

Are you a joint employer?

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The traditional employment model has evolved over the years. Many of today's businesses use a variety of organizational and staffing models to run their operations. They may share workers with other employers, engage independent contractors or use staffing agencies to supplement their workforce. Although organizations may not consider workers who provide services under these arrangements to be employees in the traditional sense of the term, under the Department of Labor's Wage and Hour Division's (DOL) recent Administrator's Interpretation (AI), they may still be responsible for complying with the applicable employment laws as a joint employer.

The AI provides DOL's interpretation on joint employment under the Fair Labor Standards Act (FLSA) and Seasonal Agricultural Worker Protection Act (SAWPA). In the AI, DOL states that it is taking an expansive interpretation of the term "employ" to ensure the scope of employment relationships and joint employment is "as broad as possible." Thus, it is likely that DOL will increasingly find that joint employment exists.

The AI is the most recent example of the DOL's focus on [expanding the scope](#) of the employment relationship. All employers should be aware of DOL's standards for determining joint employment status and the consequences of being deemed a joint employer.

DOL's standards for determining joint employment status

According to DOL, there are two likely scenarios where joint employment exists:

(1) *Where the employee has two (or more) technically separate but related or associated employers (Horizontal Joint Employment).*

Under the first scenario, joint employment exists where two (or more) employers benefit from the employee's work, and they are sufficiently related to or associated with each other. For example:

- The employers have an arrangement to share the employee's services;
- One employer acts in the interest of the other in relation to the employee; or
- The employers share control of the employee, directly or indirectly, because one employer controls, is controlled by or is under common control with the other employer.

The analysis under this scenario focuses on the degree of association between the employers. Some factors to consider when determining joint employer status under the horizontal employment scenario include:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?
- Do the employers share supervisory authority over the employee?

- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

(2) *Where one employer provides labor to another employer and the workers are economically dependent on both employers (Vertical Joint Employment).*

DOL says joint employment also exists where a worker is, as a matter of economic reality, economically dependent on two employers: an intermediary employer that actually hires the worker (such as a staffing agency or other labor provider) and another employer who engages the intermediary to provide workers. The focus of vertical joint employment is the employee's relationship with the other employer (as opposed to the intermediary employer).

DOL provides seven factors to consider that demonstrate whether a worker is economically dependent:

- Does the other employer direct, control or supervise (even indirectly) the work?
- Does the employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
- How permanent or lengthy is the relationship between the employee and the other employer?
- Does the employee perform repetitive work or work requiring little skill?
- Is the employee's work integral to the other employer's business?
- Is the work performed on the other employer's premises?
- Does the other employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment or workers' compensation insurance?

DOL stresses that these factors are not exhaustive and any other evidence that indicates economic dependence should be considered, as well. DOL also cautions that the "control" factor should not be the main focus of the analysis.

Importantly, this AI provides DOL's interpretation of joint employment under the FLSA and SAWPA. DOL separately noted that the analysis for determining joint employment under the Family Medical Leave Act (FMLA) is the same as under the FLSA.

Thus, the AI sets the standard for determining joint employment status only under these three statutes. A different analysis likely applies for other employment laws, such as Title VII, the Americans with Disabilities Act or the National Labor Relations Act.

Obligations as a joint employer

When joint employment exists, the employers are responsible, both individually and jointly, to the employee for compliance with employment laws.

Under the FLSA, joint employment means that both employers are responsible for ensuring that employees receive at least the federal minimum wage for all hours worked and overtime pay for hours worked over 40 in a work week. Additionally, joint employers must combine all of the hours worked by the employee in a workweek to determine if the employee worked more than 40 hours and is due overtime.

Obligations under the FMLA depend on whether the business is considered the primary or secondary employer. Both primary and secondary employers are prohibited from interfering, discriminating or retaliating against employees for using FMLA leave.

The primary employer is also responsible for providing required notices to employees, providing FMLA leave, maintaining group health insurance benefits during leave, restoring the employee to the same job or an equivalent job upon return from leave, and keeping all FMLA-required records.

Secondary employers may be responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave.

What employers can do now

Employers should take this opportunity to review staffing arrangements to determine whether a joint employment relationship might exist and use the factors in the AI to avoid conditions that are likely to lead to joint employment. Employers who believe that they are a joint employer should take steps to ensure compliance with obligations under the statutes.

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