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JOINT EMPLOYMENT– ARE YOU A JOINT EMPLOYER?

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On January 20, 2016, the United States Department of Labor issued the Administrator's interpretation of "joint employment" under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Interpreting the FLSA and the MSPA consistently to a great extent, the Administrator notes that "employ" under both statutes includes "to suffer or permit to work". Finding that these statutes have a similar definition of "employ", the Administrator takes a further step and claims that, as a result, joint employment should be broadly defined. The Administrative interpretation goes well beyond the common law test of establishing joint employment. Under the common law, the degree of control that an employer exercises over an employee is the determinative factor in ascertaining whether or not the employee was a joint employee of two or more entities. Under the recent Administrator interpretation, the Administrator, claims that since both the FLSA and the MSPA broadly define "employ" and encompass such a broad range of employment relationships, joint employment should be interpreted as broadly as possible as well.

The Administrator deals with horizontal joint employment which is, employment in a circumstance where the affected employee has "employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee". For example, separate restaurants that have the same managers will be found, under the Interpretation, to be joint employers.

As a result of this interpretation, determining a horizontal joint employment relationship, as set forth by the Interpretation, includes the consideration of the following factors: 1) who owns the potential joint employers (does one employer own part or all of another or do they have any common owners); 2) do the potential joint employers have overlapping officers, directors, executives or managers; 3) do the potential joint employers share control over operations; 4) are the potential joint employers' operations intermingled (by way of example, does a single entity do the payroll for employees of both employers); 5) does one potential joint employer supervise the work of the other; 6) do the potential joint employers share supervisory authority for the employee; 7) do the potential joint employers treat the employees as a pool of employees available to both of them; 8) do the potential joint employers share clients or customers; and 9) are there any agreements between the potential joint employers.

In addition to horizontal joint employment, the Administrator's Interpretation addresses vertical joint employment. Vertical joint employment exists when an employee has an employment relationship with one employer (the intermediary employer) and the economic realities establish that the employee is actually dependent on, therefore employed by, another business involved in the same work (the joint employer). Perhaps the simplest manner of explaining a vertical joint employer is by way of example. A staffing agency is a classic intermediary employer under this definition and the staffing agency's client, to whom it provides employees, would be a joint employer. Under the MSPA, there are factors to be considered in determining the economic realities of an intermediary employer/joint employer situation. Those include: 1) directing, controlling or supervising the work performed; 2) controlling the employment conditions; 3) permanency and duration of the relationship; 4) repetitive nature of the work; 5) integral nature of the work to the joint employer's business; 6) work performed on the premises of the joint employer; and 7) the administrative functions that are commonly performed by the employer. Another classic example of a potential vertical joint employer relationship is a general contractor with its subcontractors in a construction project.

So what does this mean to you as an employer? The impact can be significant. For example, if two employers are found to be joint employers, the hours an employee works for those two employers in a work week are actually combined. This can and may likely trigger overtime compensation issues that neither employer anticipated, thought about or paid.

In addition, with joint employers, there is joint and several liability under the FLSA. Therefore, if a single employer fails to meet an economic obligation under the FLSA, both employers are jointly liable. As a result, if you "share" employees with another employer or are affiliated with or related to another company through shared ownership or anything similar, you should re-evaluate your "collective" use of employees. Demarcating when an employee works for one company versus another is likely inadequate. The companies must truly be separate, apart and unrelated to avoid a joint employer situation.

Personnel Files—What Should They Contain?

Employee application; background check consent form; offer letter; handbook acknowledgment; confidentiality agreement; non-piracy and non-compete agreement, if applicable, harassment policy acknowledgment; drug testing policy acknowledgment; drug testing consent form, if applicable; performance reviews; disciplinary actions; sexual harassment training certification and other job specific training certifications.

What Not to Include in an Employee's Personnel File

I-9s and their supporting documentation; the results of a background check, the results of a drug test; notes regarding any disciplinary or pre-disciplinary investigations; payroll information; medical or other confidential information; benefit enrollment forms and leave of absence forms.

EEO-1

For those employers with 100 or more employees and those employers with fewer than 100 employees who are federal contractors, 2017 will mark changes in the EEO-1 Report you file. Currently, the EEO-1 Report contains information from private sector employers on the race, ethnicity, sex and job category of its employees. The new requirement being implemented by the EEOC and likely to go into effect January 1, 2017, will require employers to also provide W-2 earnings and hours worked for its employees. This is all designed to highlight for the EEOC in an employer driven form, the difference or disparity, if any, between men and women working the same jobs. The proclaimed purpose of the change is to move women closer to men in equal compensation for equal work. Statistically, women are still making $.77 for every dollar earned by a man performing the same or similar job. With this additional information and data, the EEOC will have, at its fingertips, the beginning of a compilation of the material necessary to establish employer gender discrimination through pay. As a result, it makes sense for you now to review the most recent W-2s and hours of work for your employees and ascertain whether or not you have a potential issue. If you find that the women in your workforce are generally paid less than the men, and, after comparing the positions held and compensation, it may well be that you should review and modify your compensation to address the likely EEOC concern proactively.

The End of Independent Contractors?

The US Department of Labor really wants all individuals performing work for any organization to be employees. To that end, it has unequivocally stated its opinion that "most workers are employees under the Fair Labor Standards Act" and formally adopted the Economic Realities Test in determining whether workers are employees or independent contractors.

The Economic Realties Test includes the following factors: 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss depending on his or her managerial skills; 3) the extent of the relative investments of the employer and the worker; 4) whether the work performed requires special skills and initiative; 5) the permanency of the relationship; 6) the degree of control exercised or retained by the employer.

The Department of Labor is relying less and less upon the sixth factor, the degree or control exercised or retained by the employer. Historically, this was a predominant consideration by the Department and courts; however, it is being surpassed by the other factors. As a result, it is very important for employers to understand that the likelihood of having a truly independent contractor do regular and consistent work and not be categorized as an employee is minimal. If an individual provides services that are integral, key or significant to the employer's actual business, that individual being deemed an employee is almost certain. Independent contractors will be limited to those individuals, organizations or business that provide services that are not in any way related to the primary services provided by the employer business. As a result, I believe it is important for you to review any independent contractor relationships you currently have under the Economic Realities Test. I would be happy to assist you in this review so that we can make a logical decision as to how to categorize these individuals, businesses or groups.

Amendment to Illinois Equal Pay Act

Attention small employers! The Illinois Equal Pay Act has been amended to cover **all employers**. Just as a reminder, the Illinois Equal Pay Act prohibits an employer from discriminating between employees on the basis of gender by compensating one employee at a rate less than another employee of the opposite gender for the same or substantially similar work on jobs which require equal skill, effort and responsibility in similar working conditions. This was originally adopted to ensure women were payed equally for the same work as men.

In addition, Equal Pay Act penalties have been modified. Employers who are found to have violated the Illinois Equal Pay Act may be subjected to increased civil penalties. In the past, it has been limited to those employers with four or more employees. In addition, employers who are found to have violated the Illinois Equal Pay Act may be subjected to increased civil penalties. For each affected employee the penalties are as follows: 1) An employer with fewer than four employees, a) first offense: a fine not to exceed $500; b) second offense: a fine not to exceed $2500; c) third and subsequent offenses: a fine not to exceed $5,000. 2) Any employer with four or more employees, a) first offense: a fine not to exceed $2500; b) second offense: a fine not to exceed $3,000 and c) third and subsequent offenses: a fine not to exceed $5,000.

These are "not to exceed" numbers as the Illinois Department of Labor, the agency who enforces this Act, is to consider the size of the business and the severity of the violation. As with most laws, there are exceptions. With the Illinois Equal Pay Act the exceptions include: compensation systems that measure earnings by quantity or quality of production, seniority systems, merit systems or any system which is based on any other factor that does not constitute an unlawful discrimination under the Illinois Human Rights Act.

FLSA Exemption Changes

As you may recall, last year the Department of Labor warned that it would be modifying the salary threshold for exempt employees. In other words, before there is even analysis of the duties of the position to ascertain exempt status, an employee must earn a threshold amount. Today that threshold amount is the equivalent of $23,660 a year. That is going to change in 2016, although the date is not yet established, to $50,440. This is designed to set the salary level at the fortieth percentile of weekly earnings for full-time salaried workers. Similarly, the highly compensated employee exemption which obviates the need for any duty analysis at all, is being adjusted to equate to the ninetieth percentile of weekly earnings for full-time salaried workers or $122,148.00. Finally, these compensation levels will be adjusted **automatically** in the future. What can you do with those employees who have historically been treated as exempt, thus not earning overtime for hours in excess of 40 in a work week, but are below the $50,440 mark? There are two different alternatives: you can make the employee non-exempt and not increase their compensation; however, you will be required to pay overtime for hours in excess of 40. This may cause you to analyze their compensation rate and, instead of simply determining an hourly rate based on 40 hours a week at their current compensation, make educated guesses as to their expected number of hours, including overtime hours, and the appropriate hourly rate to reach the employee's historical or desired compensation rate. The other alternative, of course, is to boost the employee's compensation to the $50,440 mark. This will ensure you meet the salary threshold; however, remember, that is only the first step. It then becomes essential that you review the employee's actual job to ascertain whether they fall within an overtime exemption. The Department of Labor anticipates publishing these final overtime changes within 90 days.

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Currently Congress is attempting to stop these regulations from being imposed. I will continue to monitor the legislation and send out a bulletin if it turns out the imposition of these new guidelines are somehow delayed. It is unlikely, since I would expect President Obama to veto the legislation and I do not believe there will be a veto-proof majority.

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UPDATED FMLA FORMS (links)

WH-380-E **Certification of Health Care Provider (Employee)** http://www.dol.gov/whd/forms/WH-380-E.pdf

WH-380-F **Certification of Health Care Provider (Family Member)** http://www.dol.gov/whd/forms/WH-380-F.pdf

WH-381 **Notice of Equal Rights and Responsibilities** http://www.dol.gov/whd/forms/WH-381.pdf

WH-382 **Designation Notice** http://www.dol.gov/whd/forms/WH-382.pdf

WH-384 **Certificate of Qualifying Exigency for Military Family Leave** http://www.dol.gov/whd/forms/WH-384.pdf

WH-385 **Certification of Serious Injury or Illness (Service member)** http://www.dol.gov/whd/forms/WH-385.pdf

WH-385V **Certification of Serious Injury or Illness (Veteran)** http://www.dol.gov/whd/forms/wh385V.pdf

OSHA Guidance on Restroom Access for Transgender Employees

As you are aware, transgender is one of the newest categories requiring accommodations and dealing with the needs of transgender employees while being sensitive to the needs and desires of other employees has become a relatively hot topic. This first came up as an issue in schools in California but is also becoming an employment concern. If someone identifies as a female who is physically a male transitioning to female, what is the appropriate restroom? OSHA guidance, consistent with EEOC guidance, suggests that employers allow employees to use the restroom for the gender with which the employee identifies. Therefore, under the above example, even though physically a male, the employee would be allowed to use the women's restroom. While this may be difficult or problematic for other employees, quite frankly, they will have to adjust for you to stay compliant with EEOC guidance. There is, of course, the alternative of creating a single use gender neutral restroom that all employees at a given location can use.

In addition, the EEOC has consistently broadly interpreted gender so as to include, to the greatest extent possible, lesbians, gays, bi-sexuals and transgenders. Indeed, relatively recently, the EEOC brought a gender discrimination suit against an eye clinic in Florida claiming that its termination of a transgender employee "in transition" was gender discrimination, claiming that the employer was making its termination decision based on a stereotypical belief as to gender appropriate behavior because the employee did not conform to the employers "gender-based expectations, preferences and stereotypes". It seems that, despite the fact there is no federal statutory protection based on gender orientation, or gender identity gender is going to be interpreted broadly to include such claims in the future.