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In For A Penny, In For A Pound

Companies face expansive wage liability for shared workers under new D.O.L. "Joint Employment" interpretation

Chad E. Willits
Partner

Email: CEW@Rendigs.com
Direct: 513 381 9297
Fax: 513 381 9206

Does your business hire labor through staffing agencies or subcontractors? Do you share workers with another company? If so, new interpretive guidance from the U.S. Department of Labor ("DOL") Wage & Hour Division suggests you should pay careful attention to those shared workers and their hours, as your business could be responsible for more of their wages than you might expect.

A traditional employment relationship typically involves one or more workers employed by a single employer. However, if certain circumstances are present, two or more companies can be treated as an "employer" of the same worker. This is known as "joint employment," and it triggers legal duties for *both* employer-companies under laws like the Fair Labor Standards Act ("FLSA") which governs minimum wage and overtime obligations.

DOL Administrator David Weil recently released interpretive guidance on scenarios that may constitute "joint employment" of a single worker by more than one company under the FLSA. While there has been no formal change in that statue, *Administrator's Interpretation No. 2016-1* reveals how the DOL will interpret and enforce the current legal standards, and it should serve as a wake-up call to businesses who share workers. The full text of the *Interpretation* can be found **here**.

"Joint employment" of a worker can occur when more than one company is involved in the work being performed, or when two or more separate businesses overlap operations and share employees. In these circumstances, the DOL may determine that both companies "jointly" employ the worker, and all of the worker's hours for each employer should be aggregated to calculate whether overtime pay may be due. Perhaps more importantly, in the event one employer cannot or does not pay the worker, the other joint employer may be responsible for the entire amount of wages earned while working for both companies, known as "joint and several liability."

The FLSA defines the term "employ" broadly to include "to suffer or permit to work." That definition is broader than the common-law concept used in many States that focuses on a company's control over an employee's work. Under this "suffer or permit to work" standard, a company can be

Rendigs, Fry, Kiely & Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202

considered the worker's "employer," if it merely *allows* or *permits* a worker to perform tasks for the benefit of its business, regardless of whether or not it directs or controls the details of those tasks. *Interpretation 2016-1* makes clear that the DOL will interpret "*joint* employment" just as expansively.

Joint employment can arise in either of two scenarios – "horizontal" joint employment and "vertical" joint employment. "Horizontal" joint employment may occur where an employee works for two or more technically separate entities that are sufficiently related or overlapping in their operations. Examples of horizontal joint employment scenarios include separate restaurants that have common management and shared employees, and health care providers who share staff among multiple businesses.

In this horizontal context, joint employment can occur even where the employee performs separate duties or works different hours for each company. The DOL focuses on the relationship between the employer companies, and looks for common ownership, officers, and management; shared operational control over hiring, firing, and payroll; and treating workers as a pool of employees available to both companies. Although *Interpretation 2016-1* is not specifically targeted at franchises, it clearly has important implications for commercial chains and franchised businesses.

"Vertical" joint employment on the other hand, can occur where an employee has a traditional established employment relationship with one company, but that employer provides labor or services to a second company which receives the benefit of the work. Examples of vertical joint employment are staffing agencies and subcontractors.

In this vertical context, the DOL focuses on the relationship between the worker and the second employer. The control over the worker's tasks is less critical, and the more important factor is the second company's control over terms and conditions of the worker's employment, such as the ability to hire and fire, rates of pay, training, payroll, the location where the work is performed, and whether the work is an integral part of the second company's business.

Not every staffing arrangement, subcontract, or worker with multiple jobs will qualify for joint employment. The DOL recognizes that many workers have multiple jobs with multiple employers who do not qualify as "joint employers," as long as the companies operate independently and are disassociated in terms of ownership and management. For example, a high school teacher could take a part-time job for a standardized test preparation service without triggering "joint employment" wage obligations between the school and the prep company.

However, related companies that share workers must be aware of these potential obligations. Under these standards, a company may believe it is only "in for a penny," with limited wage obligations to shared, temporary, or subcontracted workers. But if joint employment is established, the company may find itself "in for a – much larger – *pound*" of shared wage responsibility for *all* work for *either* company, and possible overtime obligations after forty hours in a given workweek.

Employers in these circumstances are wise to be vigilant and proactive to monitor the hours of all workers and ensure that both companies are compliant in their payroll practices. Companies who routinely share workers are well-advised to do so only with trusted business partners. Express indemnification provisions should also be considered in any staffing or subcontracting arrangement to ensure that these obligations are clear from the outset. Such alternative labor arrangements can be flexible and effective tools, as long as these details are monitored closely. Otherwise, a company may be subject to significantly more FLSA wage liability than it expects.

Chad Willits *concentrates his practice on employment law and general civil litigation in Ohio and Indiana. He has extensive experience and an active pre-trial, trial, and appellate practice in these areas. Chad also assists businesses and organizations with risk management and related proactive planning to prevent or resolve claims before they escalate into expensive lawsuits. These services include drafting and implementing workplace policies and practices, management training, and overseeing internal investigations and audits.*