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New DOL Guidance on Joint Employment: Navigating Heightened Scrutiny and Minimizing FLSA Liability

Analyzing Horizontal and Vertical Joint Employment, Structuring Agreements With Contractors and Staffing Firms to Limit FLSA Exposure

WEDNESDAY, JUNE 1, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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What's the Risk?

- Wage and Hour Laws
- Affordable Care Act
- Employee Benefit Plan-Related Liability/ERISA
- Employment Discrimination Laws
- Tax Laws (unemployment, work comp, disability)
- Additional Risks
  - WARN exposure
  - Traditional Labor: Employees can have "concerted activity" and can organize to have unions
  - Trade Secrets/Confidential Information
  - OSHA

Joint Employer Issues

- Companies often believe that they can avoid liability by sourcing workers from a third party vendor/staffing agency and/or having that entity be the “employer-of-record.”
- There is no such magical protection

What is a joint employer?

- An employer deemed to be an employer of an individual along with at least one other company. Typically, this occurs when workers are sourced from an employee leasing firm or temporary staffing agency, but could be from larger vendors who provide staff augmentation, and that person works for both the vendor and the hiring company
- Companies deemed to be a joint employer of an individual are fully responsible for any employment related liability arising out of an employment matter, including wage and hour issues, discrimination disputes, or otherwise

Joint Employer Issues: Tests Under Various Employment Laws

- NLRB:
  - Under the old NLRB test, a joint employer was an entity that had control or the right to control an employee's essential terms and conditions of employment, generally meaning hiring, firing, discipline, and direction. TLI, Inc., 271 NLRB 798 (1984); Laerco Transportation, 269 NLRB 324 (1984)
  - Under the new NLRB test, the scope of joint employment has been expanded through the concepts of horizontal and vertical joint employment. DOL A.I. No. 2016-1 (Jan. 20, 2016)
  - The NLRB's new administrative interpretation explains: "In sum, the expansive definition of 'employ' as including 'to suffer or permit to work' rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible." Id.

Joint Employer Issues: Tests Under Various Employment Laws

- Title VII and other federal discrimination laws:
  - Although no single factor is dispositive, factors to consider when determining joint employment status include:
    - Skill required to perform the work;
    - Source of the instrumentalities and tools;
    - Location of the work;
    - Duration of the relationship between the parties;
    - Whether the hiring party has the right to assign additional projects to the hired party;
    - Extent of the hired party's discretion over when and how long to work;
    - Method of payment;
    - Hired party's role in hiring and paying assistants;
    - Whether the work is part of the regular business of the hiring party;
    - Whether the hiring party is in business;
    - The provision of employee benefits; and
    - The tax treatment of the hired party.

  Faush v. Tuesday Morning, Inc., 808 F.3d 208, 214 (3d Cir. 2015)

Joint Employment Tests For FLSA Purposes

- The US Supreme Court's decision in Rutherford Food Corp. v. McComb (331 U.S. 722 (1947) provides the foundation for contemporary "joint-employer" jurisprudence
  - Held that individuals hired by a supervisor in a meat processing plant as independent contractors were employees of the plant owner when they worked alongside other plant employees on a production line, used the plant's equipment, had essentially identical contracts as employees, and performed work exclusively for the plant.
  - Although the Court in Rutherford did not directly address the joint-employer relationship, it made clear that the determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather ***upon the circumstances of the whole activity***." (emphasis added)
- Building on this concept, circuit courts of appeal have subsequently fashioned their own multifactor tests for determining whether a company could be held liable as a joint employer under the FLSA

Joint Employment Tests For FLSA Purposes

- Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. (1983)). In that case, Ninth Circuit established the following test to determine whether a state welfare agency was the joint employer of in-home caregivers:
  - Whether the alleged employer
    - (1) had the power to hire and fire the employees;
    - (2) supervised and controlled employee work schedules or conditions of employment;
    - (3) determined the rate and method of payment; and
    - (4) maintained employment records.
  - Applying these factors, the court held that the agency was an "employer" under the FLSA because it "exercised **considerable control** over the nature and structure of the employment relationship." (emphasis added)

Joint Employment Tests For FLSA Purposes

- The Ninth Circuit and several of its sister circuits have since added additional factors to the Bonnette test to account for the so-called "indirect" control that putative employers may exercise over workers
- The First Circuit has adopted the Bonnette test. See Baystate Alt. Staffing, Inc. v. Herman, 163, F.3d 668, 675 (1st Cir. 1998) (finding that the plaintiffs' complaint does not allege any facts that trigger any of the four Bonnette factors)
- Courts in the Third Circuit appear to approve of the Bonnette four-factor test in joint employer cases. See In re Enterprise Rent-A-Car Wage and Empl. Practices Litigation, 735 F. Supp. 2d 277 (W.D. Pa. 2010) (applying factors that are virtually identical to the Bonnette factors and stating that this test is generally applicable to cases involving a "parent-subsidy relationship")

Joint Employment Tests For FLSA Purposes

- Second Circuit: Three sets of factors recognized to determine joint employment. Greenawalt v. AT&T Mobility LLC, No. 15-949-CV, 2016 WL 945048, at *1 (2d Cir. Mar. 14, 2016)
  - The first test, derived from Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984), looks to whether a putative employer exercises "formal control" over a worker.
    - Because Carter defines employment more narrowly than FLSA requires, satisfying this test is sufficient, but not necessary, to show joint employment
  - The second test, set out in Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988), focuses on whether "the workers depend upon someone else's business . . . or are in business for themselves"
    - This is "typically more relevant for distinguishing between independent contractors and employees," Velez v. Sanchez, 693 F.3d 308, 326 (2d Cir. 2012), than for determining by whom workers who are assumed to be employees are employed

Joint Employment Tests For FLSA Purposes

- Second Circuit (cont'd)
  - The third test, first developed in Zheng v. Liberty Apparel Co., 355 F.3d at 61, which weighed six factors:
    - (1) whether [the manufacturer's] premises and equipment were used for the [putative employees'] work;
    - (2) whether the Contractor[s] . . . had a business that could or did shift as a unit from one putative joint employer to another;
    - (3) the extent to which [the putative employees] performed a discrete line-job that was integral to [the manufacturer's] process of production;
    - (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes;
    - (5) the degree to which the [manufacturer] or [its] agents supervised [the putative employees'] work; and
    - (6) whether [the putative employees] worked exclusively or predominantly for the [manufacturer].

Joint Employment Tests For FLSA Purposes

- The Fourth Circuit adopted a hybrid of the Bonnette test and modified Zheng factors, although it has not explicitly determined what test it will use. See Jacobson v. Comcast Corp., 740 F. Supp. 2d 683 (Md. 2010)
- In Jacobson, cable technicians contracted with installation companies who then contracted with Comcast; the technicians, therefore, alleged that Comcast was their joint employer
  - Applied the Bonnette factors and three of the Zheng factors: (1) whether Comcast's premises or equipment were used; (2) whether the technicians could move as a business unit from one alleged employer to another; and (3) whether the subcontractor's contract with Comcast could be transferred to another subcontractor without material changes to the contract
  - The Court eventually held Comcast was not a joint employer because the technicians still would have had to apply to Comcast, and the technicians did not use Comcast's premises and equipment, the court found that Comcast was not the technicians' joint employer

Joint Employment Tests For FLSA Purposes

- The Fifth Circuit has adopted a modified Zheng test and uses 5 factors to determine joint employer status. See E.E.O.C. v. Valero Ref.-Texas L.P., No. 3:10-CV-398, 2013 WL 1168620, at *4 (S.D. Tex. Mar. 13, 2013) ("Because the Fifth Circuit has not formally defined the control factors to consider, this Court will follow the approach of at least two district courts in this Circuit and use the factors set forth by the Second Circuit.")
- The five factors used are whether the alleged joint employer:
  1. Did the hiring and firing;
  2. Directly administered any disciplinary procedures;
  3. Maintained records of hours, handled the payroll, or provided insurance;
  4. Directly supervised the employees; or
  5. Participated in the collective bargaining process.

Joint Employment Tests For FLSA Purposes

- The Sixth Circuit uses a modified version of the Bonnette factors.
- E.E.O.C. v. Skanska USA Bldg., Inc., 550 F. App'x 253, 256 (6th Cir. 2013) ("To determine whether an entity is the plaintiff's joint employer, we look to an entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.")
- The Seventh Circuit, has established a similar, but not identical test
- E.E.O.C. v. Illinois, 69 F.3d 167, 169 (7th. Cir. 1995) (using a modified Bonnette test to determine "whether the putative employer exercised sufficient control, and whether the 'economic realities' are such that the putative employer can be held liable under Title VII.")
- In particular, the court analyzed five factors as relevant to the applicable economic realities' test:
  1. The extent of the company's control and supervision over the employee;
  2. The kind of occupation and nature of skill required, including whether skills were acquired on the job;
  3. The company's responsibility for the costs of operation;
  4. The method and form of payment and benefits; and
  5. The length of the job commitment.

January 2016 Department of Labor Administrator's Interpretation

- On January 20, 2016, the Department of Labor issued an Administrator's Interpretation addressing the DOL's test to determine whether an entity is the joint employer of a worker under the FLSA
- The Interpretation is not binding. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) (judgment that government agency "interpretive rules" are not subject to notice-and-comment rulemaking, but cautioned that those same rules do not carry the "force and effect of law")
- The Interpretation describe two types of joint employment:
  - Horizontal joint employment
  - Vertical joint employment

Horizontal Join Employment

- "Employee is employed by two (or more) technically separate but related or overlapping employers."
- Focus is on the relationship between the potential joint employers
- According to the AI, if a manager at one company is employed as a manager at another company and the companies are related, then the employees of each company are likely to be considered jointly employed by both companies.
  - **Example 1: Two restaurants that share economic ties and have the same managers controlling both restaurants**
  - **Example 2: Home health care providers that share staff and have common management**

Horizontal Join Employment

Factors

- Common ownership of the potential joint employers
- Overlapping officers, directors, executives, or managers
- Shared control over operations
- Intermingled operations
- One employer supervises the work of the other
- Employers share supervisory authority for the employee
- Employers treat the employees as a pool of employees available to both of them
- Employers share clients/customers
- Agreements between the potential joint employers

Horizontal Join Employment

Vertical Joint Employment

- According to the Interpretation "vertical joint employment" is a situation in which an intermediary entity appears to have an employment relationship with an employee, but "economic realities" suggest or show that the employee may be dependent upon, and thus also be employed by, the additional entity

- "Employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary provider) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work."
  - **Example: Employee is hired and paid by staffing agency, but reports to work at the premises of another entity and an employee of that entity trains and supervises the employee**

January 2016 Department of Labor Administrator's Interpretation

Vertical Joint Employment

- According to the Interpretation "vertical joint employment" is a situation in which an intermediary entity appears to have an employment relationship with an employee, but "economic realities" suggest or show that the employee may be dependent upon, and thus also be employed by, the additional entity

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  - **Example: Employee is hired and paid by staffing agency, but reports to work at the premises of another entity and an employee of that entity trains and supervises the employee**

January 2016 Department of Labor Administrator's Interpretation

- Under the DOL's proposed standard, courts are asked to assess the economic reality of any potential joint-employment situation using, in part, the following factors:
  - whether the purported employer directs, controls, or supervises workers
  - whether the purported employer has the power to hire, fire, and modify the employment conditions, including rates of pay
  - the degree of permanency and duration of the parties' relationship

Factors under the DOL's proposed standard (con't):

- the extent to which the service rendered by the workers is repetitive or rote by nature
- whether the work performed is integral to the overall business of the purported employer
- whether the work is performed on the putative employer's premises
- whether the responsibilities performed by the putative employer are those commonly performed by employers

JOINT EMPLOYMENT REDEFINED: A DANGEROUS TWIST IN COMMON BUSINESS RELATIONSHIPS

January 2016 Department of Labor Administrator's Interpretation

Take-aways for employers:

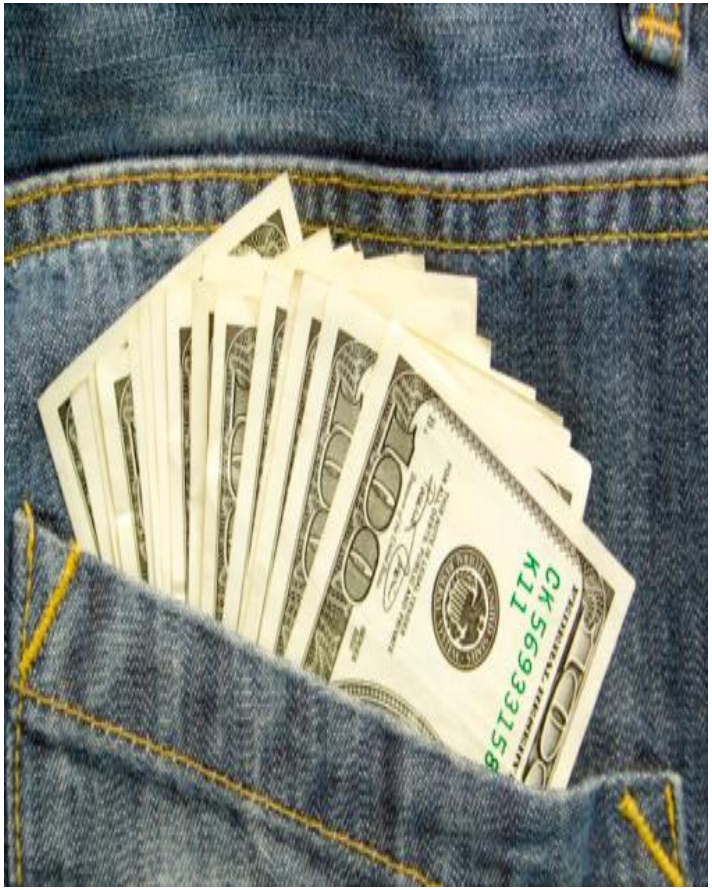
- The DOL's expansive view of joint employment signals the agency's intention to closely scrutinize employment arrangements to identify scenarios in which two or more employers may be jointly liable for wage and hour violations under the FLSA
- Employment counsel must prepare companies to evaluate their existing practices and contracts, and consider how to best minimize the risk of being deemed a joint-employer of another company's workers
- Across the spectrum of business relationships, counsel must be able to explain the new standard and help clients assess their risks of being deemed a joint-employer under the FLSA and the potential impact that could have on their business operations

Joint Employer v. Integrated Enterprises

- Joint Employer legal tests apply to unrelated entities in terms of ownership and finances

- Integrated Enterprise legal tests apply to parent/subsidiary/sister company relationships

Common Usage



- Achieve statutory coverage that might otherwise not exist
- Exert pressure to settle during investigations
- Achieve broader compliance
- Have a deeper pocket to ensure financial recovery

Common Usage

- If you use contingent workers, your classification may be challenged.
  - Independent Contractors
  - Temporary Agency workers
  - Third-Party Service Providers

    (i.e., Delivery Service Providers as just one example)

Joint and Several Liability Is Real

- Joint employers independently share liability for violations by one
- Either can be sued for entire liability (generally not "comparative fault")
- Employee may collect judgment from parties in various amounts until judgment is paid in full
- If any defendant cannot pay equal share, others must pay the difference

Target Arrangements

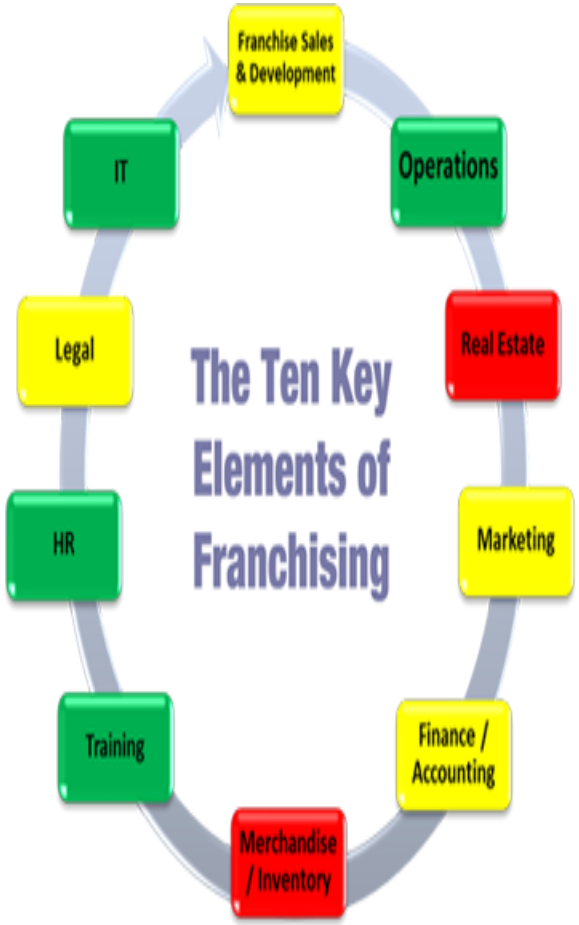
- Traditional staffing agency relationships/temp workers
- Parent/subsidiary relationships
- Contractor/subcontractor/outsourcing
- Predecessor/successor
- Independent contractors (drivers, salespersons)
- Consultants/specialists (IT consulting; project management)
- Franchisor/franchisee (BFI says no, reality more complicated)
- PEOs

Contractor-Sub (Green Jobworks)

- Board reviewing dismissal of claim that demolition contractor and staffing agency named in election petition were joint employers
- Agency provided on-site supervision; agency employees did not require or receive on-the-job training from the general contractor
- Work schedule, hours and breaks were set by the agency within parameters fixed by the project's general contractor
- Contractor played no role in setting compensation, hiring, discipline or termination of agency employees

Franchisors-Franchisees

- Historically, franchisors have been permitted to exercise enough quality control to protect their brand and comply with laws as long as they did not direct or control hiring, firing, supervision or discipline
- Providing optional training or guidance on HR issues, periodic inspections for quality control, setting guidelines with regard to products, liability insurance, operation and presentation, and use of trademarks was generally permitted
- *Nuritionality, Inc. d/b/a Freshii*, Cases 13-CA-134294 (2015)



McDonald's USA, LLC

- Complaint alleges McDonald's is a joint employer of franchisees' employees
- Burdensome subpoenas involving confidential business information
- Focus is on McDonald's alleged coordination or direction of franchisee efforts to respond to protected activities
- Indirect economic control and impact on wages

Wage & Hour Liability Can Be Significant!

- March 2016: an appellate court upheld a $2 million jury award against Vulcan Power Group LLC for a wage claim, retaliation and punitive damages, finding Vulcan to be a joint employer of a salesperson

- September 2015: a district court found Phillips 66 Company to be a joint employer with its security services contractor for a wage and hour class action

Understand Key Risk Areas

- Lack of due diligence with respect to potential business partners
- Written agreements that reserve more control than necessary with respect to terms and conditions of employment
- Lack of training and auditing of “on the ground” practices and supervision
- Nature of work performed/interaction with “regular” employees (performance of core functions)
- Management overlap/shared services/procedures (parent/sub – franchisor/franchisee)

Best Practices

- Review existing contractor relationships and carefully select new contractors, focusing on the contractor's compliance with labor and employment laws.
  - Occasionally audit time records, pay stubs, etc.
  - Determine that contract workers are provided with break and timekeeping policies and training
  - Ensure contractors have established separate terms and conditions of employment, policies and handbooks
  - Determine if contractor uses arbitration agreements with a class/collective action waiver

Best Practices

- Review service agreements with contractors to ensure agreements contain broad indemnification rights:
  - for liability for violations of laws
  - legal fees and costs incurred in defending claims
  - BUT, indemnity only valuable if contractor can fulfill its indemnity obligation AND itself can defend claims

Best Practices

- Service agreement should make clear that terms and conditions of employment are determined by contractor employer (e.g., hiring, firing, supervision of workers, discipline, compensation, etc.)
- Service agreements should be for a limited or fixed period.
- Service agreements should include disclaimer language: no joint relationship
- Service agreements should define project or work to be done and contractor employer should determine staffing levels, means of completing work, and individual workers to be hired

Best Practices

- Any exertion of control should be tied to:
  - customer experience or brand
  - professional method
  - legal requirements
- If feasible, use a fee structure for contract workers that is not based on wage rates and hours of work rendered by contract workers

Best Practices

- Do not use contract workers that are an integral part of the employer's business
  - Distinguish work performed by employees and contract workers
- Do not intermingle operations (e.g., separate administrative functions, payroll, benefits processing)
- Determine whether the contract work can be performed other than on premises owned or controlled by the employer

Best Practices

- Avoid having employees work with or assist contract workers
- Separate supervision of employees and contract workers; no directions or assignments given to contract workers
- No training of contract workers or meetings with contract workers
- Avoid common uniforms, break rooms, time clocks, work hours, work rules
- Dealings should be between companies or supervisory personnel

Thank You

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