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McNair Employment and Labor Alert: Joint Employment - What You Need to Know

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As the make-up of the workforce in the United States is evolving with part-time workers, use of third-party management companies, staffing agencies, labor providers, temporaries, or independent contractors to cover both normal business or spikes in a business cycle by employers to staff their workforce, the issue of joint employment is a much more common issue that has to be understood by all employers. On January 20, 2016, the Wage and Hour Division of the United States Department of Labor ("DOL") released an Administrator's Interpretation concerning joint employment under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). While this Administrator's Interpretation is specific to the statutory schemes under the FLSA and the MSPA, it provides some instructive guidance on how federal agencies view joint employment from an enforcement perspective.

First, let's generally define joint employment. 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. This Alert will focus on the FLSA and MSPA statutory guidance.

Not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment. Having made that observation, the DOL will look at two general business structures - "horizontal joint employment" and "vertical joint employment." Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related

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with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. 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 statutes drive the DOL's assumptions and analysis. The statutes define "employee" as "any individual employed by an employer," and "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." The statutes definition of "employ" "includes to suffer or permit to work," with court decisions giving this term (suffer and permit) the broadest definition that has ever been included in any one act. Regulations contemplate joint employment and state that a single worker may be "an employee to two or more employers at the same time."

The DOL's enforcement position is that the joint employment concept is to be interpreted broadly and, in fact, the concepts of employment and joint employment under the FLSA and MSPA 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.

Factors for analyzing the breadth of the joint employment concept in a horizontal joint employment setting are as follows:

- 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?

In contrast to the horizontal joint employment analysis where the focus is the relationship between the employers, the focus in vertical joint employment cases is the employee's relationship with the potential

joint employer and whether that employer jointly employs the employee. The vertical joint employment inquiry focuses on whether the employee of the intermediary employer is also employed by another employer - the potential joint employer. In vertical joint employment situations, the other employer typically has contracted or arranged with the intermediary employer to provide it with labor and/or perform for it some employer functions, such as hiring and payroll. There is typically an established or admitted employment relationship between the employee and the intermediary employer. That employee's work, however, is typically also for the benefit of the other employer.

A threshold question in a vertical joint employment case is whether the intermediary employer (who may simply be an individual responsible for providing labor) is actually an employee of the potential joint employer. Where there is vertical joint employment, there is likely a contract or other arrangement - but not necessarily an employment relationship - between the intermediary employer and the potential joint employer. 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 employment analysis.

However, once it is determined that the intermediary is not an employee, the vertical joint employment analysis should be applied to determine whether the intermediary employer's employees are also employed by the potential joint employer. The vertical joint employment analysis must be an economic realities analysis and cannot focus only on control. The DOL focuses on the following factors in assessing the economic realities (the factors are used because they are indicators of economic dependence and should be viewed qualitatively to assess the evidence of economic dependence):

A. Directing, Controlling, or Supervising the Work Performed.

B. Controlling Employment Conditions.

C. Permanency and Duration of Relationship.

D. Repetitive and Rote Nature of Work.

E. Integral to Business.

F. Work Performed on Premises.

G. Performing Administrative Functions Commonly Performed by Employers.

LESSONS FOR EMPLOYERS

As a result of continual changes in the structure of workplaces, the possibility that a worker is jointly employed by two or more employers has become more common in recent years. In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases, particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer.