CLIENT ALERT: Wage & Hour Division Issues Expansive Guidance On Joint Employer Liability

On January 20, 2016, the Wage and Hour Division of the U.S. Department of Labor ("WHD"), issued a sweeping interpretive bulletin that applies a broad construction of joint employer liability for violations of federal wage and hour law under the under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). In response to the WHD's observation that joint employment scenarios are becoming more common and potentially exposing workers to wage and hour violations, Administrator David Weil issued "Administrator's Interpretation No. 2016-1." This guidance targets employment situations where more than one business directly benefits from the work being performed and where workers provide services to two or more related corporate entities. For example, a housekeeper at a hotel may report to and be paid by a third-party contractor to whom the hotel has delegated housekeeping functions, yet wear a uniform with the hotel's logo and take direction from hotel staff. The WHD emphasized that it has seen these types of joint employer scenarios in all industries, including construction, agriculture, janitorial, warehouse, staffing, and hospitality.

Determining whether an employee works for one or more employers is critical in determining the employee's rights – and the employers' obligations – under the FLSA and the MSPA. When an employee is jointly employed by two or more employers, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment for overtime calculation purposes. Additionally, when a joint employment relationship exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA. The Administrator's Interpretation provides guidance to determine when a joint employer scenario exists.

The Administrator's Interpretation promotes two main policy goals: first, ensuring that so-called "fissured workplaces" do not have the effect of depriving employees of overtime pay; and second, ensuring that sophisticated companies that directly benefit from an employee's labor cannot use complex staffing mechanisms to avoid exposure for wage-and-hour violations. Indeed, the Administrator's Interpretation has put the onus on large businesses to police the misdeeds of contracted parties: "Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance."

Who is a "Joint Employer?": Horizontal and Vertical Joint Employment

Not every subcontractor or labor provider relationship constitutes a "joint employer" scenario under the FLSA or MSPA. However, the recent guidance emphasizes that the joint employer analysis should be applied broadly. The Administrator's Interpretation discusses two types of joint employment: horizontal and vertical. Horizontal joint employment exists where an employee establishes

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relationships with two or more employers who are "sufficiently associated or related with respect to the employee such that they jointly employ the employee." An example given by the WHD of a horizontal joint employment relationship is a scenario in which an employee works for separate restaurants that share economic ties and have the same managers controlling both restaurants. This fact-intensive inquiry looks beyond the actual terms of employment itself and focuses on the relationship between the employers:

- Do the employers share common ownership?
- Do the employers share officers, directors, executives, or managers?
- Do the employers share overhead costs and control over operations and personnel decisions?
- Are administrative, financial, and human resources functions intermingled?
- Does one employer supervise the work of another?
- Do the employers share supervisory authority for the employee?
- Do the employers view employees as pooled labor, available to work on behalf of either employer?
- Do the employers share a common customer base?
- Are there any written or verbal agreements between the employers?

While these factors are not individually dispositive, the Administrator's Interpretation makes clear that only entities that are acting "entirely independent of each other and are completely disassociated" will avoid classification as joint employers. Horizontal joint employers will be jointly and severally liable for one another's violations of wage-and-hour laws. Also, they will be required to aggregate the weekly hours of each jointly-employed worker for purposes of establishing entitlement to overtime pay.

By contrast, in a vertical joint employment scenario, the employee performs only one job but the employee's labor directly benefits two or more employers. Common examples of vertical joint employment are staffing agencies that place employees on long-term assignments under the supervision of a contracting entity, subcontractors that employ construction workers who work under the supervision of a general contractor, and entities that employ migrant farm workers to serve under the supervision of a grower.

Again, the WHD takes an expansive view of vertical joint employment relationships. An important factor in the analysis is control, taking into account these factors:

- Is the work performed by the employee controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight?
- Does the potential joint employer have the power to hire and fire the employee, set working conditions, or determine the rate or method of pay?

However, the Administrator's Interpretation emphasizes that lack of control does not necessarily mean that a joint employer relationship will not be found. Rather, the WHD uses an "economic realities test" to determine the degree to which the employee is economically dependent on the putative joint employer. In addition to the factors set forth above, the Administrator's Interpretation

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takes into consideration the following:

- Is the employment relationship indefinite in duration or for a lengthy term?
- Is the employee's work rote or unskilled?
- Is the employee's work an integral part of the putative joint employer's business?
- Does the employee perform work on the premises of the putative joint employer?
- Does the putative joint employer perform administrative functions such as handling payroll, providing workers' compensation insurance, equipment or transportation?
- Does the employee exclusively work for the putative joint employer?

In short, if a company directly benefits from an employee's services, and the employee in turn depends on the company for his or her livelihood, the likelihood is high that both the nominal employer and the contracting entity will be considered joint employers. As such, they will be jointly and severally liable for wage-and-hour violations involving the employee, regardless of the knowledge by the larger or more sophisticated party of such violations or the degree of control over the entity committing the violations. Again, all of the employee's hours for work performed for vertical joint employers will be aggregated for overtime calculation purposes.

Recommendations for Employers

The Administrator's Interpretation takes a dim view of what it deems "tenuous and murky" employment relationships between companies, intermediaries, and laborers. Employers who turn to alternative staffing arrangements to save costs should be aware that increased complexity does not necessarily translate into reduced legal exposure. To the contrary, companies that have put a premium on their own compliance now face increased exposure to wage-and-hour violations by incautious intermediaries with whom they contract. Similarly, businesses whose employees also perform work for related entities must actively monitor the working hours of shared employees and ensure that sufficient controls are in place to ensure the joint employers' compliance with FLSA's overtime pay provisions.

Employers who are considered joint employers under the new guidance and fail to pay their employees accordingly can face significant penalties for overtime violations. Employers should think carefully about whether they could be considered a "joint employer" under this guidance, even if they assert little or no control over some employees. Employers should engage in a risk and liability analysis to minimize exposure in the event they are categorized as a joint employer for FLSA purposes. Businesses that are involved in intermediary worker arrangements, such as temporary staffing agencies, should analyze whether there are actions they may take that are less likely to classify them as "joint employers" under the new guidance.

Employers should contact their MBJ attorney to discuss the potential implications of the Administrator's Interpretation on their business and for assistance in complying with the FLSA under the new guidance.

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