Dawn Of A New Day? Labor Department Withdraws Obama-Era Guidance On Misclassification, Joint Employment

Insights
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In a welcome development for employers, Secretary of Labor Alexander Acosta announced today that the U.S. Department of Labor (USDOL) was immediately withdrawing guidance published during the Obama administration that had hampered businesses when it comes to independent contractor misclassification and joint employment standards. While the guidance letters did not carry the force of law, they were relied upon by USDOL investigators and courts when examining allegations of wrongdoing, and were often cited by plaintiffs' attorneys to support their demands.

Their withdrawal is one of the first concrete steps taken by the Trump Department of Labor to free up employers to conduct business in a less burdensome regulatory environment. Although employers still need to proceed with caution when developing policies and practices involving classification and joint employment principles, this development might signal the dawn of a new day.

Short But Sweet Announcement From Labor Department

Without prior fanfare, the USDOL issued a three-sentence news release this morning announcing the withdrawal. "U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors," the release read. In fact, if you search for the informal guidance letters on the USDOL's website as of this morning, you will now find a blank page reading: "Page Not Found – The page you requested wasn't found on our website." The release then reminded employers that they are still on the hook for potential violations of wage and hour statutes such as the Fair Labor Standards Act (FLSA), and concluded by stating the agency "will continue to fully and fairly enforce all laws within its jurisdiction."

The words might be brief but their impact is powerful. With a sweep of the digital pen, Secretary Acosta has scrapped the guidance that had troubled businesses for the past several years.

2015 Misclassification Guidance Deemed To Miss The Mark

In July 2015, the USDOL – then headed by Obama appointee Tom Perez – issued Administrator's Interpretation No. 2015-1, subtitled "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." This document pronounced misclassification as a "problematic trend" and sought to limit the number of businesses using independent contractors. In it, the Department of Labor said that the test to determine whether an individual was misclassified should be applied in a "broad" manner, and, once applied, most individuals would be considered employees. The agency essentially boiled the issue down to a single question: is the worker in business for himself (which leads to an independent contractor finding) or economically dependent on the business (which makes him an employee)?

The problem with such a test was that, rather than providing the certainty that the law should provide and that a business deserves, it left a lingering question about possible misclassification issues. Under the 2015 test, a business could take all of the typical steps necessary to readily safeguard contractor status – drafting a comprehensive and easy-to-understand contractor agreement, permitting workers the freedom to work for competitors, allowing them to choose their own schedules, requiring them to make a substantial investment in their own enterprise, forcing them to use their own tools and equipment, etc. – but the USDOL could nevertheless determine that the worker was economically dependent on that business and, therefore, considered an employee. If the worker chose to cast his lot fully with that one company and not take advantage of the freedom that a contracting model provides, an overzealous court could have followed the Department of Labor's Interpretation to its logical extreme and found the worker to have been an employee.

This was an especially thorny problem for businesses in the nascent "gig" or "sharing" economy, where workers are paired with consumers via a digital marketplace (think your latest ride-sharing trip, or food delivery, or handyman experience). These workers are most often classified by businesses as independent contractors, but a steady stream of class action litigation filed against these on-demand companies has led to apprehension about whether this classification system is accurate. Both Uber and Lyft have attempted to settle such claims against them for hundreds of millions of dollars, demonstrating the costly nature of misclassification claims.

Although some states have stepped into the breach to do what they can to protect the classification status of ride-sharing drivers so long as the businesses for which they perform work permit them a certain modicum of freedom (both Florida and Texas have passed state laws in the last several weeks), the overwhelming number of businesses in the sharing economy face the concern that their business may be susceptible to a misclassification claim. This is especially true given that state laws would not necessarily insulate them from federal FLSA claims.

While today's development does not eliminate all such concerns, it is certainly a step in the right direction. No longer will government investigators, judges, or plaintiffs' attorneys be able to rely on the USDOL's 2015 classification guidance for support when advancing claims against sharing economy companies and other businesses.

Joint Employer Guidance Brushed Aside

Secretary Perez took another step to hamstring employers in January 2016 when the USDOL issued Administrator's Interpretation No. 2016-1, subtitled "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act." Organizations engaged in multi-participant arrangements – such as outside-party management, joint ventures, staffing services, employee leasing, temporary help, subcontracting, certain kinds of "job sharing," and dedicated vendors or suppliers – were put on notice that the USDOL wanted to put as many of them as possible on the hook for any alleged wage and hour violations filed under the FLSA or the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The guidance portended both an expansive interpretation of the principles governing the standards and a new and aggressive agency enforcement posture.

Under the FLSA and MSPA, a worker can be employed by two or more employers simultaneously. In such a situation, each joint employer would be deemed to share the same compliance responsibility for each jointly employed worker, potentially on the hook for wage and hour liability and other claims. The 2016 informal guidance focused on two joint-employment scenarios: "horizontal" and "vertical" arrangements.

The guidance announced that "horizontal" joint employment relationships could exist when two or more employers separately employ a worker, but the employers are deemed to share a sufficiently close association or relationship with respect to the employee's work. It then provided a series of relevant considerations that should be taken into account by government investigators, courts, and others when making a joint employment determination, including whether and to what extent there is common ownership, overlapping officers, directors, executives, or managers; shared or intermingled operational control; shared clients or customers; supervisory authority over employees; or relevant written agreements between the entities.

It then described "vertical" joint employment relationships, which, according to the USDOL, exist when one company contracts for workers who are directly employed by what the agency calls the "intermediary" company supplying their labor. The guidance purportedly embraced an "economic realities" analysis to determine whether a joint employment relationship existed, announcing that the ultimate question is whether the worker is "economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work."

These tests were skeptically viewed by many as too broad, failing to take into consideration the flexibility necessary to conduct business in today's modern workplace environment. The rise of staffing arrangements and contingent relationships offers businesses the ability to better manage costs and business operations, and have been adopted by countless entities in recent years. Luckily, with today's announced withdrawal of the rigid and overbroad standard, businesses should enjoy a more flexible and realistic approach when it comes to their relationship with other businesses and contingent workers.

What This Means For Employers

Today's development is a positive one for employers. It begins to tilt the playing field back to a level surface, and kick starts the process of introducing an element of certainty to modern business relationships. That said, joint employment remains an issue that employers need to be cognizant of under the FLSA, and the USDOL's actions today have no impact on other federal statutes that could entangle employers in these areas, such as under the National Labor Relations Act.

We now await whether the Trump-era USDOL will take further steps to assure 21st-century businesses more certainty in these areas, whether through replacement guidance letters, FLSA opinion letters, or brand new regulations. We will monitor these developments and provide updates as warranted.

For more information, contact your regular Fisher Phillips attorney, or any member of our Staffing and Contingent Workers Practice Group, Wage and Hour Law Practice Group, or Gig Economy Practice Group.

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Related People

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

John M. Polson
Chairman & Managing Partner
949.798.2130
Email

Service Focus

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