DOL Standards for Joint Employment

On Jan. 20, 2016, the DOL issued guidance on joint employment and liability under the Fair Labor Standards Act (FLSA) with Administrator's Interpretation No. 2016-1.

In a joint employment relationship, one employee is considered to be working for more than one employer at the same time. Under the FLSA, joint employers are “jointly and severally liable” for wage violations. This means that an employer that is part of a joint employment relationship can be held liable for the wage violations of a secondary or intermediary employer.

In its Administrator’s Interpretation (AI), the DOL examines “horizontal joint employment” and “vertical joint employment” relationships as situations where joint employment is likely to exist, as well as the standards for making this determination.

Horizontal joint employment exists when the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee, such that they jointly employ the employee. The DOL provides the example of a waitress who works for two separate restaurants that are operated by the same entity. Here, the question is whether the two restaurants are sufficiently associated with respect to the waitress, such that they jointly employ the waitress.

Vertical joint employment exists when the employee has an employment relationship with one employer (typically a staffing agency, subcontractor or other intermediary employer) and the economic realities show that the employee is economically dependent on, and therefore employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee’s labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer.

The AI outlines separate factors to be considered when determining whether a potential horizontal or vertical joint employment relationship exists. These factors are not entirely consistent with the way the courts have historically made joint employment determinations.

Employers must remember that certain speech and affiliation is considered protected. The National Labor Relations Board (NLRB) has stated that non-disruptive political advocacy related to employment issues during non-work time and in non-work areas is protected. Employers may, however, enforce neutrally applied restrictions on political advocacy during work time or in work areas.

The above are just a few things employers should be aware of when thinking about addressing political speech in the workplace. You should also check for state laws that govern political activity.