June 7, 2017

Department of Labor Withdraws Controversial Independent Contractor and Joint Employer Guidance

Earlier today, the U.S. Department of Labor ("DOL") withdrew two controversial Obama-era guidance letters relating to independent contractor classification and joint employment. The 2015 independent contractor guidance emphasized, among other things, the DOL's position that "most workers are employees" under the Fair Labor Standards Act, and foreshadowed greater scrutiny with respect to the classification of workers. The 2016 joint employment guidance outlined the DOL's expansive interpretation of the concept of "joint employment"—situations in which two or more employers would be deemed responsible for the same workers—with significant implications for franchised businesses, temporary and contract workers, and affiliated business entities, among others. In that 2016 guidance, the DOL explained that the joint employer doctrine does not require direct control over workers, but applies when one employer exercises "indirect control" over the workers of another employer.

Notwithstanding the withdrawal of this DOL guidance, employers should approach independent contractor classification and joint employment issues with Obama-era caution. Withdrawal of the guidance does not overrule the case law on which it was based, or necessarily signal a shift in position by the DOL with respect to interpretation of applicable regulations and other legal authority. Even the DOL's official press release cautions employers: "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law." Employers must also consider more stringent state laws, as well as interpretation of these issues by other agencies such as the National Labor Relations Board ("NLRB"), which continues to apply Obama-era guidance. Specifically, for instance, the NLRB adopted a joint employer standard in August 2015 that has had a significant impact on franchised businesses, and it is unlikely to alter this standard unless and until the Trump administration changes the composition of the NLRB.

While business and free-market groups applaud the DOL's move, the actual legal landscape for employers may not have changed significantly—yet. Employers are encouraged to contact legal counsel prior to making any modifications to their employment policies and practices based on the withdrawal of the DOL's guidance.

Christine A. Samsel
Shareholder
csamsel@bhfs.com
303.223.1133 (CO)
310.500.4622 (CA)

Karen Dinino
Senior Counsel
kdinino@bhfs.com
310.500.4619

Sherli Shamtoub
Associate
sshamtoub@bhfs.com
310.500.4618

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This document is intended to provide you with general information regarding the withdrawal of DOL guidance letters relating to independent contractor classification and joint employment. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.