

Wage and Hour Update – Independent Contractors, Joint Employment and the New Rule on White-Collar Exemptions

Delaware Valley Labor & Employment Conference

Stephanie K. Rawitt
(215) 640-8515
srawitt@clarkhill.com

Stacey C. Schor
(215) 640-8534
sschor@clarkhill.com

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TOPICS TO BE COVERED

- Independent Contractors
- Joint Employment
- New Rule on White-Collar Exemptions
- Hypotheticals and Questions

FAIR LABOR STANDARDS ACT (FLSA)

General Rules

1. Employers must pay a statutory minimum hourly wage
2. Employers must pay employees overtime at the rate of one and one-half (1½) times the “regular rate” of pay for each “hour worked” in excess of forty (40) hours in a seven-day workweek
3. Employers must keep track of the hours worked by employees in a workweek
4. Employees may be exempt from the minimum wage or overtime pay provisions or both

INDEPENDENT CONTRACTOR V. EMPLOYEE

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INDEPENDENT CONTRACTOR V. EMPLOYEE

- What is an employee?
 - Relevant FLSA definitions:
 - Employee – any individual employed by an employer
 - Employ – includes to suffer or permit to work
 - Employees are frequently improperly classified as independent contractors
- Independent Contractor is not defined in the Act

INDEPENDENT CONTRACTOR V. EMPLOYEE

- The benefits of independent contractor status for employee:
 - No income tax withholding
 - 1099 rather than W-2
- The benefits of independent contractor status for employer:
 - Employment laws (including discrimination and wage & hour laws) do not apply
 - No payroll taxes (Employer portion of FICA, Unemployment, etc.), no benefits, no workers' compensation
- Despite the benefits to the workers as well as the employers, in recent years, governmental agencies (federal and state) have been scrutinizing the independent contractor status

INDEPENDENT CONTRACTOR V. EMPLOYEE

- Third Circuit Courts use an “economic reality” test to determine whether an individual is an employee or an independent contractor under the Act
- The economic realities test factors include:
 - **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
 - **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

INDEPENDENT CONTRACTOR V. EMPLOYEE

- The economic realities test factors (continued):
 - **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
 - **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 V. EMPLOYEE

- On July 15, 2015, the Department of Labor issued a Wage & Hour Division Administrator's Interpretation (2015-1) providing guidance on how the DOL will distinguish employees from independent contractors
- Key themes from Administrator's Interpretation 2015-1:
 - The misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States
 - “Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws”
 - “The ‘suffer or permit’ standard was specifically designed to ensure as broad of a scope of coverage as possible”
 - “[A]pplying the economic realities test in view of the expansive definition of ‘employ’ under the Act, most workers are employees under the FLSA”

INDEPENDENT CONTRACTOR V. EMPLOYEE

- Ultimately, the inquiry is whether a worker is economically dependent upon the employer's business (and thus an employee), or whether the individual is in business for him/herself (and thus an independent contractor)
- To be properly classified as an independent contractor, an individual needs to look like he/she is in business for him/herself, offer his/her services to the general public, have a risk of profit and loss, and actually perform work for and receive compensation from several different businesses
- Neither industry practice or custom, having the worker sign an independent contractor agreement, nor providing him/her a 1099-MISC form will protect an employer from a claim of misclassification

INDEPENDENT CONTRACTOR V. EMPLOYEE

Acme Real Estate manages apartment properties. It hires Bob as a janitor and handyman. Acme assigns Bob to maintain three buildings, but Bob may decide how to complete his daily tasks. Bob's daily duties include basic cleaning, as well as cleaning pipes, replacing electrical outlets, and making basic repairs. Acme provides Bob with some tools, but Bob also uses his own tools. In addition to working for Acme, Bob has his own maintenance business on the side. Bob has worked for Acme for 12 years, and each year Acme has issued him a W-2 tax form.

Is Bob an employee or an independent contractor?

- A. Employee
- B. Independent Contractor

INDEPENDENT CONTRACTOR V. EMPLOYEE

AtoB is a company that uses a mobile-based app to connect drivers to users requesting a ride. AtoB conducts background checks on each of its drivers, and while drivers provide their own vehicles, AtoB requires vehicles to be less than 10 years old. The drivers issue their own tax ID cards, pay their own gas, and create their own schedule and routes. Drivers can accept as many or as few riders as they wish. AtoB takes a set percentage of the user payments and pays the rest to the drivers.

Are the drivers of AtoB employees or independent contractors?

- A. Employees
- B. Independent Contractors

INDEPENDENT CONTRACTOR V. EMPLOYEE

InstaFood is a grocery delivery service for the Delaware Valley. Daniel contracts with InstaFood to provide delivery services in Montgomery County only. Daniel has discretion to determine the routes for delivery and to hire other drivers to help him. InstaFood required Daniel to pass a background check and to deliver food packages within a certain time window. Daniel provides his own vehicles but must put an InstaFood decal on his cars. InstaFood pays Daniel based on the number of deliveries he makes and a supplemental fee for every delivery person who wears an InstaFood t-shirt.

Is Daniel an employee or an independent contractor?

- A. Employee
- B. Independent Contractor

JOINT EMPLOYERS

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JOINT EMPLOYERS

- What is an employer?
 - FLSA defines employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee”
 - This broad definition means certain corporate officers, participating shareholders, supervisors, managers or other employees may be individually liable
- What is a joint employer?
 - A joint employment relationship exists where (a) an arrangement exists between the employers to share the employee’s services; (b) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (c) the employers share control of the employee because one employer controls or is under common control with the other employer

JOINT EMPLOYERS

- Why do we care?
 - An entirely independent employer may disregard work performed by an employee for another employer for purposes of complying with the FLSA
 - If an employee is “jointly” employed by two or more employers, all of the employee’s work for each of the joint employers during the workweek is considered as one employment for purposes of the FLSA
 - Joint employers must consider the work performed by an employee for another joint employer when ensuring compliance with the FLSA. Each joint employer is jointly and severally liable for compliance

JOINT EMPLOYERS

- On January 20, 2016, the Department of Labor issued a Wage and Hour Division Administrator's Interpretation (No. 2016-1) providing guidance on Joint Employment under the FLSA and the Migrant Seasonal Agricultural Worker Protection Act ("MSPA")

- The Interpretation emphasized three concepts:
 1. Joint employment should be defined expansively (more so than other labor statutes)
 2. Horizontal joint employment relationships should be analyzed using the common law control test defined in the FLSA regulations
 3. Vertical joint employment relationships should be analyzed using the economic realities test factors identified in the MSPA regulations

JOINT EMPLOYERS

- Horizontal Employment
 - Employers are sufficiently associated or related with respect to the employee
 - Focus is on relationship of the employers
 - Typically, there is an admitted or established employment relationship between the employee and each of the employers
- Examples:
 - Separate restaurants that share economic ties and have same managers controlling both restaurants
 - Home health care providers that share staff and have common management

JOINT EMPLOYERS

- Factors to consider for horizontal employment (common law control test):
 - 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)
 - The extent to which one employer supervises the work of the other's employees
 - The degree to which the employers 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

JOINT EMPLOYERS

Vertical Employment

- Employee has an employment relationship with one employer, and economic realities show employee is economically dependent on another employer involved in the work
- Generally involves one employer that has contracted or arranged to provide another employer with labor and/or services such as hiring or payroll
- Focus is on economic realities between the employee and each potential joint employer and is very broadly interpreted
- Vertical joint employers may have relationship with each other, but tends to be contractual as opposed to employment related
- Examples:
 - Company A contracts for workers with Company B, who directly employs the workers
 - Nurses placed at a hospital by a staffing agency

JOINT EMPLOYERS

Factors to consider for vertical employment (economic realities test):

- **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
- **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. These facts indicate that the employee is economically dependent on the indirect employer

JOINT EMPLOYERS

Factors for vertical employment (continued):

- **Integral to Business:** The degree to which the employee's work is an integral part of the indirect employer's business. This 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.
- **Performing Administrative Functions Commonly Performed by Employers:** The 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. These factors indicate economic dependence by the employee on the indirect employer.

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JOINT EMPLOYERS

Caffeine Café is a corporation which franchises coffee shops. Each franchisee handles its own day to day management of employees, has its own employee handbook and policies, sets its own overtime policies and handles its own payroll. The corporate office requires each franchisee to utilize corporate's logo and menu. Reid is a cashier for one of the Caffeine Café franchises in Center City. Reid works 42 hours a week and is paid no overtime.

Is Caffeine Café Corporation jointly liable for Reid's overtime payments as a joint employer with its franchisee?

- A. Yes
- B. No

JOINT EMPLOYERS

FengCo and ShuiCo are competing warehouses who specialize in furniture manufacturing. Both companies use Zen Staffing to provide labor. Zen Staffing pays wages and employee benefits, while FengCo and ShuiCo control employees' hours of work and duties. Shane works for Zen Staffing and is placed at FengCo for 25 hours per week and ShuiCo for 20 hours per week.

Who is liable for Shane's overtime payments?

- A. Zen Staffing only
- B. FengCo, ShuiCo and Zen Staffing
- C. FengCo and Zen Staffing
- D. ShuiCo and Zen Staffing

JOINT EMPLOYERS

FengCo and ShuiCo are bought out by NRG Company, who provides management services to both warehouses but keeps them as separate legal entities. FengCo and ShuiCo now share certain employees between the locations and jointly coordinate the scheduling of their hours. Shane continues to be placed at FengCo for 25 hours per week and ShuiCo for 20 hours per week.

Who is liable for Shane's overtime payments?

- A. Zen Staffing only
- B. FengCo, ShuiCo and Zen Staffing
- C. FengCo and Zen Staffing
- D. ShuiCo and Zen Staffing

NEW RULE ON WHITE-COLLAR EXEMPTIONS

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WHITE-COLLAR EXEMPTIONS

- DOL regulations exempt certain employees from eligibility for overtime pay
- The white-collar exemptions are those exemptions from the FLSA's minimum wage and overtime pay requirements for the so-called "white-collar" occupations:
 - Executives
 - Administrative employees
 - Professional employees
 - Computer employees
 - Outside sales employees
 - Highly compensated employees (over \$100,000/year)

WHITE-COLLAR EXEMPTIONS

- To qualify for exemption, white-collar employees must meet the salary test and the duties test:
 - The salary test requires that the employee be paid a minimum weekly amount
 - The duties test requires that the employee's job duties primarily involve executive, administrative, or professional duties as defined by the regulations
- To qualify for the executive, administrative, or professional exemptions, employees must be paid a minimum salary of \$455 per week, or \$23,600 annually

WHITE-COLLAR EXEMPTIONS

- On March 13, 2014, President Obama signed a Presidential Memorandum directing the DOL to revise the regulations defining which white-collar workers are exempt from overtime and minimum wage standards
- On July 6, 2015, the Federal Register published the DOL's proposed amendments
- The DOL set forth a 60-day public comment period, and is expected to release its final rules in mid 2016

WHITE-COLLAR EXEMPTIONS

- Proposed Rules – Salary Level Test
 - Increase the minimum weekly salary for white-collar workers from \$455 to \$970 (or \$47,892 annually)
 - This new level represents the 40th percentile of earnings for full-time salaried workers for 2016, and is expected to extend FLSA protection to over 5 million previously exempted employees
 - Exempt employees must continue to meet the duties test

WHITE-COLLAR EXEMPTIONS

Proposed Rules – Highly Compensated Employees

- Increase the annual compensation requirement for exempting highly compensated employees from \$100,000 or more to \$122,148
- This new salary is computed from the 90th percentile of weekly earnings of full-time salaried workers

WHITE-COLLAR EXEMPTIONS

Proposed Rules – Annual Updates

- Impose an automatic annual increase for updating the salary and compensation levels
- The proposed rules did not specify the mechanism for determining the annual increase, but suggested either a fixed percentile increase or an increase based on changes in the Consumer Price Index for All Urban Consumers

WHITE-COLLAR EXEMPTIONS

Best Practices

- Don't delay
- Reevaluate non-exempt employees (duties, salary)
- Determine cost/benefit analysis of overtime v. exempt status
- Analyze all job classifications and actual duties performed for FLSA liability
- Consult with an attorney

QUESTIONS?



Stephanie K. Rawitt

(215) 640-8515

srawitt@clarkhill.com



Stacey C. Schor

(215) 640-8534

sschor@clarkhill.com

THANK YOU

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