CLIENT ALERT: USDOL Rescinds Administrative Guidance Regarding Joint Employment and Independent Contractor Classification – By Desiree Murphy

On June 7, 2017, U.S. Secretary of Labor Alexander Acosta announced that the U.S. Department of Labor (the "DOL") has rescinded its 2015 and 2016 guidance on joint employment and independent contractors.

Issued during the Obama administration, both of these administrative interpretations effectively expanded the criteria for when employers may be held liable for another company's wage and hour violations. Specifically, in the July 15, 2015 Administrative Interpretation, which dealt with the issue of independent contractor classification, the DOL broadly interpreted the Fair Labor Standards Act's ("FLSA") regulations in a manner where most workers engaged as "independent contractors" would qualify as employees. To determine an employee's status, the DOL articulated a six factor "economic realities" test. (See previous MBJ client alert: U.S. Department of Labor Issues New Formal Guidance on Independent Contractor Classification under the Fair Labor Standards Act). In doing so, the DOL emphasized that the nature and extent of the employer's control over the worker was only one part of the analysis, and created a broader determination focusing on whether a worker was economically dependent on the employer.

Approximately six months later, the DOL issued Administrator's Interpretation 2016-1, which sought to broaden the definition of "joint employers" under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). In the 2016 guidance, the DOL identified two types of potential joint employer relationships: (1) "vertical joint employment," or when the worker is directly employed by one company and performs work for another; and (2) "horizontal joint employment," or where the worker is directly "employed" by two companies that are interrelated. (See previous MBJ client alert: Wage & Hour Division Issues Expansive Guidance on Joint Employer Liability). The

DOL embraced this broad theory of joint employment to "achieve statutory coverage, financial recovery, and future compliance [with the FLSA]." Notably, the 2016 guidance was issued after the National Labor Relations Board ("NLRB") issued its decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), in which the NLRB held that a company could be considered a joint employer under the National Labor Relations Act ("NLRA") even if the company only indirectly controls the terms and conditions of employment.

It is not clear at this time if the DOL is planning to implement new guidance, or if it will merely withdraw its previous guidance with no further interpretive input. With this guidance withdrawn, employers must remember that these Obama Administration guidelines were merely aggressive interpretations of rules that continue to apply to employers. Indeed, employers cannot reply upon "independent contractor" designations where the employer still controls the actions of the "contractor." (Indeed, state law in Massachusetts separately mandates significant restrictions on independent contract designation in Massachusetts. M.G.L. c. 149, Section 148B). Similarly, employers should still aggressively monitor its agreements with other employers where they, in part, continue to control aspects of the performance of the employees of the separate employer. Both the NLRB's *Browning-Ferris Industries* case and other laws may bring joint employer obligations to a third-party company.

Employers should contact MBJ with questions about how these changes affect their business.

Desiree Murphy is an attorney at Morgan, Brown & Joy, LLP, and may be reached at 617-523-6666 or at dmurphy@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was originally published on June 19, 2017.