SEYFARTH SHAW

One Minute Memo®

U.S. Department of Labor Expansively Defines Joint Employment Under FLSA

By Alexander J. Passantino, Richard L. Alfred, Brett C. Bartlett, and Noah A. Finkel

Today, the U.S. Department of Labor's Wage & Hour Division (WHD) issued another Administrator's Interpretation (the AI or "Guidance") that it hopes will have a far-ranging impact on how employers do business throughout our economy. This latest AI describes in great detail the WHD's standards for determining whether two or more businesses are joint employers and therefore may be held jointly and severally responsible for fulfilling minimum wage, overtime, and other obligations under the federal Fair Labor Standards Act (FLSA).[1] And while it highlights the staffing, hospitality, construction, janitorial, warehouse and logistics, and agricultural industries in particular, the AI suggests that the WHD expects these broadened standards to influence employers' behaviors in every industry.

Similar to last summer's guidance regarding the FLSA treatment of independent contractors, the joint employment guidance comes in the form of an Administrator's Interpretation[2] issued by WHD Administrator, Dr. David Weil. Taking another page from Dr. Weil's writings about the impact of the "fissured workplace" on the U.S. economy, this most recent AI (Administrator Interpretation No. 2016-1) expands the definition of who is an employer; whereas his last AI, regarding the potential misclassification of independent contractors, expanded the definition of who is an employee.

Both Dr. Weil's recent statements on joint employment and his past writings on "fissured industries" make the focus of this Guidance unsurprising. Dr. Weil focuses on a number of specific situations in which WHD views joint employment issues as particularly common: shared employees, staffing companies, independent contractors, or "labor providers." He also flags those industries mentioned above. Notably absent from the AI is any reference to franchise relationships; there can be little doubt, however, that the DOL and plaintiff's counsel will attempt to apply the AI to those relationships, as well as to many other contexts such as private equity, real estate holdings, and general contracting.

Many businesses recently embroiled in WHD investigations will have already heard rumblings from investigators about the relationships shared between primary businesses, their vendors, their owners, and their operators. Those rumblings foreshadowed the substance of today's AI. In fact, we anticipate that the AI's most immediate impact will be felt by its use in DOL investigations and enforcement actions, as investigators and their supervisors at WHD now have clear written guidance

---

[1] The guidance also discusses the Migrant and Seasonal Agricultural Workers Protection Act (MSPA). This Alert will focus only on the FLSA.

[2] An Administrator's Interpretation is a form of sub-regulatory guidance issued by WHD. Unlike regulations, it is not subject to notice-and-comment rulemaking during which the regulated community has the opportunity to provide input on a proposal. It is simply a statement of WHD's interpretation of the law and applicable regulations; it does not carry the force of law, Courts and litigants may rely on it for guidance, though the Third Circuit has recently concluded that judges need not follow DOL guidance.

on which they can rely to "educate" employers about the joint employer standards that should determine whether a hotel, for instance, is responsible for the overtime pay of its janitorial service's employees. And, of course, WHD's pronouncement draws significant attention to the issue; and that will almost certainly encourage plaintiffs' lawyers and their clients to rely on the AI to claim that even tenuously related businesses are joint employers who owe them back wages and damages under the law. While the AI is not entitled to judicial deference, it is likely that some courts may agree that the AI justifies findings that multiple businesses are jointly liable for the same wage-hour law violations. At least, we anticipate that some judges might be more reluctant, in consideration of the AI's reasoning, to refuse to dismiss purported joint employers from litigation at early stages.

As persuasive authority, the AI would call for the courts and WHD investigators alike to apply an "expansive" definition when deciding whether two or more businesses are responsible for a single employee's pay and when a business employs a worker who is more clearly employed by a third party. Harkening to its explanation of why most independent contractors are, in its view, actually employees, the WHD explains in today's AI that a business is responsible for work performed by a third party's employee if the economic realities demonstrate an employment relationship and if the business "suffers and permits" the work. Although some might say that is legal jargon, the WHD has explained that it has built the standard on a legacy of defining employer status broadly to protect workers from harm, beginning with broad definitions of when state laws -- and ultimately the FLSA -- could be applied to protect child laborers from overwork and hazardous conditions. If you read Dr. Weil's writings, the explanation is consistent with his view that the regulation of workplace conditions, including pay, should not allow businesses to avoid their legal obligations by engaging third parties whose practices do not comport with the law.[3]

Against this backdrop, WHD today explains the scope of joint employment as being "as broad as possible." The AI then analyzes what it refers to as "horizontal" and "vertical" joint employment.

Horizontal Joint Employment

According to WHD, "horizontal" joint employment exists when there is an established or admitted employment relationship between the employee and each of the employers, and the employee performs separate work or works separate hours for each employer. In horizontal joint employment, therefore, the proper inquiry is whether the two employers are sufficiently related. For example, where a waitress works for two separate restaurants that are operated by the same entity, the question is whether the two restaurants are sufficiently associated such that they jointly employ the waitress.

WHD identifies the following factors, which should come as no surprise to any employer who has had a WHD investigation in the past year or two, as relevant to its inquiry of horizontal joint employment:

- 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);

---

[3] Dr. Weil's views should sound familiar to those grappling with the NLRB's decision in *Browning-Ferris* that expanded the definition of joint employer liability under the NLRA. Although the Board's decision in *Browning-Ferris* purports to stop short of applying the FLSA's economic realities test, which the Supreme Court has described as providing for the broadest definition of "employment" in any U.S. employment law, that decision and today's AI are clearly influenced by Dr. Weil's theory that a business need not be in direct control of a worker's employment to bear responsibility for regulatory obligations governing the worker's employment conditions.

- 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.

Vertical Joint Employment

In "vertical" joint employment scenarios, the focus is on the question of whether the employee is economically dependent on both employers. In other words, the proper inquiry focuses on the relationship between employee and employer. The AI states that this inquiry will be used in the context of whether employees of a subcontractor are also employed by the general contractor, among other relationships.

The AI focuses first on the inquiry of whether the intermediary employer (*e.g.*, the subcontractor or "labor provider") is itself an employee of the putative joint employer. If the intermediary is an employee, WHD states that no further inquiry is necessary: the intermediary's employees likewise are employees of the putative joint employer.

If the intermediary employer is not an employee of the putative joint employer, then the AI suggests that the inquiry turn to the factors enumerated in the regulations governing MSPA to determine whether joint employment exists under the FLSA:

- The extent to which the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight. According to the AI, the potential joint employer's control can be indirect (for example, exercised through the intermediary employer) and still be sufficient to indicate economic dependence by the employee, and the potential joint employer need not exercise more control than, or the same control as, the intermediary employer to exercise sufficient control to indicate economic dependence by the employee.
- The extent to which the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay. Again, the potential joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.
- The permanency and duration of relationship.
- The extent to which the employee's work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training.
- The extent to which the employee's work is an integral part of the potential joint employer's business.
- The extent to which the employee performs the work on premises owned or controlled by the potential joint employer; and
- The extent to which the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work.

In setting forth its belief that these -- and similar -- factors should be used for the joint employment inquiry, WHD expressly rejects appellate decisions "that address only or primarily the potential joint employer's control (power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records)."

What Does This Mean for Employers?

The true legal impact of the AI is not likely to be felt for years, as the courts decide whether -- and how much -- to defer to WHD's pronouncement. Lawsuits seeking to find additional (and deeper pocketed) employers responsible for the same employees are becoming common, however, and it is likely, especially in the environment of massive increases in wage and hour lawsuits over the past decade, that WHD's attention to the issues in the AI will further fuel more court filings. The Guidance issued by WHD today will likely be used by the plaintiffs' bar to try to pin liability for FLSA violations, for example on upper-tier contractors, franchisors, staffing agencies, lenders, private equity firms; at the very least, we expect additional parties to be more commonly named in wage and hour litigation. Court decisions on those issues likely will be the legacy of the AI.

This AI must, of course, be read in conjunction with the summer's AI on independent contractors as an effort to expand dramatically the "economic realities" test and to increase the number of workers who are subject to the FLSA's minimum wage and overtime requirements. Add to these AIs the anticipated massive increase to the salary level required for the "white collar" exemptions, and it is clear that WHD's actions have the potential to fundamentally alter countless business models, without Congressional activity and (in the case of the AIs) without any opportunity for the regulated community to provide its comments on WHD's positions.

Employers who have been following developments in WHD's "fissured industry" (*e.g.*, industries using independent contractors, employee leasing, and franchise relationships, such as restaurants, hotels, staffing companies, cleaning services, and construction, among several others) initiative should view the AI as squarely targeted at their business models. Without question, WHD is now poised to apply an expanded joint-employer standard to target members of those industries, and we expect its investigators' to intensify their focus on members of those industries. So beware if you are:

- An on-line retailer that staffs a product distribution center with staffing company employees
- A national hotel company contracting with local management companies to operate hotels
- A business employing reduced cost janitorial, security, parking, or IT services through third-party vendors
- A restaurant company using a franchise model under which franchisees employ workers
- A construction company using multiple subcontractors on one or more worksites
- A private equity investment firm exercising sufficient control over an investment's operations to ensure a smooth turnaround post-acquisition and beyond
- A hospital system using hourly nurses and other staff at multiple properties, whether or not through a staffing agency

Any business that uses or shares a third-party's workers should review this AI and consider carefully how the WHD and courts applying the factors set forth in the AI would view their business relationships. A business that improperly determines its joint employment responsibility may face significant exposure under the FLSA, including liability for any failure to pay at least the minimum wage for all time worked, failure to pay overtime for work in excess of 40 hours per week, violations of the Family and Medical Leave Act and other statutes that borrow the FLSA's definition of "employee," and violation of the FLSA's

recordkeeping requirements. At least it is worth the time and energy necessary to review vendor contracts and practical relationships so guardrails might be built to protect against that potential liability.

WHD's focus on "fissured industries" has been front and center for several years. Today's pronouncement is a clear statement that WHD's focus will not be changing in this Administration. We anticipate that the WHD, under Dr. Weil's stewardship, will leverage this AI in an attempt to cause businesses to take aggressive steps to ensure that workers performing services for them are properly compensated under federal law, even when the businesses would not traditionally have viewed the workers to be their own employees. Indeed, Dr. Weil has famously written that, "we need to create ripple effects that impact compliance far beyond workplaces where we physically conduct investigations, or organizations to which we provide outreach directly. We need to continue to find ways to make our investigations of one employer resonate throughout that particular sector and influence the behaviors of employers across the entire industry…."

We will continue to inform our clients and the broader employer community about the effect of the AI and to blog about these issues at www.wagehourlitigation.com.

If you have any questions, please contact your Seyfarth attorney, Alexander J. Passantino at *apassantino@seyfarth.com*, Richard L. Alfred at *ralfred@seyfarth.com*, Brett C. Bartlett at *bbartlett@seyfarth.com*, or Noah A. Finkel at *nfinkel@seyfarth.com*.

www.seyfarth.com