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Joint Employment Can Have Expensive Consequences for Unsuspecting Businesses

by Darren Feider and Nate Bailey

During its waning hours, the Obama Administration has been busy issuing new regulations and administrative interpretations to accomplish administratively what it was unable to accomplish legislatively. An area of focus has been wage and hour law because of the Administration's concerns about income inequality and its belief that workers are often not paid fairy and accurately. In July 2015, the Administration issued a new administrator's interpretation addressing misclassification of employees as independent contractors. With a new administrative interpretation in January, the Administration has turned its focus to joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[1]

A joint-employer relationship exists where an employee has two or more employers with respect to her work. In today's economy, businesses are increasingly turning to flexible staffing solutions that potentially create joint employment, including third-party management companies, independent contractors, staffing agencies, professional employer organizations, farm-labor contractors, and others. The consequences of creating unexpected joint-employment relationships can be significant—liability for wages and overtime and unexpected coverage under the Family and Medical Leave Act (FMLA). Businesses should regularly review their working relationships to determine whether they give rise to joint-employer status and if so, understand what consequences follow. This note will focus on joint employment under the FLSA, but agricultural employers should be aware that similar issues will exist under the MSPA.

Horizontal Joint Employment. Joint employment under the FLSA comes in two flavors—horizontal and vertical—and both can have significant consequences. Horizontal joint employment occurs when an employee has two or more employers that are sufficiently related with respect to the employee. The focus is on the employers' relationship to each other. Non-exclusive factors to consider when determining horizontal joint employment include: common ownership; common management; shared administrative operations; shared supervision of the employee; shared pool of employees; and shared clients or customers.

Where a horizontal joint-employment relationship exists, all hours worked for the joint employers are deemed to be one employment and all joint employers are jointly and severally liable for complying with the FLSA with respect to those hours. Besides being responsible for unpaid wages and benefits, joint employment raises the specter of overtime. Thus, if an employee works 25 hours in a workweek for one joint employer and 25 hours for another joint employer, she will be deemed to have worked 50 hours collectively for the joint employers. The joint employers will be jointly and severally liable for 40 regular hours and 10 overtime hours.

Vertical Joint Employment. Vertical joint employment occurs when an employee works for one employer (e.g., staffing agency, professional employer organization, etc.) and is economically dependent on another business (e.g., the staffing agency's client) with respect to the work. The focus is on the employee's relationship with the potential joint employer. Non-exclusive factors considered when determining vertical joint employment include: control over the employee's work; control over employment conditions; duration of the relationship; repetitive or rote nature of work; work that is an integral part of potential joint employer's business; control over the premises; and performance of administrative functions commonly performed by employees.

A vertical joint employer is also jointly and severally liable for paying the wages of joint employees. Consequently, if a joint employment relationship is established, an employer may be liable for the wages of its staffing agency's employees if the staffing agency is unable to pay or unlawfully withholds wages. This can be a source of significant unexpected liability.

Consequences of Joint Employment under the FMLA. Joint employees must be counted by all joint employers when determining employer coverage under the FMLA. For example, an employer that has 40 employees and uses a staffing agency to provide 15 additional workers may unexpectedly find that it is a "covered employer" under the FMLA if it is deemed a joint employer of the 15 staffing-agency workers.

Joint employment may also lead to unexpected employee eligibility under the FMLA. To be eligible for FMLA leave, an employee must work at least 1250 hours during the prior 12 month period and be employed at a worksite where the employer has at least 50 employees within 75 miles. Where an employee works more than 1250 hours combined for two or more covered joint employers, she is entitled to FMLA leave.

Under the FMLA, only the "primary employer" is responsible for giving a joint employee required notices, providing FMLA leave, and maintaining group health benefits during FMLA leave. While a "secondary employer" is not responsible for the above, it must not interfere with the employee's exercise of FMLA rights and must restore the employee, after FMLA leave, to the same or equivalent job under certain circumstances.

What Should Employers Do? Employers should review their nonstandard working relationships to determine whether they constitute joint employment. If there is a possibility of joint employment, businesses should take steps to minimize their potential liability for payment of wages and under the FMLA. Businesses that use staffing agencies should ensure that the staffing agency complies with the FLSA (i.e., pays minimum wage and overtime) and is solvent. Businesses should also consider requiring staffing agencies to provide indemnification in the event the business is found to be a joint employer. In addition, potential joint employers should determine whether they are "primary" or "secondary" employers under the FMLA. If you need help determining whether you are a joint employer, do not hesitate to seek legal counsel because the consequences of delay may be severe.

[1] The National Labor Relations Board (NLRB) recently announced a new test for joint employment under the National Labor Relations Act. Though similar, the test for joint employment under the FLSA and MSPA provides a broader definition of joint employment and affects different employer responsibilities. For more information about the NLRB's test and its implications, please see our October 2015 Employment Law Note.