# DEPARTMENT OF LABOR ANNOUNCES BROAD INTERPRETATION OF JOINT EMPLOYMENT

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**United States Labor, Employment and Workplace Safety Alert**

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The U.S. Department of Labor, Wage & Hour Division (DOL) issued guidance from its administrator in late January, espousing a broad view of joint employment under the Fair Labor Standards Act (FLSA). The guidance, issued in the form of an "Administrator's Interpretation" (AI),[1] follows the growing trend of government agencies focusing on, and taking an expansive view of, employment relationships. In particular, this AI comes on the heels of the controversial AI on independent contractors, which DOL issued in July 2015,[2] and the NLRB's August 2015 decision in *Browning-Ferris Industries*, expanding joint employment for purposes of the National Labor Relations Act.[3] While the AI applies to employers in all industries, the issue of joint employment may arise more frequently for employers in certain industries, such as construction, hospitality, agriculture, staffing, warehouse and logistics, and janitorial services. Indeed, DOL has specifically identified those industries as ones in which it encounters joint employment. Therefore, employers operating in those sectors should be especially cautious of potential joint employment scenarios and should be prepared to face increased DOL enforcement activity scrutinizing potential joint employment relationships.

At the outset, it is important to understand the implications of a joint employment relationship under the FLSA. Such a relationship would make all joint employers of a worker jointly and severally liable for compliance with FLSA requirements, like the payment of minimum wages and overtime. With respect to overtime pay, when more than one employer jointly employs a worker, that individual's hours of work for all employers are aggregated for purposes of determining the number of hours worked and calculating the amount of overtime pay. In the context of franchises, some franchisors could be considered joint employers with their franchisees.[4] As a practical matter, DOL may look to the larger or more established employer in a joint employment relationship to recover back wages when a smaller, more direct employer cannot — or does not — pay all wages due. Similarly, in individual or collective actions, plaintiffs may look to the employer with deeper pockets to recover wages that were not properly paid by the primary employer.

To determine when a business could face this liability as a joint employer, there are a number of considerations. First, employers should be aware that the definition of "employ" is very broad under the FLSA, and DOL views the joint employment analysis through the lens of this broad definition.[5] The AI goes as far as to say that this "expansive definition … ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible." Employers should then be aware that there are two possible routes to a finding of a joint employment relationship, referred to as "horizontal" and "vertical." The structure and nature of the relationships at issue will determine the applicable route.

**Horizontal.** Horizontal joint employment applies when a worker has employment relationships with two or more employers, and the employers are sufficiently associated or related with respect to the worker that they jointly

employ him or her.
This type of joint employment relationship may arise, for example, when a server works different shifts at two restaurants that have common ownership and management. The implication of joint employment here would be that, if the employee's combined hours for the week exceed 40, both employers would be jointly and severally responsible for overtime pay.

Fundamentally, the relationship between the potential joint employers will determine whether there is horizontal joint employment. Such a joint employment relationship may exist when (1) the potential joint employers have an arrangement to share the worker's services, (2) one potential joint employer acts in the interest of the other potential joint employer in relation to the worker, or (3) the potential joint employers are associated and may be deemed to share control of the worker, directly or indirectly, by virtue of the fact that one employer controls, is controlled by, or is under common control with the other employer. When determining whether the potential joint employers share control, or the extent to which they are associated with each other, DOL may consider the following:

- 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 intermingled (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)?
- Does one potential joint employer supervise the work of the other?
- Do the potential joint employers share supervisory authority for 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?
- Are there any agreements between the potential joint employers?

**Vertical.** Vertical joint employment applies when a worker has an employment relationship with one employer, and the economic realities show that he or she is economically dependent on, and thus also employed by, another entity involved in the work.

In the typical vertical joint employment situation, the potential joint employer has contracted with an intermediary employer to provide it with labor or to perform specific functions, such as payroll. Examples could be a temporary staffing agency providing workers to a company, or a subcontractor providing workers for a larger contractor's project. The AI notes that it is possible for the intermediary employer to qualify as an employee of the potential joint employer itself. If the intermediary employer so qualifies, then all of the intermediary's employees will also qualify as employees of the potential joint employer.

 

The fundamental inquiry in a vertical joint employment analysis is the relationship between the employee and the potential joint employer. The AI explicitly rejects a control-based analysis, which has been endorsed by some courts, and which would focus on factors like the purported joint employer's power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay and maintenance of employment records.[6] Instead, the AI focuses on an analysis of the economic realities, which look to whether the employee is economically dependent on the potential joint employer. In conducting this analysis, the AI suggests that the economic realities factors set forth in MSPA regulations (i.e., regulations addressing the employment relationship in the context of certain migrant and seasonal agricultural workers) are probative. Those factors include the following:

- How much control or direction the potential employer has over the employee.
- How much control the potential employer has over employment conditions, such as hiring and firing and determining the rate and method of pay.
- The permanency and duration of the relationship between the employee and the potential joint employer.
- Whether the employee's work is repetitive, rote, or unskilled, so as to suggest the employee is economically dependent on the potential joint employer.
- Whether the employee's work is integral to the potential joint employer's business.
- Whether the employee works on premises owned or controlled by the potential joint employer.
- Whether the potential joint employer performs administrative functions for the employee, such as handling payroll or providing tools and materials required for the work.[7]

Finally, noting changes in the structure of modern workplaces, the AI concludes that the possibility of joint employment has become more common in recent years. DOL is clearly paying increased attention to the issue of joint employment, and so should employers in every industry — especially those industries identified by DOL: franchisors, employers associated in some way with another entity, and employers who use a staffing agency, contractor, or other intermediary to provide labor. By staying abreast of developments in this area of the law, companies can better understand their potential exposure and evaluate the best way to structure their relationships with vendors, partners, contractors, and employees.

**Notes:**

[1] The full text of this guidance, designated as "Administrator's Interpretation No. 2006-1," is available here. The AI also addresses joint employment under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

[2] Administrator's Interpretation No. 2015-1. For an overview of this guidance, see the K&L Gates Alert by Amy L. Groff entitled "DOL Issues New Guidance on Independent Contractors," available here.

[3] *Browning-Ferris Indus. of California, Inc., d/b/a Bfi Newby Island Recyclery & Fpr-II, LLC, d/b/a Leadpoint Bus. Servs. & Sanitary Truck Drivers & Helpers Local 350, Int'l Bhd. of Teamsters, Petitioner*, 362 NLRB No. 186 (Aug. 27, 2015). For an overview of this case, see the K&L Gates Alert by Michael A. Pavlick and Kaitlin C. Dewberry entitled "NLRB Broadens Joint Employment Standard," available here.

[4] For a discussion of some other related issues facing franchisors, see the K&L Gates Alert by Carlos L. White, John M. Farrell, and Reese Brammell entitled "'Twas the 2016 Franchise Renewal Season … and Labor and Regulatory matters are stirring throughout the franchise model," available here.

[5] *See* 29 U.S.C. § 203(g) ("employ" includes "to suffer or permit to work"). The AI also cites *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), for the proposition that the FLSA's definition of "employ" is "the broadest definition that has ever been included in any one act."

[6] *See, e.g., In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468–69 (3d Cir. 2012); *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998). DOL's AI expressly rejects the approach of these federal circuit courts, deeming them "not consistent with the breadth of employment under the FLSA."

[7] *See* 29 C.F.R. § 500.20(h)(5)(iv).

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