

DOL's Administrator Interpretation Solidifies Aggressive Stance in Joint Employment Debate

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On Wednesday, January 20, [the U.S. Department of Labor \(DOL\) issued an Administrator's Interpretation \(AI\)](#) providing guidance on how "joint employers" are defined under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). It relies on many of the concepts contained in the [AI issued last year on independent contractor misclassification](#).

[The DOL's blog post on the newly issued AI](#) lays out the DOL's rationale for the newly issued guidance:

"Economic forces and technological advancements have been changing the nature of work for a long time. As a result, more and more businesses are changing their organizational and staffing models by, for instance,, sharing employees or using third-party management companies, independent contractors, staffing agencies or other labor providers. We often see these kinds of arrangements in the construction, agricultural, janitorial, distribution and logistics, staffing, and hospitality industries. The growing variety and number of business models and labor arrangements have made joint employment more common and our need to address it more pressing."

The DOL also confirmed that the concepts of employment and joint employment under the FLSA and MSPA are notably broader than the common law concepts of employment and joint employment applied under other labor statutes, which typically turn on the degree of control that an employer exercises over an employee. Instead, the DOL's FLSA/ MSPA analysis is guided by principles of economic reality and dependence, which, in general, is far less forgiving for employers.

The AI divides the analysis and guidance into two categories- horizontal and vertical:

- 1. Horizontal Joint Employment:** The horizontal analysis focuses on whether two different businesses jointly control a worker (such that the worker's hours need to be combined to figure out when they are eligible for overtime). An example that is offered is "separate restaurants that share economic ties and have the same managers controlling both restaurants." The AI provides that if an employee works 25 hours at one restaurant and 25 hours at another restaurant where there is "horizontal joint employment" the employee would be entitled to payment for 40 hours at the regular rate of pay and 10 hours at the overtime rate of pay.

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2. Vertical Joint Employment: The AI's vertical analysis focuses, similar to the 2015 AI on independent contractor misclassification, on the economic dependence of the worker – and typically involves outsourced services or temporary workers. An example offered of vertical joint employment is workers hired by staffing agencies, either for outsourced functions such as the cleaning of hotels, or placed by a staffing company on a job-site. The AI deemphasizes the importance of worker control in its analysis.

The DOL's guidance provides a unique set of factors to be considered in evaluating whether joint employment exists under both the horizontal and vertical analyses. The AI reminds employers that where there is a finding of joint employment, all employers are jointly and severally liable to the workers. The AI notes that, "if one employer cannot pay the wages because of bankruptcy or other reasons, then the other employer must pay the entire amount of wages; the law does not assign a proportional amount to each employer."

The DOL's guidance is of obvious interest for any employers that make use of temporary or contract workers, as well as employers in the industries specifically referenced in the AI. In fact the AI itself mentions the hospitality industry specifically on its first page three times. It also lists several industries of focus, prominently referencing the hospitality industry three times on the first page alone. Other businesses and industries mentioned multiple times are health care/hospitals, construction, manufacturing, satellite television and agriculture

Given this new guidance from the DOL, all employers, especially those in the mentioned industries, should assess their vulnerabilities to joint employer challenges and work to put in place effective strategies to address the associated legal risks.

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