

*If you have any questions
about this Advisory,
please contact:*

BETHANY APPLEBY
203.498.4365
bappleby@wiggin.com

PETER LEFEBER
203.498.4329
plefeber@wiggin.com

LAWRENCE PEIKES
203.363.7609
lpeikes@wiggin.com

JOHN ZANDY
203.498.4330
jzandy@wiggin.com

CAROLINE PARK
203.498.4317
cpark@wiggin.com

OTHER LABOR,
EMPLOYMENT AND
BENEFITS
DEPARTMENT MEMBERS

MARY GAMBARDILLA
Chair

KAREN CLUTE

SHERRY DOMINICK

NAJIA KHALID

LISA MCINTYRE

CHRISTINE WACHTER

JOSHUA WALLS

U.S. Department of Labor Expansively Defines FLSA Joint Employment in New Guidance

The U.S. Department of Labor's Wage and Hour Division issued an Administrator's Interpretation ("AI") on January 20, 2016, setting forth the agency's approach to evaluating whether putatively separate entities are joint employers under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act, the latter of which applies to employers registered as farm labor contractors. The AI is issued on the heels of the **National Labor Relations Board's** recent expansion of the concept of joint employment under federal labor law. In a **blog post**, Wage and Hour Administrator David Weil contends the guidance simply "reflects existing policy," but the AI is clearly another step away from well-established standards in favor of an expansive test for joint employment.

Proving an entity is a joint employer can have significant repercussions under wage and hour law. As the AI notes, when two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated for the purpose of calculating overtime pay. Moreover, when a joint employment relationship exists, all joint employers are jointly and severally liable for compliance with the FLSA.

The AI draws a distinction between two categories of joint employment: so-called horizontal and vertical joint employment.

- "Horizontal" joint employment exists where an employee has employment relationships with two or more employers, and those employers are sufficiently related to each other so as to be properly considered a joint employer. The AI gives the example of a waitress working for two separate restaurants that are operated by the same entity; in that scenario, the DOL would assess whether the two restaurants are so associated with or related to each other as to be considered joint employers.
- A "vertical" joint employer relationship exists, according to the AI, "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 [the employee] is economically dependent on, and thus employed by, another entity involved in the work." This might mean, for example, that an employee is jointly employed by both a staffing agency and the company who contracts for the employee's labor through the staffing agency.

Horizontal Joint Employers

The AI's guidance for horizontal joint employers is not a significant departure from existing DOL regulations, which find joint employment among companies where:

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1. Arrangements exist among employers to share the employee's services;
 2. Where one employer acts (directly or indirectly) in the interest of another employer with respect to the employee; or
 3. Where the employers are associated "with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."
- does one potential joint employer supervise the work of the other;
 - do the potential joint employers share supervisory authority over 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.

Expanding on those categories, the AI offers the following additional factors to assess the degree of association between, and sharing of control by, potential horizontal joint employers:

- 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 (e.g., 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);

Vertical Joint Employers

When it comes to vertical joint employers, however, the DOL will apply a different test, known as the "economic realities" test, instead of the test set forth in its regulations. The AI lists the following factors as indicative of vertical joint employment:

- The extent to which the potential joint employer directs, controls, or supervises the work performed;
- The extent to which the potential joint employer has the power to directly or indirectly control the conditions of employment;
- The permanency and duration of the relationship between the employee and the potential joint employers;
- The extent to which the employee's work is repetitive or rote;

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- The extent to which the employee's work is an integral part of the potential joint employer's business;
- Whether the work in question is performed on the potential joint employer's premises; and
- The extent to which the potential joint employer performs administrative functions (e.g., processing payroll, providing workers' compensation insurance, etc.) on the employee's behalf.

The Effect of the AI

While the AI is guidance and not a law or regulation that is binding on courts, it provides insight into the arguments the DOL could make when pursuing joint employer liability.

The AI specifically mentions the staffing, construction, agricultural, janitorial, warehouse and logistics, and hospitality industries, but any business that uses or shares a third-party's workers should review

this AI and consider carefully how their business relationships might fare under the factors set forth in the AI. This includes, but is not limited to, any businesses that outsource work; those that regularly use contractors, such as janitorial services or staffing agencies; and any entity that has an overlapping workforce with an affiliate.

Notably absent from the AI is any reference to franchise relationships. In a Q&A published on its website the DOL wrote that the AI is not directed expressly at franchising, and that "the existence of a franchise relationship, in and of itself, does not create joint employment." That being said, the AI could have implications for franchisors, whose franchise agreements and business practices often have been mistakenly interpreted to suggest some level of control, regulation, or oversight over the employees of their franchisees. Over the past couple of years franchisors have experienced increased efforts to make them joint employers of their franchisees' employees for various purposes. As a result, the franchise community continues to follow developments in this area of law closely.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.