CONNER & WINTERS
Attorneys and Counselors at Law

EMPLOYMENT ALERT

DOL Issues New Guidance Expanding Joint Employer Liability under FLSA

On January 20, 2016, the U.S. Department of Labor's Wage & Hour Division issued new guidance for assessing joint employment status under the Fair Labor Standards Act ("FLSA"), the federal law that establishes minimum wage and overtime pay requirements. Why is this significant? A finding that two entities are joint employers under the FLSA makes both employers responsible for any unpaid wages and may also be used to assert joint and several liability against unwitting employers for violations of any number of other employment laws.

Administrator's Interpretation No. 2016-1 recognizes two types of joint employment—horizontal and vertical. Horizontal joint employment exists "where the 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 employee the employee." Factors indicating horizontal joint employment include:

- common ownership of the potential joint employers;
- overlapping officers, directors, executives and managers;
- shared control over operations (*e.g.*, hiring, firing, payroll, advertising, costs, etc.);
- intermingling of operations;
- shared supervisory authority over employees;
- shared clients or customers; and
- existence of agreements between potential joint employers.

Examples of horizontal joint employment cited in the Interpretation include warehouses that share employees, separate restaurants that share economic ties and have the same managers controlling both restaurants and intermingling staff, and home health care providers that share staff and have common management.

Vertical joint employment, on the other hand, exists "where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the *economic realities* show that he or she is economically dependent on, and thus employed by, another entity involved in the work" (emphasis added). In this scenario, this "other employer," which typically contracts with the "intermediary employer" to receive the benefit of the employee's labor, would be the potential joint employer. Examples of vertical joint employment cited in the Interpretation largely focus on situations where a staffing agency or other intermediary contracts with a second employer to provide labor or other employer functions. For example, under certain circumstances a general contractor on a construction project may be considered the joint employer of laborers employed by its independent subcontractor. Traditionally, the degree of control exercised by a person or entity over the worker has been afforded great weight in determining joint employer status. Now, however, the DOL has announced that "[t]he vertical joint employment analysis must be an *economic realities analysis* and cannot focus only on control" (emphasis added). Factors to be considered include:

- the potential joint employer's direction/control/supervision of work (even indirectly);
- the potential joint employer's power (even indirectly or simply retained) to control employment conditions (*e.g.*, hiring, firing, working conditions, compensation);

- the permanency and duration of the relationship between the employee and potential joint employer;
- whether the work is repetitive or requires little skill;
- whether the work is integral to the potential joint employer's business;
- whether the work is performed on the potential joint employer's premises; and
- whether the potential joint employer performs functions commonly performed by employers (*e.g.*, handling payroll or providing workers' comp insurance, tools or equipment)

If these factors sound familiar, you likely recall the DOL's Administrative Interpretation No. 2015-1, issued last July, in which the DOL laid out a very similar list of factors to be considered in reviewing the economic realities to determine whether workers have been misclassified as independent contractors rather than employees.

A finding of joint employer status under either theory—horizontal or vertical—could result in significant liability under the FLSA for unsuspecting employers. Joint employers share joint and several liability for ensuring all non-exempt employees are paid the applicable minimum wage for all hours worked as well as overtime. Liability may attach for violations during the previous two years (three years in the case of willful violations).

Employers should fully expect continued aggressive enforcement measures by the DOL on this issue. Going forward, DOL will likely use this Interpretation as support for charging more companies with violations of the FLSA (*i.e.*, failure to pay minimum wages or overtime) on the ground that they are joint employers with an offending employer. Indeed, as is expressly stated in the Interpretation, DOL "may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations." Companies engaged in the construction, agricultural, janitorial, warehousing, distribution and logistics, staffing, and hospitality industries should be particularly vigilant; the DOL's Interpretation notes that the agency frequently finds joint employer relationships in those industries.

Employers should act now to review current personnel and contractor relationships in light of the DOL's new guidance. If you have questions or if you would like assistance with this or any other matter, please do not hesitate to contact us. More information, including a copy of Administrator's Interpretation No. 2016-1, is available at the DOL's webpage devoted to this issue, available at: www.dol.gov/whd/flsa/jointemployment.htm.