NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

Wage & Hour Division Issues New Interpretation of "Joint Employment"

For years, there has been a fairly clear understanding of the employer-employee relationship with respect to who is the "employee" and who is their "employer." Generally speaking, an "employer" is the company with the power to hire, fire, direct, and pay a worker. Those abilities and responsibilities would typically be vested in a single entity, so identifying a given worker's "employer" tended to be simple: who issues the paychecks, and who hires, fires, and directs the worker?

That understanding could fundamentally change under a new "interpretation" from the Administrator of the U.S. Department of Labor's (DOL) Wage & Hour Division (WHD). Administrator's Interpretation No. 2016-1 and new DOL Fact Sheet #35, both issued January 20, 2016, describe how WHD will look at the question of who is the "employer" for purposes of whether that company has met all of the obligations owed to a given worker. Those companies most likely to be affected by this will be those who use staffing agencies or farm labor contractors (FLCs), but this could potentially expand to sweep in growers who contract with FLCs to perform work on their farm.

WHD Administrator David Weil has been discussing for several months WHD's concern with a "fissured" workplace, reflecting a trend toward outsourcing and treating workers who had been "employees" as independent contractors, or replacing employees with workers provided through an outside staffing company. These strategies for securing labor for a business can trigger findings of "joint employment" according to WHD in two general scenarios: "horizontal" joint employment (one employee shared back-and-forth between two related employers sharing a common pool of workers) or "vertical" joint employment (workers supplied by an outside labor contractor or staffing agency). For the nursery and landscape industry, the idea of "vertical" joint employment is relatively more likely to arise than "horizontal" joint employment.

As an initial note – companies using the H-2A or H-2B program are clearly the "employer" for their own workers (U.S. and foreign), this has always been the case and is perfectly clear. The concern is that companies for whom they perform work – e.g., where they supply workers to perform a job for a grower – might now be found responsible for ensuring that the workers are paid correctly, and that all disclosures and other obligations associated with being an "employer" are met. Even for the H-2 employer, there could be consequences of this new interpretation to the extent that these business clients seek to include language in their agreements with the employer to protect them against such responsibilities.

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In agriculture, more generally, one of the specific scenarios referenced in the Administrator's Interpretation is the use of farm labor contractors (FLCs). Where a grower who owns the land contracts with an FLC to provide workers to plant, tend, and/or harvest a crop, WHD will apply this new analysis to determine if the landowner-grower has become, in effect, an "employer" of the workers provided by the FLC. WHD will now look at the relationship between the worker and the potential "employer" and whether that company exhibits "economic dependence" on the worker. The factors for finding "economic dependence" include the following:

- Does the grower direct, control, or supervise the work? This is a long-standing part of the joint employer test, but WHD now includes "indirectly" directing, controlling, or supervising, without explaining how that would be done. Read broadly, every interaction between companies and staffing agencies involves "indirect" direction or control, since their contract would likely call for workers to perform a given task: cultivate or harvest a given crop, etc.
- Does the grower have the power (even indirectly) to hire/fire the worker, change employment conditions, or determine the rate and method of pay? For those employers using H-2A or H-2B workers, this factor is actually helpful, for the purposes of the entity who is not the H-2 employer, since anything to do with hiring/firing, employment conditions, and rate/method of pay are so strictly prescribed through the labor cert process. Again, taken to the extreme, the idea of "indirectly" setting or changing "employment conditions" could be read by an aggressive WHD auditor to include essentially the entire labor contract, and further guidance and probably litigation will be needed to crystallize what this actually means.
- How permanent or lengthy is the relationship between the worker and the grower? All H-2 employment is of limited duration, and work on a specific project may last for a few hours or weeks or months, which weigh against a finding of joint employment, as opposed to a worker employed by one company for 10 or 15 years, leaving a job then signing on with a staffing company and returning.
- Does the worker perform repetitive work or work requiring little skill? It is not clear what relevance this has for the relationship between a worker and a company contracting for labor assistance, but taken at face value, this factor could tend to be used by WHD to sweep more ag workers and lower-skilled non-ag workers into joint employment.
- Is the employee's work integral to the "other employer's business"? Again, "integral" is not defined or discussed and is potentially in the eye of the beholder. Arguably, a highly-skilled or managerial worker would be more "integral" to the business than a particular line worker, but taken together, having a full work crew perform a given project may well be "integral" to the operation of the business.
- Is the work performed on the "other employer's" premises? For growers using workers through an FLC, this factor may point to a "yes" answer as to that grower.
- Does the grower perform functions for the worker typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance, or, in agriculture, providing housing or transportation? This involves a number of factual considerations, but for most companies other than the traditional "employer" or the staffing company, the answer would be "no" to most or all of these questions.

WHD states that these 7 factors are part of the analysis but are not exhaustive, and that WHD will consider "any other evidence that indicates economic dependence." They also reiterate that the analysis "cannot focus solely on control. The degree of control is only one consideration, and joint employment can exist even when the other employer exercises little control over the workers."

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Some NCAE-member associations have recommended that their grower members include "hold harmless" or indemnity provisions in their FLC contracts. Mike Stoker who represents UnitedAg in California advises his grower members to obtain a bond from any FLCs that they work with, the amount would vary depending on the number of workers involved, payable to the grower in the event of any claim arising out of a "joint employment" theory where the FLC did not meet its payroll or other obligations as the employer. We believe others have similar arrangements. These are the types of contractual protections that growers and FLCs might negotiate as part of a labor agreement.

This new "interpretation" signals WHD's intention of pressing this issue and expanding the long-standing concept of who is an "employer." Going forward, growers, FLCs, and other employers need to keep tracking this issue and watching for future NCAE reporting on it.

This article written for NCAE by Chris Schulte of the Law Firm CJ-Lake, LLC February, 2016.

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