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DOL Issues an Administrator's Interpretation Regarding Joint Employment

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The U.S. Department of Labor ("DOL") recently issued an Administrator's Interpretation ("AI") regarding joint employment under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). Both statutes are enforced by the DOL and both use the same broad definition of employment, namely, "to suffer or permit to work." The AI was issued in light of what the DOL believes is the growing variety, and number, of business models and labor arrangements which have made joint employment under these two statutes more common.

The AI identifies two types of joint employment relationships: (a) **horizontal joint employment**, where the worker has employment relationships with two or more employers and the employers are sufficiently associated with respect to the employee that they are considered to jointly employ the person; and (b) **vertical joint employment**, where the worker has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider or other intermediary employer) and the economic realities show that the worker is economically dependent on – and thus employed by – another entity involved in the work.

With regard to **horizontal joint employment**, the AI identified a number of facts that would be relevant to the DOL's finding of a joint employment relationship, *e.g.,* do the employers have common ownership, overlapping management or officers/executives; share supervisory authority over employees; or share the same clients/customers? Concerning **vertical joint employment,** the AI noted that a key factor is the worker's relationship with the two employers, *e.g.*, nurses placed at a hospital by staffing agencies. In regard to the vertical joint employment relationship, some of the factors that the DOL considers are: who controls/supervises the worker; who controls the worker's employment conditions; the duration of the working relationship; the extent to which the work is repetitive in nature, *etc.*

Where a joint employment relationship has been found to exist, the number of hours worked per week by the employee for each of the joint employers must be added together and where it exceeds 40 hours, the worker is entitled to overtime. While this Administrator's Interpretation does not say anything new, it summarizes the regulations and court decisions on which the Department will undoubtedly rely in any Wage and Hour investigation; it therefore can be a helpful self-audit tool for employers assessing their own situations.

If you have any questions about joint employment, please contact your Miller Canfield attorney or any of the attorneys listed on this e-alert.

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