

How the DOL's New Interpretations of Independent Contractors and Joint Employer Will Affect You

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JOINT EMPLOYER RELATIONSHIP

- Joint employment is not a new concept in labor, employment, or wage and hour laws
- Wage and hour interpretations of joint employment date back to at least 1958
- Wage and hour enforcement action using principles of joint employment date back to enactment of the FLSA in 1938

JOINT EMPLOYER RELATIONSHIP

- Joint employment exists when an employee is employed by two or more employers such that the employers are responsible, both individually and jointly, to the employee
- You may be in a joint employer relationship if you and another employer:
 - Share employees
 - Share common ownership, managers or owners
 - Share operational functions such as payroll
 - Coordinate employees' hours and schedules
 - Are involved in hiring or supervising employees
 - An employee's work is integral to both employers

JOINT EMPLOYER RESPONSIBILITIES

- When two or more employers jointly employ an employee, the employee's hours worked in one work week must be aggregated for purposes of calculating overtime
- Joint employers are jointly and severally liable for compliance with and liability under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

ESTABLISHING A JOINT EMPLOYER RELATIONSHIP

- Department of Labor Administrator's Interpretation No. 2016-1
 - Guidance to employers on joint employer relationships under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
 - Joint employment under the FLSA is joint employment under MSPA
- Interpretations are not binding law, but do advise how the USDOL-WHD will interpret and enforce the FLSA and MSPA
- Two tests for joint employment: Horizontal Test and Vertical Test
- Tests are not identical to tests under other statutes (NLRB, OSHA...)

HORIZONTAL JOINT EMPLOYMENT RELATIONSHIP

- Employee has an employment relationship with two or more employers and
- The employers are sufficiently associated or related
- The horizontal analysis focuses on the relationship of the employers to each other

HORIZONTAL JOINT EMPLOYMENT RELATIONSHIP

The following facts are relevant when analyzing potential horizontal joint employers relationships between two or more employers:

- The degree of common ownership of the employers
- The degree of overlapping officers, directors, executives, or managers
- The degree of common control over operations (i.e., hiring, firing, payroll, advertising, overhead costs)
- The extent to which the employers' operations intermingled (i.e., 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)

HORIZONTAL JOINT EMPLOYMENT RELATIONSHIP

Factors continued:

- The extent to which one employer supervises the work of the other's employees
- The degree to which the employer share supervisory authority over their respective employees
- The degree to which the employees for each employer are combined or pooled and used by both
- The degree to which the employers share clients or customers
- The extent to which there are agreements between the employers regarding the employees

HORIZONTAL JOINT EMPLOYMENT RELATIONSHIP: JOINT EMPLOYERS OR NOT?

Mary works part-time at Restaurant A in the mornings and Restaurant B in the afternoons. She is a waitress at both restaurants. The managers at both restaurants are aware that Mary works at both establishments. Restaurant A and Restaurant B do not have an arrangement to share employees and do not have common management or ownership.

HORIZONTAL JOINT EMPLOYMENT RELATIONSHIP: JOINT EMPLOYERS OR NOT?

Mary quits Restaurant A and B to work part-time at two different locations of BOB'S BBQ, a local franchisor's restaurants.

The two locations operate as separate legal entities. Bob is the owner of the both locations of BOB'S BBQ. Mary is not the only employee that works at both restaurants, so for convenience of scheduling, the managers at both restaurant locations coordinate employee schedules. Also for convenience and cost savings, the two locations use the same payroll processor and share supervisors to supervise employees at both locations.

VERTICAL JOINT EMPLOYMENT RELATIONSHIP

- Employee has a direct employment relationship with only one employer and
- Economic realities demonstrate that employee is economically dependent on another, separate and distinct, disassociated employer for the work
- Analysis focuses on economic realities of the relationship between the two employers
- Typical relationships involve one employer that has contracted or arranged to provide another employer with labor and/or services such as hiring or payroll (i.e., staffing or temporary employment agencies)

VERTICAL JOINT EMPLOYMENT RELATIONSHIP

- **Directing, Controlling, or Supervising the Work Performed.** Degree to which the work performed by the employee is controlled or supervised by the indirect employer beyond a reasonable degree of contract performance oversight. More control suggests that the employee is economically dependent on the indirect employer
- **Controlling Employment Conditions.** Degree to which the indirect employer has the power to hire or fire the employee, modify employment conditions, end the work assignment, or determine the rate or method of pay. More control indicates that the employee is economically dependent on the indirect employer
- **Permanency and Duration of Relationship.** An indefinite, permanent, full-time, or long-term relationship by the employee with the indirect employer suggests economic dependence

VERTICAL JOINT EMPLOYMENT RELATIONSHIP

- **Repetitive and Rote Nature of Work.** Degree to which the employee's work for the indirect employer is repetitive and rote, is relatively unskilled, and/or requires little or no training. Those facts indicate that the employee is economically dependent on the indirect employer
- **Integral to Business.** The degree to which the employee's work is an integral part of the indirect employer's business. That fact indicates that the employee is economically dependent on the indirect employer
- **Work Performed on Premises.** The employee's performance of the work on premises owned or controlled by the indirect employer indicates that the employee is economically dependent on the indirect employer. The indirect employer's leasing as opposed to owning the premises where the work is performed is immaterial because the indirect employer, as the lessee, controls the premises

VERTICAL JOINT EMPLOYMENT RELATIONSHIP

- Performing Administrative Functions Commonly Performed by Employers. To degree to which the indirect 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. Those facts indicate economic dependence by the employee on the indirect employer

VERTICAL JOINT EMPLOYMENT RELATIONSHIP: JOINT EMPLOYERS OR NOT?

A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was hired by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers' compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer's schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor's construction projects, whether through ABC Drywall or another intermediary.

INDEPENDENT CONTACTOR MISCLASSIFICATIONS

- DOL working with IRS to investigate employee misclassifications
- In FY 2015, DOL investigations into employee misclassifications resulted in \$74 million in back wages
- The DOL will apply the most broad definition of “to suffer or permit to work” and the Act’s intended expansive coverage

INDEPENDENT CONTRACTORS VERSUS EMPLOYEES

| | EMPLOYEES | INDEPENDENT CONTRACTORS |
|--|-----------|-------------------------|
| Covered by labor and employment statues | Yes | No |
| Covered by worker's compensation laws | Yes | No |
| Eligible for unemployment insurance benefits from employer's account | Yes | No |
| Employers must withhold income tax, FICA/MEDICARE tax | Yes | No |
| Employers must withhold unemployment tax | Yes | No |

HOW IS AN INDEPENDENT CONTRACTOR STATUS DETERMINED?

- Simply designating or calling a worker an independent contractor is not sufficient
- Simply requiring a worker to sign an independent contractor agreement is not sufficient
- Industry custom or practice is irrelevant

ECONOMIC REALITIES TEST

- Is the work an integral part of the employer's business?
 - Looks to whether the work to be performed by the worker is integrated into the main flow or purpose of the work done at the business
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
 - Looks to whether the worker has the benefit of profit or risk of losing money on the agreed-upon project

ECONOMIC REALITIES TEST CONT.

- How does the worker's investment compare to the employer's investment?
 - Based upon whether the worker makes a significant investment in establishing his or her own business by purchasing tools, materials, equipment, or facilities. The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent business
- Is the relationship between the worker and the employer permanent or indefinite?
 - Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee

ECONOMIC REALITIES TEST CONT.

- Does the work performed require special skill and initiative?
 - A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. That a worker is skilled is not itself indicative of independent contractor status
- What is the nature and degree of the employer's control?
 - The employer's control should be analyzed in light of the ultimate determination whether the worker is economically dependent on the employer or truly an independent businessperson. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. But an employer's lack of control over workers is not particularly telling if the workers work from home or offsite

INDEPENDENT CONTRACTOR OR NOT?

Sue provides cleaning services for a cleaning company. Every year, she is issued a Form 1099-MISC. Upon hire, she signed a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for Sue to use although sometimes she bring in her own preferred cleaning supplies. The company is responsible for finding clients.

INDEPENDENT CONTRACTOR OR NOT?

Ken is a carpenter that works for a construction company that is in the business of framing residential homes. Ken never works at the home office; he only works at the site of the residences in which the framing is to be performed. Ken primarily uses his own tools. There are sometimes two or three carpenters working at each residence all of who signed contracts stating that they are independent contractors.

CONCLUSION

- When reviewing an independent contractor relationship, conduct an analysis of the economic realities factors to determine whether a worker is an employee or an independent contractor
 - The factors should not be analyzed in a vacuum
 - No single factor, should be over-emphasized or controls
- Under the DOL's interpretation, most workers are employees under the FLSA's broad definitions

QUESTIONS?



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THANK YOU

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