

DOL Reverses Course on Independent Contractor and Joint Employment Tests

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Yesterday Department of Labor ("DOL") Secretary Alex Acosta announced the withdrawal of two significant DOL Administrator Interpretations that had formerly provided enforcement guidance on independent contractor misclassification and joint employment. The first was issued in July 2015 and extended the Obama administration's enforcement priority of ferreting out misclassification of independent contractors. The second guidance was issued in January 2016 and focused on joint employment, broadening the scope when business relationships could be defined as joint employment. The joint employment guidance declared that even a business having only indirect control over the employees of another business might be deemed a joint employer of those employees for purposes of liability. The interpretation caused significant concern for franchisors, third party providers and staffing companies.

What Has Changed?

DOL's withdrawal of the Interpretations signals a shift – if not a reversal – in the Department's enforcement priorities. The 2015 guidance pronounced that "most workers are employees under the FLSA" adopting the most expansive definition of "employee" possible. It identified the critical question to be "whether a worker is economically dependent upon the business the worker serves." It rejected its former standard – largely used by courts – which considered a business's control, rather than the dependence, of the worker to decide the question of whether the worker was an employee. It is now expected that DOL enforcement will return to use of the narrower control standard, potentially reducing the number of challenges to independent contractor arrangements.

Similarly, with removal of the 2016 guidance, DOL might be expected to return to applying its pre-guidance standard in enforcement, finding joint employer liability only in those business arrangements where one business has direct control over the workplace of another business. As a cautionary note, however, the National Labor Relations Board has also adopted, but not yet rescinded, the indirect control standard. Although its adoption of the same is under court challenge, the issue has not been decided.

What is the Effect on Business and Employers?

In rescinding these Interpretations, DOL may be moving toward applying a lower level scrutiny when auditing independent contractor arrangements or the roles of related businesses in assessing employment liability. However, DOL will most certainly continue to challenge misclassification and assess joint liability at some level. It should be remembered that DOL is only one possible challenger on these questions; multiple state and federal agencies and private plaintiffs will continue to contest these issues, being especially aggressive on independent contractor misclassification. The safest course is to regularly review the details of independent contractor and third party arrangements to ensure they will pass muster with state and federal agencies and courts.

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