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DOL Rescinds Joint Employment, Independent Contractor Guidance

By Kate McGovern Tornone, Editor

The U.S. Department of Labor (DOL) has withdrawn two major Obama-era guidance documents, one addressing joint employment and one on independent contractors.

The move, while not a surprise, is good news for employers, according to H. Juanita Beecher, of counsel with Fortney & Scott and an editor of *Federal Employment Law Insider*. The Obama administration was trying to find a way to way to deal with shifting employer-employee relationships, Beecher told BLR®; this included a focus on outsourcing and the use of staffing companies, as well as a big push to examine whether workers hired as independent contractors were actually employees. By rescinding these documents, the DOL is backing off that "aggressive" initiative, Beecher said.

The Society for Human Resource Management had called for the DOL to rescind the pair earlier this year at a congressional hearing, arguing that they complicated an already-complex area of the law. A nonpartisan think tank, however, defended the documents, arguing that they adopted existing case law and provided needed clarity on new issues created by the 21st century economy.

Guidance Documents

The two documents released by the Wage and Hour Division (WHD) were Administrator Interpretations, or AIs. These replaced WHD "opinion letters" (which answered individual questions) in 2010 and the agency has since issued seven. In the 9 years preceding the shift, the DOL issued between five and 54 Fair Labor Standards Act (FLSA) opinion letters each year.

Business groups have asked the DOL to do away with the AIs and return to opinion letters, but it has not yet announced such a switch.

The first AI rescinded was FLSA2015-1, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (July 15, 2015). That document narrowed the DOL's interpretation of independent contractors and declared that "most workers are employees under the FLSA's broad definitions." The guidance directed employers to use a six-factor test to evaluate the economic reality of the situation when classifying workers.

The second document, FLSA2016-1, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* (January 20, 2016), clarified that the DOL believes joint employment can exist, for FLSA purposes, in two circumstances: when an employee has two or more separate but related or associated employers; or when one employer provides labor to another employer and the workers are economically dependent on both employers.

Employer Takeaway

The DOL released few details about the rescission, saying only that "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act."

The department confirmed to BLR that the announcement referred to FLSA2015-1 and FLSA2016-1, which already have been removed from its website, but declined to say whether the rescission will affect related documents, such as the DOL fact sheets, which, at press time, were still live.

Beecher, however, said she expects such supporting documents will be removed soon. This could include, among others, *Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)* (January 2016) and *Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities under the Family and Medical Leave Act (FMLA) (January 2016).*

For now, this means that the DOL will be addressing these issues the way it did under the Bush administration, Beecher said. "Joint employment" wasn't a new issue created by the Obama administration, she noted; they just expanded the definition.

Meanwhile, employers also should be aware of any joint employment test adopted by applicable courts. Federal appellate courts have adopted various approaches for joint employment in recent years. The 4th Circuit (which covers Maryland, North Carolina, South Carolina, Virginia and West Virginia) added to the array of tests just this year, rejecting its sister circuit's rulings and adopting its own two-step, six-factor test. (*See Appeals Court Expands Definition of 'Joint Employer' in Wage Claims.)*

What's Next?

The National Labor Relations Board, under Obama, adopted interpretations similar those in the DOL's AIs for enforcing the National Labor Relations Act, Beecher noted, so it's possible the Board will change course as well. That would take some time, however, because the Board adopts its positions through rulings (as opposed to publications) and will still have an Obama-appointed general counsel for a few more months.

Employers also might see some movement in the opposite direction. One agency to watch is the U.S. Equal Employment Opportunity Commission, Beecher said. The commission's acting chair, Victoria A. Lipnic, said during a panel discussion earlier this year that she intends to focus on the evolution of employment relationships, giving special attention to employer responsibilities in joint employment, the use of staffing agencies and the "gig economy."

Congress also has shown interest in addressing gig worker issues, Beecher noted. Bills introduced in both the House and the Senate 2 weeks ago, for example, would test portable benefits for independent contractors, temporary employees, and self-employed individuals.

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