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Labor Department withdraws Obama-era guidance on independent contractors and joint employers

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The U.S. Department of Labor (DOL) announced its withdrawal of two Administrator's Interpretation letters on independent contractors and joint employment issued during the Obama administration. The letters only provided informal guidance, but advocated for expansive interpretations of wage and hour laws to support more robust enforcement actions by the agency. The rescission of these letters does not change existing law, but marks a shift by the DOL to adopt a more traditional and conservative approach to analyzing employment relationships.

In July 2015, the DOL issued an Administrator's Interpretation to provide guidance on the classification of workers as independent contractors versus employees under the federal Fair Labor Standards Act (FLSA). The guidance stated that under the FLSA's broad definitions of employment, "most workers" are employees. The DOL stated that it would apply an expansive interpretation of the "economic realities test" to determine an individual's status. The guidance rejected the traditional common law right-of-control test which focuses on the extent of a company's control over the conditions under which a worker performs the job. The effect of the agency's approach would be to substantially limit the number and types of workers who could be properly classified as independent contractors.

In January 2016, the DOL issued another Administrator's Interpretation which outlined new standards for analyzing joint employment under the FLSA and the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The guidance stated, "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." In a departure from precedent, the DOL also indicated that it would apply different standards for "horizontal" and "vertical" joint employment. The DOL's guidance stated that a horizontal joint employment exists when the relationship between two or more employers, who separately employ a worker, "are sufficiently associated or related with respect to the employee such that they jointly employ the employee." Vertical joint employment most often arises in a subcontracting or staffing context when one entity contracts to provide workers for use by the other entity. Notably, the DOL stated it would analyze factors set forth in MSPA regulations to determine joint employment status in the vertical context; however, those regulations do not apply to the FLSA and the factors outlined by the agency do not appear in its FLSA regulations.

The DOL's withdrawal of these Administrator's Interpretations signals its intent to reverse course on the expansive positions taken on worker classification and joint employment under the Obama administration. The DOL is likely to take additional steps in the months ahead to clarify its views on these key employment issues.

While the business community has lauded this move as a step by the DOL in the right direction, employers should not relax their compliance efforts. As the agency noted in the press release announcing its withdrawal of the guidance, its action "does not change the legal responsibilities of employers under the [FLSA] and the [MSPA], as reflected in the department's long-standing regulations and case law." Moreover, there remains considerable uncertainty in the law about how to define the myriad types of worker relationships that exist in the modern era. Federal courts, other administrative agencies and certain states have adopted various different and conflicting standards for determining independent contractor and joint employer status. Employers should closely monitor developments on these key issues in the jurisdictions relevant to their operations.

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