U.S. Labor Department rescinds Obama-era rule on 'joint employment'

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(Reuters) – The U.S. Labor Department on June 7 said it was rescinding the Obama administration's standard for determining when companies are "joint employers" of contract and franchise workers, in the agency's first major shift in labor policy under President Donald Trump.

The department in a statement said it had withdrawn a 2016 interpretation of the federal Fair Labor Standards Act, 29 U.S.C.A. § 201, that expanded the circumstances under which a business could be held liable for wage-law violations by staffing agencies, contractors, and franchisees.

Previously, companies were considered joint employers when they hired and fired workers and set wages. The Obama administration said a worker's level of "economic dependence" on a company should also be considered.

> The 2016 interpretation of the Fair Labor Standards Act expanded the circumstances under which a business could be held liable for wage-law violations by staffing agencies, contractors, and franchisees.

The expanded definition of joint employment had rankled the business community, which said it threatened the franchise business model and would draw companies into lawsuits when they were not responsible for setting working conditions.

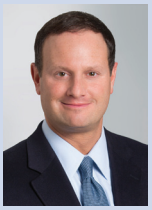
Also on June 7, the department withdrew 2015 guidance that said that under the same law, many workers are improperly treated as independent contractors when they are actually employees, which would make them eligible for minimum wage, overtime, and other legal protections.

Guidance issued by federal agencies is not legally binding, but serves as a blueprint for how agencies will enforce federal laws. A shift in enforcement priorities at the Department of Labor had been widely expected since Trump, a Republican and wealthy businessman from New York, took office.

Business groups have said the department's guidance on employment and worker classification was misguided and affected nearly every U.S. industry, and they praised the agency's changes.

"Diligent employers work hard to be compliant with the FLSA and these (department) interpretations were merely enforcement traps waiting to spring," Randy Johnson, a vice president at the U.S. Chamber of Commerce, said in a statement.

Employment attorneys' reactions to the Labor Department's decision to withdraw joint employer/independent contractor interpretations



Allan Bloom, partner with Proskauer Rose:

"This is a major development, and employers across the country should be breathing a sigh of relief. Critics of the Administrator's Interpretations viewed them as yet another way the Obama-era federal agencies were skirting the traditional rulemaking process, under which the public is notified and has the opportunity to comment on proposed changes in the rules and regulations interpreting the law. This is the first major sign that the Trump DOL intends to 'undo' some of the overstepping and activism of the prior administration, starting with this 'sub-regulatory' guidance on issues that are top of mind for many businesses across the country. As more and more businesses that rely on independent contractors are facing legal challenges to that model (in the form of class-action lawsuits, government investigations and tax audits), the elimination of the prior DOL's guidance — which generally was perceived as pro-employee — will be welcome."

John W. Hargrove, partner with Bradley Arant Boult Cummings:

"The withdrawn interpretations had attempted to define more rigidly the situations in which a worker should be found to be an employee even if that was not the intent of the company and the worker. Employers should note, however, that no statutes, regulations or case interpretations have changed, so the analysis to be applied to these issues in the real world remains the same, at least for now. For example, in the wage-and-hour context, DOL regulations and existing federal case law should be consulted. In the labor relations area, National Labor Relations Board cases must be reviewed. In cases involving employee or third-party injury, state workers' compensation laws and common law agency principles apply as they always have. Finally, federal and state tax statutes and regulations regarding governing withholdings and contributions have not changed."

Alexander Passantino, former acting administrator of the Labor Department's wage and hour division, and current partner with Seyfarth Shaw:

"The withdrawal [of the Administrator Interpretations] does not change the law; it simply removes as the DOL's position those statements made in the AIs. The withdrawal likely indicates a changing focus in the department's enforcement efforts away from the 'fissured' industry initiative of the Obama [a]dministration.

We may get additional insight when Secretary [Alexander] Acosta testifies before the House Labor appropriations subcommittee to discuss the Trump administration budget."

– from his June 7 post on Seyfarth's Wage & Hour Litigation Blog

Unions and workers' rights groups said they were troubled by the labor department's decision.

"This was guidance that made it easier for employers, workers, unions and others to know about their rights and obligations under the law," Lynn Rhinehart, general counsel for the AFL-CIO, said in a statement.

The withdrawal of the guidance does not affect a separate expansion of the definition of joint employment by the National Labor Relations Board, which is under review by a federal appeals court. The NLRB's standard has had more of an impact than the labor department's because it is legally binding and requires joint employers to bargain with unions.

(Reporting by Daniel Wiessner)

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