
The U.S. Department of Labor's Shift in Policy: A Win for Businesses?

By Amy C. Lachowicz / Jun 12, 2017

On June 7, 2017, the Secretary of Labor announced that the Department of Labor is withdrawing its Obama-era Wage and Hour Administrator's Administrative Interpretations addressing joint employment and independent contractors. The abandonment of those interpretations, which were aimed at extending protections to workers, marks a significant shift in favor of businesses.

During the Obama administration, the misclassification of employees as independent contractors became a hot button issue, particularly because increasing numbers of employers used contract employees and independent contractors in lieu of the "traditional" employees. The Department of Labor viewed the misclassification of workers as problematic for several reasons. Initially, independent contractors do not have access to benefits that employees would receive, including minimum wage, overtime compensation, family and medical leave and unemployment insurance. The misclassification of workers as independent contractors also manifests itself as a problem for the government in the form of lost tax revenues and non-existent contributions to unemployment insurance and workers' compensation funds.

On July 15, 2015, the Department of Labor issued an [Administrative Interpretation](#), opining that most workers were misclassified as "independent contractors," and providing guidance in the form of an "economic realities" test. That test included various factors to ascertain the nature of the employment relationship and to evaluate whether an employer properly classified the worker as an independent contractor.

Similarly, on January 20, 2016, the Administrator published an [Administrative Interpretation](#) expanding the test for determining whether two employers are the joint employers of a worker. The 2016 guidance addressed the "joint employer" issue, focusing on contract employees who were being shared by more than one employer, and was aimed at sweeping more workers under the Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, and the Family and Medical Leave Act. The guidance set forth a number of factors to ascertain whether a "shared" employee was subject to these statutes.

The National Labor Relations Board echoed the Department of Labor's agenda of expanding protections for workers when it issued the controversial *Browning-Ferris* decision in August 2015, which significantly broadened the definition of "joint employer" to any employer who exercised control - direct or indirect - over employees.

The Department of Labor's guidance on the joint employment and independent contractor misclassification placed a significant burden on employers, many of whom needed to audit and re-assess their employees in painstaking detail. Not surprisingly, most businesses opposed the guidance. According to the Department of Labor, the removal of these 2015 and 2016 guidance letters does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. However, the Department of Labor's shift in policy is a certain victory for businesses since it eliminates the Administrative Interpretations that made it difficult for employers to use contract employees and independent contractors. Employers should still exercise care when using contract employees and independent contractors to ensure the employer can demonstrate that they are not employees or that the employer is not a joint employer with the company that supplies the worker. It remains to be seen whether this change in course will affect the NLRB's *Browning-Ferris* decision, which is on appeal in the United States Court of Appeals for the D.C. Circuit.

If you have any questions about a worker's status as an independent contractor or whether you are a joint employer, please contact Amy C. Lachowicz at (215) 640-8504 | alachowicz@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.