GLASER & WEINER, LLP

ATTORNEYS AT LAW

Joint Employment

DOL Issues New Guidance

Last month, the U.S. Department of Labor (DOL) published a new administrator's interpretation about joint employment and how to analyze potential cases of it under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). DOL stated that there are two types of joint employment- horizontal and vertical joint employment- each with a distinct analysis to determine if a joint employment relationship exists with regard to one or more employees.

Horizontal joint employment may exist when two or more employers separately employ a person but are closely associated with or related to each other with respect to that person. Some of the factors that may be considered in determining whether or not a horizontal joint employment relationship exists include:

- Ownership structure of the potential joint employers, including common officers or managers;
- Shared control over hiring, payroll or other operations;
- Shared supervision of the employee;
- Shared clients or customers; and
- Agreements between the employers, such as to share one or more employees

The above factors are not all-inclusive. Horizontal joint employment does not exist where two or more employers are completely independent of each other, and also do not exercise any shared control over an employee who works for each of them.

Vertical joint employment may exist when a person employed by one "intermediary employer" (such as a staffing agency) is economically dependent on another employer with regard to the work he/she performs for the intermediary employer. DOL noted that the first question in a vertical joint employment analysis will often be whether the intermediary employer is actually an employee of the potential joint employer (i.e. he/she may be incorrectly classified as an independent contractor, an issue Glaser & Weiner has written about in the past). If this turns out to be the case, all

of the intermediary's employees are also employees of the potential joint employer and there is no vertical joint employment.

If the intermediary is not an employee, then an economic realities test must be conducted for the intermediary's employees. DOL and the courts have both emphasized that this analysis is not a control test. For example, DOL stated that the federal Second Circuit generally considers the following factors in resolving vertical joint employment cases:

(1) "use of the potential joint employer's premises and equipment for the work;
(2) whether the intermediary employer has a business that can or does shift from one potential joint employer to another;
(3) whether the employee performs a discrete line-job that is integral to the potential joint employer's production process;
(4) whether the potential joint employer could pass responsibility for the work from one intermediary to another without material changes for the employees;
(5) the potential joint employer's supervision of the employee's work; and
(6) whether the employee works exclusively or predominantly for the potential joint employer."

Under FLSA and MSPA, an employee's work for joint employers is considered one employment, and thus his/her hours worked for them are combined together. Further, the joint employers are jointly and severally liable for ensuring payment of all wages that he/she is due, including overtime for any hours worked over 40 in a week. By contrast, if the facts indicate that there is no joint employment relationship, an employee's work for each employer would be treated as being separate for the purpose of FLSA and MSPA compliance.

For the above reasons, employers must know if any of their employees are, or could be, jointly employed by another employer so that they can avoid violations of the law. Employers may wish to contact Glaser & Weiner to discuss these issues with Roni Glaser or Michael Weiner.