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THE EMPLOYER

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"Joint Employment" Under the FLSA

Recently the Department of Labor has been very aggressive in the way it interprets the Fair Labor Standards Act (FLSA). For example, early last year the Department proposed to dramatically increase the salary levels necessary before an employee can qualify under the "white collar" exemptions from overtime eligibility. Last summer the Department attacked the independent contractor/employee question and came down very aggressively on the side of finding most such relationships to be employment relationships. Continuing that trend, on January 20, 2016, the Department issued its "Administrators Interpretation" (AI) giving an expansive interpretation of the joint employment doctrine under the FLSA.

As with its interpretation of the FLSA in the context of independent contractor questions, the Department has announced its intent to look at joint employment through the eyes of the broad definitions contained in the FLSA. Under the FLSA, an entity is the employer of a worker if that entity "suffers or permits an individual to work". This is a very broad concept, much broader than the concept of a payroll employee, and the AI makes it even broader when applied to joint employment relationships.

According to the AI, there are two types of joint employment relationships. The first is referred to as the "horizontal" relationship, a relationship that exists when two entities are closely related to one another (such as by common ownership or partners in a joint venture) and a person who is admittedly an employee of one entity performs services that benefit the other entity. In these cases, the AI claims that the focus of whether there is joint employment will be upon the relationship between the two entities.

The second and more common relationship is known as the "vertical" relationship, which exists when a worker with an admitted employment relationship with one entity works for or benefits another entity, and is economically dependent upon that second entity. An example of such a relationship described in the AI is that of a staffing agency and its customer, or a general contractor and a building developer. In these "vertical" relationships, the inquiry will focus upon the extent to which the worker is economically dependent upon the user entity, under what is known as the "economic realities" test.

Why is this significant? There are at least two reasons employers who might be in one or the other of these joint employment relationships need to be concerned. The first is that for the purposes of computing how many hours an employee has worked in a week (such that overtime would be required after 40 hours) all of the hours worked by the employee for either of the entities within the given work week must be aggregated and counted. In other words, if the worker provided 30 hours of service to the first entity, and 30 hours of services to the second entity in the same week, (for a total of 60 hours) that worker would be entitled to 20 hours of overtime! The second reason this is important is that under the FLSA, both entities are jointly and severally liable for compliance. Therefore each of the entities in this example would be liable to the worker for 20 hours of overtime!

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The Department of Labor is not the only federal agency that has recently focused on the "joint employment" relationship. As reported in earlier issues of The Employer, the National Labor Relations Board has also taken an aggressive stance and found joint employment in the franchisor/franchisee relationship. Therefore, employers that rely on staffing agencies, management companies, independent contractors or other third party entities should no longer assume the mere use of such arrangements will insulate them from employment and labor law obligations to the workers who are providing services to them. Those employers who fail to adapt and adjust to this new reality are likely to find themselves liable for a host of potentially unforeseen employment liabilities.

We will continue to follow the extent to which the AI is implemented by the Department, and the extent to which it is accepted in the courts. In the meantime, please call any member of our Employment Law practice group if you have any questions or concerns about how this development affects your business.

EEOC proposes new EEO-1 survey

The EEOC has announced revisions to the EEO-1 survey. The commission believes the proposed revisions to the survey will assist in tracking pay inequalities. In addition to requesting the number of employees of each of the already requested groups — sex, race/ethnicity, and job classification — the proposed survey additionally requests:

- W-2 pay data, broken down by sex, race/ethnicity, and job classification, to be reported in 12 pay ranges; and
- Total number of hours worked, also by sex, race/ethnicity, and job classification.

The EEOC is accepting comments on the proposed changes through April 1, 2016.

You can find the proposed survey here:

http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm

DOL's revised timing of overtime exemption rules

As previously reported, in July 2015, the Department of Labor introduced a proposed rule that would increase the minimum salary threshold for overtime exempt employees from $455 per week/$23,660 per year; to $970 per week/$50,440 per year.

These changes were previously anticipated to take effect in early 2016. In a recent announcement, the DOL now expects to publish the final version of the rules in July 2016. Employers will have 60 days following publication to comply with the new rules.

Recently, the EEOC issued proposed guidelines covering retaliation & other issues. We will report further on this issue in upcoming editions of The Employer.

If you have any questions concerning any of the topics in this issue of *The Employer*, please contact a member of our Labor and Employment Law practice group at (419) 244-6788.

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