold question is whether the "intermediary employer" (e.g., the individual or entity that formally employs the employee) is itself employed by the potential joint employer. If the answer to that question is yes, then the analysis ends — a joint employer relationship exists. "If the intermediary employer is an employee of the potential joint employer, then all of the intermediary employer's employees are employees of the potential joint employer too, and there is no need to conduct a vertical joint employer analysis."

When a deeper analysis is necessary, the economic realities of the situation drive the calculus. The extent to which the potential joint employer actually **controls** the employee is not determinative, the AI emphasizes. While the guidance notes that different courts analyze different factors under the economic realities test, it notes that the MSPA regulation offers seven factors that should guide the analysis generally:

- The extent to which the potential joint employer directs, controls, or supervises the work performed;
- The extent to which the potential joint employer has the power to directly or indirectly control the conditions of employment;
- The permanency and duration of the relationship between the employee and the potential joint employer;
- The extent to which the employee's work is repetitive or rote;
- The extent to which the employee's work is an integral part of the potential joint employer's business;
- Whether the work in question is performed on the potential joint employer's premises; and

- The extent to which the potential joint employer performs administrative functions (e.g., processing payroll, providing workers' compensation insurance, etc.) on the employee's behalf.

Regardless of whether a horizontal or vertical analysis (or both) is used, the AI concludes by warning that "the expansive definition of 'employ' as including 'to suffer or permit to work' must be considered when determining joint employment, so as to further the statutes' remedial purposes."

Who Should Be Most Concerned?

While the AI notes that joint employment scenarios can occur in any industry, the administrator specifically identifies the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries as being on the WHD's radar. The WHD seems to hope that a broad interpretation of joint employment will create a paradigm of self-regulation in these and other industries, under which "larger and more established" employers will be incentivized to "implement policy or system changes to ensure compliance" among smaller employers.

Lest there be any doubt as to the gravitas with which WHD approaches this issue, the AI states: "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." In a related blog post, the administrator promises: "As the workplace continues to fissure, and as employment relationships continue to become more tenuous and murky, we will continue to identify where joint employment applies and to hold all employers responsible."

What Comes Next

This AI continues the disturbing trend by federal agencies, including the NLRB and OFCCP, to move away from well-established standards without following the notice-and-comment procedures mandated by the Administrative Procedures Act to effect changes to agency regulations. Thus, it remains to be seen how much stock the courts will put in the guidance in the face of inevitable challenge. The AI noted its conflict with existing case law in the Third and First Circuit Courts of Appeal while commenting favorably on expansive joint employer decisions from the Second and Ninth Circuits. Regardless, it would behoove employers of all sizes to take a close look at arrangements, and any contract governing such arrangements, that could be interpreted as establishing a joint employer relationship and proceed with caution to avoid becoming the test case.

The full AI is available here.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.