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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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Federal Court in New York Strikes Down USDOL Regulation Concerning Joint Employment

Earlier this year, the United States Department of Labor (USDOL) issued new regulations regarding joint employment under the Fair Labor Standards Act (FLSA). Seventeen states (including New York) and the District of Columbia subsequently filed suit in the U.S. District Court for the Southern District of New York to challenge the USDOL's adoption of its new joint employment regulations. The Court recently issued a decision in that lawsuit, holding that the USDOL's joint employment regulations relating to vertical joint employer liability should be vacated because they conflict with the definitions contained in the FLSA and are arbitrary and capricious.

The joint employment regulations issued by the USDOL recognized a distinction between vertical joint employment and horizontal joint employment. Vertical joint employment is employment where an employee works for one employer, but another potential employer simultaneously benefits from the work performed by the employee. For example, if a staffing agency supplies employees for a business, both the staffing agency and the business would likely benefit simultaneously from the work performed, and both employers may potentially be jointly and severally liable for all wages owed to those employees. Horizontal joint employment can occur where an employee is employed by two different employers during the course of a week.

The new regulations pertaining to vertical joint employment adopted a four-factor test to determine if two employers exercise sufficient control and supervision over an employee to be considered joint employers. Under that regulatory framework, the determination of joint employer status would be based on whether the potential joint employer actually exercises power to: (1) hire or fire the employee; (2) supervise and control the employee's work schedule or conditions of employment to a substantial degree; (3) determine the employee's rate and method of payment; and (4) maintain the employee's employment records. The regulations further provided that "the potential joint employer must actually exercise – directly or indirectly – one or more of these indicia of control" to be a joint employer under the FLSA.

The regulations also listed certain factors that should not be considered in the joint employment inquiry because they assess economic dependence, such as: (1) whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment or foresight; (2) whether the employee has the opportunity for profit or loss; (3) whether the employee invests in equipment or materials; and (4) the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

The Court struck down all of these regulations regarding the vertical joint employment analysis based principally on the Court's view that they conflict with and unlawfully limit the FLSA's broad definitions of the terms "employer," "employee," and "employ." In addition, the Court found that the USDOL did not adequately justify its departure from its prior broad interpretations of the vertical joint employment concept, and that the regulations were therefore arbitrary and capricious.

The Court agreed that the four factors set forth in the USDOL's regulations "can be *relevant* to the joint employer inquiry," (emphasis in original) but took issue with the USDOL's requirement that an entity must actually exercise one or more of the four control factors to be considered a joint employer. The Court also found that the USDOL's rule unlawfully excluded the "economic dependence" factors from being considered in the joint employment inquiry.

The Court found no reason to strike down the "non-substantive" revisions to the regulations regarding horizontal joint employment. The Court held that those horizontal joint employment regulations were severable from the vacated vertical joint employment regulations and could remain in effect.

The USDOL has stated that it is disappointed in the decision and is reviewing its options, so an appeal is possible. In the meantime, however, employers should be aware that the concept of vertical joint employment will likely continue to be given a fairly broad interpretation and that they may be held jointly and severally liable for wages owed to employees of staffing agencies, temporary agencies, or possibly even vendors who are performing work for them, if they are found to jointly employ those individuals.

If you have any questions about this information memo, please contact the attorney at the firm with whom you are regularly in contact.