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How Does the Withdrawal of the DOL's 2015 and 2016 Informal Guidance on Joint Employment and Independent Contractors by Trump's Secretary of Labor Impact Employers?

Working Together

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On June 7, 2017, U.S. Secretary of Labor Alexander Acosta announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance documents on joint employment and independent contractors. In the three sentence press release announcing the withdrawal, the DOL reminded employers that it plans to fully and fairly enforce all laws within its jurisdiction, and that the removal of the informal guidance ***does not change the legal responsibilities of employers*** under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). But how can this be so?

AI 2015-1 and 2016-01

As a reminder, the informal guidance at issue here – Administrator's Interpretations Nos. 2015-1 and 2016-01 – represented a significant shift in wage and hour law and served as the Wage and Hour Administration's justification for ramping up its enforcement efforts. For an in-depth look at Administrator's Interpretations Nos. 2015-1 and 2016-01, see our blog posts linked here and here.

In short, the July 2015 AI addressed the classification of independent contractors as employees under the FLSA and took an expansive view of the employment relationship, stating, "most workers are employees under the FLSA's broad definitions." This interpretation essentially created a presumption that workers are employees and not independent contractors, and therefore helped workers by entitling more of them to benefits such as workers compensation, unemployment, employer-sponsored health plans, etc.

Similarly, the January 2016 AI established new standards for determining joint employment under the FLSA and the MSPA, and the DOL took the position that "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." In addition, the AI addressed the difference between "horizontal" joint employment and "vertical" joint employment for the first time. Again, this interpretation benefitted workers by making it easier to find that a joint employment relationship existed, and therefore held a greater number of employers accountable for work-related issues.

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While the AIs were not binding law, the decision to withdraw them sends a clear political message – Trump's DOL intends to scale back the employee-friendly policies rolled out during the Obama administration, taking a more traditional (and narrow) view of employment relationships. This decision fits squarely within the Trump administration's overall goal of deregulation and ostensibly benefits employers by loosening the DOL's standards with respect to joint employment and independent contractors. So how can it be that the removal of this informal guidance does not change the legal responsibilities of employers under the FLSA, MSPA and other employment laws?

Joint Employment and Independent Contractor Status Under State Laws

Practically speaking, the federal DOL is not the only force to reckon with when it comes to joint employment and independent contractor status. Employers must be aware of how state administrative agencies make these determinations, and must appreciate the fact that the withdrawal of the AIs does little, if anything, to resolve the myriad (and often conflicting) interpretations of joint employment and independent contractor status under state laws and by regulatory agencies and courts. For example, here in Connecticut, the State DOL has its own test – the "ABC Test" – for determining who is an employee and who is an independent contractor for purposes of unemployment compensation coverage. The application of this multi-factor test by courts tends to embrace an expansive view of the employment relationship. The rescission of the 2015 AI is unlikely to have any appreciable effect on outcomes under the ABC Test, and is equally unlikely to stall the Connecticut DOL's enforcement efforts regarding worker misclassification. So while there may be some relief in knowing that the federal DOL will back off on its enforcement efforts, employers must continue to be cognizant of, and compliant with, their legal responsibilities under state laws, administrative regulations, and court decisions interpreting and applying those laws and regulations.

Joint Employment in the Labor Law Context

Similarly, for those employers concerned with joint employment in the labor law context, the removal of the AIs does not alter the National Labor Relations Board's (NLRB or Board) decision in *BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015) (BFI). In that case, the NLRB overruled longstanding precedent to expand its joint employment standard, treating "indirect control" as a main factor in determining whether a joint employment relationship exists under the National Labor Relations Act. The Board's decision in *BFI* has been appealed to the courts. Moreover, a Board with a Republican majority may back away from the decision. Nonetheless, for as long as *BFI* remains the governing standard, employers must remain vigilant about how the *BFI* decision impacts their employment relationships.

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Take-Aways

Employers in jurisdictions like Connecticut are at a bit of a crossroads – the federal DOL is taking steps to dismantle and rein in the expansive view of the employment relationship advanced during the Obama administration, but other key stakeholders, including state agencies, may not be similarly inclined. In other words, while the withdrawal of the Administrator's Interpretations signals a shift in enforcement priorities at the federal level, it does not move us any closer to a bright-line test for determining when a joint employment relationship exists or when we can classify a worker as an independent contractor versus an employee. Accordingly, employers must continue to exercise an abundance of caution when dealing with employee classification and potential joint employment issues to ensure compliance and avoid legal exposure.

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