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DEPARTMENT OF LABOR ISSUES GUIDANCE ON JOINT EMPLOYMENT UNDER THE FLSA AND THE MSPA

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The Department of Labor (DOL) recently issued an **Administrator's Interpretation** on joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Administrator's Interpretations are issued only infrequently when the DOL believes that additional guidance with respect to a particular issue is necessary. In the Interpretation, the DOL notes, "the growing variety and number of business models and labor arrangements have made joint employment more common," and "additional guidance will be helpful." The DOL says it "encounters these employment scenarios in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries."

Joint employment exists when an employee may be considered to be employed by two or more employers such that the multiple employers can be held responsible, individually and jointly, for compliance with a particular statute. Whether an employee has more than one employer is important in determining the employee's rights and the employer's obligations under both the FLSA and the MSPA. For example, if an employee is jointly employed by two or more employers, the employee's hours worked for all of the joint employers during the workweek must be aggregated for purposes of calculating whether overtime pay is due.

The DOL states that joint employment should be "defined expansively" under the FLSA and the MSPA, and the Interpretation discusses two concepts of joint employment—horizontal and vertical joint employment.

Horizontal Joint Employment: Horizontal joint employment may exist when two or more employers each separately employ an employee and are "sufficiently associated or related to each other with respect to the employee" as to create joint employment. In horizontal joint employment, there is typically an "established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer." The focus, the DOL states, should be on the relationship between the employers, considering the degree of association and the sharing of control between the employers. Facts that may be relevant when analyzing a potential horizontal joint employment relationship include:

- Does one employer own part or all of the other or do they have common owners?
- Do the potential joint employers share control over operations or management?
- 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?

- Are there any agreements between the potential joint employers?

Vertical Joint Employment: Vertical joint employment may exist when an employee of one employer is also economically dependent on another employer. The focus is on whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work. For example, a vertical joint employment relationship may exist when a construction worker has an employment relationship with a subcontractor and the economic realities of the situation show that he is economically dependent on the contractor involved in the work. Facts that may be relevant when analyzing a vertical joint employment relationship include:

- Does the potential joint employer control the employee beyond a reasonable degree of contract performance oversight?
- Does the potential joint employer have the power to hire or fire the employee, modify employment conditions, or determine the rate of pay?
- Is the relationship between the potential joint employer and employee permanent, full-time, or long-term?
- Is the employee's work an integral part of the potential joint employer's business?
- Is the employee's performance of the work on premises owned or controlled by the potential joint employer?
- Does the potential joint employer perform administrative functions for the employee?

Conclusion: The issuance of the Administrator's Interpretation indicates that the DOL will continue to consider the possibility of joint employment in its investigations and look for multiple employers to provide recoveries for employees. In fact, the DOL candidly states that, "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, [the Wage and Hour Division] may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations."

Employers cannot assume that using a staffing agency, a third-party management company, or a labor provider will shield them from compliance obligations under the FLSA or the MSPA. Application of the principle of joint employment – vertical or horizontal – may result in liability for more than one entity with respect to an employee's rights under these statutes.

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