

# Article

## Redefining Labor

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In June, the Department of Labor (DOL) announced a dramatic departure from its informal guidelines on classification of independent contractors and joint employers. These guidelines, issued during the Obama administration, were not legally binding, but served as a blueprint for how the DOL enforced federal laws. They also presented persuasive authority to courts.

Although the Trump administration has not yet issued new guidelines, the DOL's departure from the previous guidelines indicates that it may be easier for employers to classify individuals as independent contractors and that it will be more difficult to hold one business liable for the employment law violations of another company.

### **JOINT EMPLOYERS**

Joint employment refers to situations when one business can be held liable for employment and civil rights law violations that occur at a separate company. Before the Obama-era guidelines, companies faced liability under laws like the Fair Labor Standards Act (FLSA) and the Migrant Seasonal Agricultural Worker Protection Act only if the company exercised "direct control" over the employees at issue.

In 2015, however, the DOL issued informal guidance broadening the "control" standard to include even those companies that exercise "indirect" control over employees, significantly broadening the scope of liability for businesses. Under this interpretation, a business entity with very little control, if any, over an employee may be held liable as a joint employer. This has proven worrisome for many businesses, including franchisors and those who relied on staffing companies to provide workers at a particular location.

The recent withdrawal of these guidelines means that companies once again must have "direct control" over a worker to be held liable as a joint employer in most contexts.

### **INDEPENDENT CONTRACTORS**

Whether a person is classified as an employee or an independent contractor affects many aspects of a working relationship. For example, the distinction affects whether a business withholds employment taxes, pays unemployment insurance, and considers eligibility for overtime pay and minimum wage.

The Obama-administration guidance was openly intended to make it more difficult for a person to be classified as an "independent contractor." In fact, the DOL specifically instructed that its opinion was that "most workers are employees," not independent contractors.

With the withdrawal of the guidelines, the DOL presumably returned to its less expansive definition of "employee" as determined by the "right to control" test.

### **WHAT HAPPENS NEXT?**

Though the DOL inevitably will continue to challenge misclassification and assess joint liability at some level, its recent move indicates that it likely will do so applying a lower level of scrutiny. The DOL is only one possible challenger on these questions, however. State and federal agencies, along with individual plaintiffs will continue to contest these issues, with little regard for the DOL's recent actions.

Further, in the absence of new guidelines from the DOL, courts will likely revert to pre-guidance interpretations of independent contractor classifications and joint employment as determined by courts in each jurisdiction, causing inconsistency from state to state. As a result, businesses still lack a bright-line standard on either issue.

## LEGAL STANDARDS

Joint employer determinations vary widely from jurisdiction to jurisdiction, though many courts use a version of the “economic realities” test. Courts in the Fifth Circuit, including Texas, consider the below factors in determining employer status. Whether the employer:

- Has the power to hire/fire;
- Supervises and controls the employee’s work schedule or conditions of employment;
- Controls the employee’s rate and method of pay; or
- Maintains the employee’s personnel records.

Courts make independent contractor determinations by applying a traditional economic realities test, which usually examines some combination of the following factors:

- The degree of control exercised by the alleged employer over the manner in which the work is performed;
- The alleged employee’s opportunity for profit or loss and investment in the business;
- The degree of skill and independent initiative required to perform the work;
- The permanence or duration of the working relationship;
- The extent to which the work performed is an integral part of the business; and
- The extent of the relative investments of the employer and worker.

Courts have interpreted each of these factors differently, depending on the facts of the case, and the jurisdiction the court sits in. Absent guidance from the DOL, courts will continue to engage in this type of factor-by-factor, fact-intensive analysis.

The safest course for businesses is to regularly review the details of independent contractor and third party arrangements to ensure they will pass muster with state and federal agencies and courts, and keep a close watch for further guidance from the DOL.

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