Could It Be A Game Changer?
Joint Employers and the Fair Labor Standards Act©

On January 20, 2016, the United States Department of Labor's Administrator, David Weil, issued his first Administrative Interpretation ("AI") of 2016. The AI addresses the liability for overtime violations under the Fair Labor Standards Act ("FLSA") in joint employment relationships that exist in a variety of workplaces today, defines the difference between the different types of joint employment relationships, and cites the historical application of the joint employer test.

If your business does not use a contract staffing firm, a temporary staffing agency, own related businesses at which employees work in both, or share employees with any other business, joint employer liability under the FLSA may not be of concern to your business. However, if any of the above examples apply to your business, then the AI should be of concern or at least of interest.

In particular, the AI identifies two types of joint employment arrangements and categorizes them as horizontal and vertical joint employment relationships. The distinction is important.

A horizontal joint employment relationship is one where an employee works for different business entities controlled by or sufficiently related to one another to constitute a joint employer. For example, subsidiary corporations of a holding company that has employees provide services to each subsidiary that are owned by the same entity. Another example would be two entities owned by the same owners with common management.

A vertical joint employment relationship is one where unrelated parties have entered into a contract whereby one entity provides employees but the business providing the employees does not control the work of the employees, for example, a temporary staffing agency. In the case of a temporary staffing agency, the agency provides an employee to a business to fill a specific open position for that business and the business directs the work of the employee, but the temporary company remains an employer of the temporary employee. There are other types of business relationships or staffing arrangements that may fall into this category as well.

Why does it matter whether your business is considered a joint employer? Because joint employers are jointly and severally liable for violations under the FLSA for a failure to pay overtime to nonexempt employees who work more than 40 hours in a workweek. The joint employer test is not new and it has historically been used to prevent abuses of the FLSA. One example of an abuse would be to have an employee work 50 hours divided between related companies with each issuing a separate paycheck to avoid paying overtime. It does not matter that the two entities have their own federal employer identification numbers. What matters is the relationship and ownership of the entities.

In both horizontal or vertical joint employment situations, the analysis focuses on the economic realities of the relationship and not on what party controls the work of the employees. Under the economic realities test the focus is on economic dependence, i.e. what party is the

employee dependent upon for the job. If the employee is dependent upon both parties for the job, a joint employment relationship likely exists.

There is no bright line test for determining whether an employee works for joint employers. Each situation has to be analyzed separately and these concepts can be very confusing. Facts matter.

In the AI, Administrator Weil sets forth three examples:

> **Example:** A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers' compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer's schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor's construction projects, whether through ABC Drywall or another intermediary. *These facts are indicative of joint employment of the laborer by the General Contractor*.
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> **Example:** A worker is hired by a farm labor contractor (FLC) to pick produce on a Grower's farm. The FLC hired and pays the worker. The Grower dictates the timing of the harvest, which fields the worker should harvest, and the schedule each day. The work is unskilled, and any training is provided by the Grower. The Grower keeps track of the amount of produce that the worker picks per hour. The Grower provides the buckets for the produce, transports the produce from the field, and stores the produce. The Grower pays the FLC per bucket of produce picked, and withholds money to cover workers' compensation insurance. The worker has been continuously working on the Grower's farm during the harvest seasons, whether through this FLC or another farm labor contractor. *These facts are indicative of joint employment of the worker by the Grower.*
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> **Example:** A mechanic is employed by Airy AC & Heating Company. The Company has a short-term contract to test and, if necessary, replace the HVAC systems at Condor Condos. The Company hired and pays the mechanic and directs the work, including setting the mechanic's hours and timeline for completion of the project. For the duration of the project, the mechanic works at the Condos and checks in with the property manager there every morning, but the Company supervises his work. The Company provides the mechanic's benefits, including workers'

compensation insurance. The Company provides the mechanic with all the tools and materials needed to complete the project. The mechanic brings this equipment to the project site. *These facts are not indicative of joint employment of the mechanic by the Condos.*

The Department of Labor's Wage and Hour Division will actively look to determine whether a joint employment relationship exists when it appears that an employee is accountable to two or more businesses or employers.

The foregoing discussion does not address or describe every type of joint employer relationship that exists today or could exist in the future. Rather, the purpose of this article is to raise awareness of how the Department of Labor views joint employment under the FLSA.

If you have questions about whether your business may be a joint employer with another business, you should contact competent legal counsel experienced in employment law matters.

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