Department of Labor Issues Broad "Joint Employment" Guidance

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The Department of Labor's Wage and Hour Division (WHD) took its place next to both the National Labor Relations Board and Occupational Safety and Health Administration last week by declaring in a new Administrator's Interpretation that "the concept of joint employment, like employment generally, 'should be defined expansively.'"

The Interpretation, which courts are not required to follow, but which sent a strong message to employers, noted two separate types of joint employment: vertical and horizontal. An example of joint vertical employment would be a worker placed in a company to do janitorial work, whereas horizontal joint employment would exist when an employee is jointly employed by two different restaurants that are organized as two different corporate entities, but share common operations.

The WHD argued that in determining whether a horizontal joint employment relationship exists, the focus should be on the relationship between the potential joint employers with respect to the employee. The Interpretation then listed factors it deemed relevant to determining the degree of association between potential horizontal joint employers, including:

- 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 inter-mingled? (For example, 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?)

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- 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?

In contrast to the horizontal joint employment analysis, in vertical joint employment cases the WHD proposed focusing on the employee's relationship with the potential joint employer and whether that employer jointly employs the employee. The WHD stressed that the vertical joint employment analysis must be an economic realities analysis and, according to the DOL, courts should perform that analysis using factors promulgated in the 1997 amendments to the Migrant and Seasonal Agricultural Worker Protection Act, including: 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; 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; and whether the responsibilities performed by the putative employer are those commonly performed by employers

According to the Interpretation, provided that the factors of joint employment are satisfied, every employer in the "employment" chain would be individually and jointly responsible as joint employers under the Fair Labor Standards Act (FLSA) for any violation committed by any other entity in the chain.

Any employer that believes it may be in a potential joint employer relationship with another entity should talk to employment counsel regarding how to best protect themselves against possible lawsuits

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arising from joint employment.

For more information, please contact Catherine B. Burgett, Amy S. Wilson, or any attorney in Frost Brown Todd's Labor and Employment Practice Group.

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