SEYFARTH SHAW

Management Alert

DOL Withdraws Guidance on Independent Contractors and Joint Employers: What It Means and What Employers Should Do Now

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***Seyfarth Synopsis**: United States Secretary of Labor Alexander Acosta recently withdrew the federal Wage & Hour Division's (WHD) Obama-era guidance documents on independent contractors and joint employment. Those documents, known as Administrator Interpretations, set forth WHD's understanding of the concepts involved in determining "employer" status under the Fair Labor Standards Act. By now, you have likely seen the numerous immediate reactions of lawyers and other commentators published in the wake of the withdrawals. Ours was among them. Now that there has been some time to give deeper contemplation to the withdrawals, this Alert offers a more detailed analysis of what happened and what it means.*

What happened last week?

On June 7, 2017, Secretary Acosta announced the withdrawal of the 2015 and 2016 Administrator Interpretations on independent contractors and joint employment. The press release announcing the withdrawal noted that "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the [law], as reflected in the department's long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction . . ."

What were the Administrator Interpretations?

Administrator Interpretations first made an appearance at WHD in 2010. In part, they were replacements for opinion letters, which had been issued for decades in response to specific requests made by the regulated community and could potentially be a complete defense to liability or liquidated damages under the FLSA. In contrast to the fact-specific (and, thus, more helpful to the requestor) analysis provided in opinion letters, the AIs were sweeping statements of policy, intended to "provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees."

The AIs, however, including those on independent contractors and joint employment, were not regulations and did not go through notice-and-comment rulemaking. As a result, they could be (and can continue to be) withdrawn as easily as they were issued.

The AI on independent contractors was issued in 2015 and represented the first comprehensive statement of WHD's understanding of that issue. There, WHD took the multi-factor "economic realities" test that courts commonly used to interpret the issue and added an extremely expansive reading of the FLSA's "suffer or permit to work" definition of "employ." The end result of that combination was intended to severely restrict the use of independent contractors under federal law and to require businesses to reclassify workers as employees subject to the minimum wage and overtime requirements of the FLSA.

In early 2016, WHD issued an AI on joint employment that took a similarly expansive view of the law. Again, WHD applied the economic realities test and explained the scope of joint employment as being "as broad as possible." This created concern among upper-tier contractors, franchisors, staffing agencies, lenders, and private equity firms, among others, that they could be tagged with joint employer exposure in relationships where there had previously been little risk.

As we noted at the time the AIs were issued, however, the true impact of the AIs would be seen as courts had the opportunity to consider WHD's position and determine whether to accept it. As mere guidance documents issued by WHD (as opposed to regulations, for example), the AIs ultimately were reliant upon acceptance by the courts to have any lasting legacy.

What does the withdrawal of the AIs mean?

Initially, the withdrawal is simply the removal of WHD's positions on these issues. There have been no replacement guidance documents issued in which WHD takes a different position.

The withdrawal may also portend a shift in focus by WHD investigators. The AIs took the most expansive understanding of employment possible, ultimately seeking to interfere with traditional contractual and other business relationships. Eliminating that understanding signals to the investigative staff that they should not spend limited resources focused on those relationships.

Finally, the withdrawal of the AIs means that most courts will not even have the opportunity to consider -- whether formally or informally -- WHD's positions. This does not necessarily mean that courts will reach different decisions; it means only that, when reaching that decision, they will be unable to rely upon WHD's statements. Of course, there may be a handful of cases in which AIs continue to have relevance, and, thus, have some continued influence on the development of the law in this area: for example, any pending cases or cases addressing relationships during the short time when the AIs existed. Such cases, however, are likely to have a fairly limited impact given the AIs' withdrawal.

How does this impact employers?

Although the withdrawal of the AIs is certainly good news for employers, it would be premature to celebrate. Neither the issue of independent contractor misclassification nor the concerns over joint employment have been eliminated. Plaintiffs' attorneys will continue to bring misclassification cases; they also will continue to seek to apply joint employment principles broadly. Unless and until WHD issues replacement guidance, it will be up to the courts to create the parameters, and those parameters are likely to be inconsistent, varying from within the federal judiciary and by applicable state laws. And the parameters need not necessarily be more employer-friendly; in some circumstances, the AI standards may actually have been better for employers. For example, in a recent case, the Fourth Circuit appears to have created a new joint employment test that has the potential to force federal courts within that Circuit to conclude that a joint employment relationship exists in almost any case where two or more businesses derive the benefit of work done by an employee of one of them. That case is unchanged by the AIs' withdrawal.

Also unaffected by the withdrawal of the AIs are the myriad standards for independent contractor and joint employment in other federal, state, and local contexts. For example, the EEOC and NLRB have had a significant focus on these issues in the past several years. Although it is certainly possible that (once fully constituted) the EEOC and NLRB, may follow DOL's lead

and dial back their focus, but there is no guarantee that they will do so. Unless and until that happens, employers should continue to comply with those requirements.

In addition, many state governments have had intense focus on the issues, with state legislatures passing laws that, for example, more strictly apply independent contractor standards. State agencies enforcing these laws have taken more aggressive stances on their application and have sought increased penalties for classifying workers as independent contractors. For example, in Massachusetts, the requirements for independent contractor status are particularly restrictive and employers are subject to treble damages for violations; in California, where the standards are similarly restrictive, willful violations are subject to statutory penalties of $5,000 to $15,000; and, in New York City, repeat violations could result in penalties (in addition to damages) up to $25,000. In the potential absence of federal focus on these issues, other state and local governments may follow suit, using the withdrawal as an opportunity to "fill the gap" and pursue a more expansive understanding of the employment relationship, with more consequential penalties for failing to comply with that understanding.

As a result, employers cannot take their eyes off of these issues. They should continue to review independent contractor relationships, to analyze agreements with third parties, and to determine whether they are exercising "too much" control over the employees of other entities, such as subcontractors, franchisees, and down-stream companies with whom they do business.

Finally, employers should continue to monitor development on these issues in federal, state, and local legislatures, governing bodies, and regulatory agencies. Particularly at the state and local level, independent contractor and joint employment issues will continue to be front and center.

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