

COMPLIANCE BULLETIN

DOL Withdraws Joint Employment Guidance

HIGHLIGHTS

- The withdrawal reverts DOL policy to the direct control standard that existed in 2015.
- The withdrawal does not relieve employers of joint employment liability.
- The withdrawal limits the scope of where joint employment situations may exist.

OVERVIEW

On **June 7, 2017**, the U.S. Department of Labor (DOL) [withdrew](#) an administrative interpretation regarding joint employment. The interpretation was issued in 2016 by the DOL to help employers identify joint employment situations.

The guidance was issued with the intent of preventing employers from using intermediaries to shield themselves from liability under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

This withdrawal is effective immediately and affects compliance with the FLSA and MSPA.

ACTION STEPS

Employers should review and update the policies and procedures they use to determine whether they are in a joint employment situation. If necessary, employers should adopt and implement policies and procedures to determine whether they have direct or indirect control over another employer's workplace.

IMPORTANT DATES

June 7, 2017

The DOL withdraws its 2016 joint employment guidance.

Provided By:

Touchstone Consulting Group

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Broad Definition of “Employment”

The concept of joint employment is possible under the FLSA and MSPA because these laws have adopted a broad definition of employment—“to suffer or permit to work.” According to the DOL, a broad definition of employment is necessary to ensure that employers do not use middlemen to evade their responsibilities under the law.

Joint employment occurs when an employee works for two or more related employers. When joint employment exists, all joint employers are jointly and severally liable for compliance with applicable laws. Additionally, in joint employment situations, an employee’s hours worked for all of the joint employers during the workweek are aggregated and considered one employment. As a result, that employee’s overtime compensation depends on whether his or her aggregate hours of work exceed the limits set by the FLSA or MSPA.

The 2016 Guidance

The DOL’s withdrawn 2016 guidance allowed DOL enforcement personnel to establish two types of possible joint employment situations—horizontal joint employment and vertical joint employment. The key to determining joint employment under both scenarios was economic dependence, regardless of whether an employer exercised control or supervision over the worker.

A key issue with this guidance was that it allowed the DOL to establish the existence of joint employment in situations where an employer only has **indirect** control over another employer’s workplace. This broader approach met a lot of opposition from business groups.

Impact on Employers

The withdrawal of the 2016 guidance does not relieve employers from joint employment liability.

Rather, with this withdrawal, the DOL is returning to its 2015 policy where joint employment can be established only when an employer has **direct** control over another employer’s workplace. This change will limit the number of situations where the DOL may hold employers liable for FLSA and MSPA violations committed by affiliated entities.

However, employers should also note that the National Labor Relations Board’s (NLRB) definition of joint employment is unaffected by this DOL action. Therefore, it is possible that the NLRB may find an employer liable for certain violations while the DOL may determine that no joint employment situation actually exists.