

Employment Practices Liability

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USDOL Withdraws Joint Employment and Independent Contractor Guidance

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Executive Summary: The recent announcement by Secretary of Labor Alexander Acosta to rescind Administrator's Interpretation Nos. 2015-1 and 2016-1 should allow employers more latitude to hire independent contractors by removing the restrictive interpretations put in place during the prior administration. Additionally, employers will no longer be subject to the U.S. Department of Labor's broad interpretation of joint employment. While employers should be mindful that there are still legal obligations under joint employment and independent contractor principles, employers no longer are burdened with this administrative guidance.

Background: In 2015, the U.S. Department of Labor ("DOL") issued Administrator's Interpretation No. 2015-1 titled "The Application of the Fair Labor Standards Act's 'Suffer and Permit' Standard in the Identification of Employees Who are Misclassified as Independent Contractors." The DOL issued this administrative interpretation to provide guidance as to the proper classification of independent contractors and the considerations for determining whether an employer-employee relationship exists. Under this guidance, the DOL's position that the phrase to "suffer and permit" as defined in the Fair Labor Standards Act ("FLSA") is subjected broad applicability to ensure the widest coverage possible under the FLSA.

An employee is broadly defined under the FLSA as "any individual employed by the employer." 29 U.S.C. §203(e)(1). The FLSA's definition of "employ" includes to "suffer or permit" work. The DOL analyzed the "economic realities test" developed by certain circuit courts to determine whether an individual is economically dependent on the employer, and thus is deemed an employee, or if properly classified as an independent contractor. Based upon that test, the DOL provided that "[i]f the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for himself or herself, (i.e., economically independent from the employer), the worker is an independent contractor." However, the DOL took this analysis a step further by stating that most workers are employees under the FLSA.

This guidance created challenges for employers. Although the Administrative Interpretations are not binding and do not carry the same weight as case law or statutory law, many plaintiff's attorneys and judges relied upon them for guidance. Judges found them persuasive when rendering decisions. The recent rescission of this particular interpretation should allow employers more flexibility to classify individuals in ways that are appropriate for their business without as much concern that nearly every individual will be classified as an employee.

In addition to the rescission of Administrator's Interpretation No. 2015-1, Secretary Acosta also rescinded Administrator's Interpretation No. 2016-1. The Obama administration issued Administrator's Interpretation No. 2016-1 to provide guidance on joint employment under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). Under both the FLSA and MSPA, a worker can be employed by two or

more employers who are both responsible for compliance under the statutes. The determination of whether joint employment exists is important for determining an employer's obligations under the statutes, as well as an employee's rights under the statutes.

Although the DOL had been examining employment relationships for years, in 2016, joint employment became a major focus for the department. It became a goal of the DOL to protect workers in "fissured workplaces" where there was a possibility of more than one employer benefitting from the work of an employee, such as in a relationship involving an employer and a staffing agency or professional employer organization ("PEO").

The DOL stated that the most likely scenarios for joint employment are: (1) where the employee has two (or more) technically separate but related or associated employers ("horizontal employment"); and (2) where one employer provides labor to another employer and the workers are economically dependent on both employers ("vertical employment"). In an effort to provide comprehensive guidance of joint employment, the DOL analyzed both "vertical" employment and "horizontal" employment relationships. The department also provided a list of common scenarios and factors to consider in determining whether a joint employment situation exist. An example of "horizontal employment" is when an employee works for two restaurants that are separate but have the same managers, and the managers jointly coordinate the scheduling the employee's hours so that both can benefit from the employee's work. One example for "vertical employment" is when a business contracts with a staffing agency to engage workers. The workers are employees of the staffing agency, but in some situations, can also be considered employees of the company that contracted with the staffing agency.

Analogous to Administrator's Interpretation 2015-1, this interpretation was extremely broad, making it challenging for employers. The removal of these broad interpretations will allow employers a better opportunity to staff and operate in ways more suitable to their business goals and objectives.

Employers' Bottom Line: As announced by the DOL, "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in this department's long-standing regulations and case law." Employers must continuously be mindful to properly classify employees and independent contractors. Employers must also recognize that they may be a joint employer under certain circumstances. Federal Statutes and case law interpreting those statutes are still in place and remain binding on employers.

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