LABOR & EMPLOYMENT *Newsletter*

February 2016 Issue

In this Issue:

In New Guidance, DOL Gets Aggressive on "Joint Employment"

by Tom H. Luetkemeyer

By issuing a new interpretative document in January, the U.S. Department of Labor's Wage and Hour Division attempted to clarify the concept of "joint employment" under the Fair Labor Standards Act. And make no mistake, from an agency enforcement perspective, the joint employer concept has been expanded.

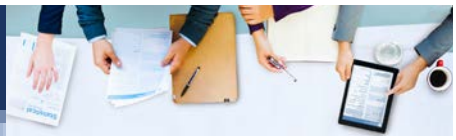
The Basic Concept

Inherent in the concept of joint employment is the recognition that an employee can have two or more employers. The DOL recognizes that businesses use varying staffing models, including temporary labor providers, staffing agencies and management companies.

Imagine this simple scenario: An orthopedic physicians group engages a physical therapy company to provide services at the group's clinic, and the company's therapists are assigned to work at the office. The physicians group does not track the time of the therapists, does not provide vacation or other benefits, does not process payroll, and does not check the accuracy of the therapists' paychecks. The group does not even schedule individual therapists, other than generally identifying when they want a therapist on site. The physicians group does, however, provide clinical supervision, allow the therapists to work on the clinic premises and issue medical orders. The group also subjects the therapists to its policies when on site (e.g., prohibition of harassment, confidentiality) and reserves the right to remove a therapist from the jobsite in the event of poor performance or conflicts.

Somewhat amazingly, under the DOL's new interpretation, the physicians group likely would be responsible for any mistakes in payroll made by the physical therapy company.

DOL supports its expansive approach to joint employment by referencing the broad definition of employ under the FLSA ("to suffer or permit to work") and finds further



support in the fact that an employer is defined by statute as "any person acting directly or indirectly in the interest of an employer in relation to an employee." If those definitions are not clear, the FLSA's definition of "employee" doesn't help either—an employee is defined as "any individual employed by an employer". These vague and circular definitions provide the statutory groundwork for the DOL's belief that individuals and entities other than the statutory employer could be a responsible party under the joint employment concept. Of course, in the DOL's words, joint employment under the FLSA also is "notably broader" than the concepts of joint employment under other statutes.

"Horizontal" vs. "Vertical" Joint Employment

The guidance proceeds to explain analytical frameworks for examining potential joint employment relationships: "horizontal" and "vertical". According to the Interpretation, "horizontal joint employment" exists where the employee has two or more employment relationships with employers that have a relationship regarding that purported employee. In other words, the focus is the relationship between the employers: whether the two entities are sufficiently associated with each other with respect to the employee. The best example of joint employers under a horizontal analysis would be two commonly controlled entities that share an employee for portions of a workweek. The hours of such an employee likely would be aggregated for purposes of computing potential overtime exposure.

"Vertical joint employment," on the other hand, exists where the employee has an employment relationship with one employer and the "economic realities" demonstrate that the worker is "economically dependent" upon another entity, which then is the "joint employer". This analysis requires consideration of several factors:

1) the extent of supervision by the potential joint employer over the work;
2) the extent to which the potential joint employer controls employment conditions and the workplace;
3) the permanency and duration of the relationship with the worker;
4) the nature of the work performed by the worker;
5) whether the worker's services are an integral part of the potential joint employer's business;
6) whether the tasks of the worker are performed on the premises of the potential joint employer; and
7) whether the potential joint employer performs certain administrative functions for the worker, such as handling payroll.

As with any multi-factored analysis, a potential joint employer may satisfy some of the factors of the vertical joint employment test, and not satisfy others. DOL points out that no one factor is controlling, and that the issue of control over the services of the employee is not to be overemphasized. As a result, the existence of the multi-factored analysis creates ambiguity: it is easy to craft conflicting arguments even on an agreed set of facts.

Conclusion: What Next?

The end result of DOL's new Interpretation is that more businesses will likely face exposure for wage and hour violations of workers they didn't hire, don't directly supervise, and don't pay. This will also require potential joint employers to be more vigilant about the wage and hour practices of affiliates, subcontractors, vendors, and business partners. The review and increased use of indemnities in business relationships between employers may become even more commonplace, along with disputes among businesses as to who might be liable, albeit on an indirect basis, for the wage and hour mistakes of a third party.

EEOC Announces Plan to Begin Collecting Pay Data on EEO-1 Reports

by Evan J. Bonnett

On January 29, the Equal Employment Opportunity Commission announced a proposed rule that will require all employers with 100 or more employees to report pay and hours based on their employees' race and gender. The rule change would revise the EEO-1 Report to include this new reporting category. The public has until April 1, 2016 to comment.

What's the context behind these proposed rule changes?

The White House unveiled the proposed rules at a press conference, in an announcement that featured several other actions that the "Administration is taking to advance equal pay for all workers." The actions stem from the recommendation of President Obama's 2010 Equal Pay Task Force and a Presidential Memorandum issued on April 8, 2014.

Well, what are the proposed changes to the reporting requirements?

Pursuant to Title VII of the Civil Right Act of 1964, the EEOC and the Department of Labor already require employers with 100 or more employees to count employees by ethnicity, race, and sex by job category. The data is collected annually from any pay period occurring from July through September, and then reported by September 30th on the Standard Form 100, Employer Information Report EEO-1.

The proposed rules would require those same employers to also collect data on employees' total annual W-2 earnings and annual hours worked. Reporting on this data would begin with the 2017 reporting cycle (i.e., September 30, 2017).

As an overview, the revised, draft EEO-1 form requires reporting of the number of employees who make a certain salary within each of ten job classifications, divided by gender and by seven race and ethnicity categories. Each job category has twelve pay bands for "annual salary," ranging from "$19,239 and under" to "$208,000 and over." The draft form first requires the employer to report the number of employees in each classification, category, and pay band. Next, the draft form requires the employer to report the number of hours worked in the last year in each pay band cell.

A few potential problems are readily apparent from a review of the proposed rules. Most critically, the proposed rules are not crystal clear about how an employer should determine the "annual salary" and "total number of hours worked in the last year." The proposed rules seem to envision a rolling one-year look back from the chosen pay period occurring from July through September. However, the proposed rules could also be interpreted to require a report from October 1 of the previous year through September 30 of the reporting year. The final rules should be much clearer given the importance for employers of getting this data correct.

Confidentiality of information for individual workers is also an issue. While the proposed rules do not require pay data on individual workers, they also do not fully address confidentiality concerns when, for instance, only one employee falls into a particular classification, category, and pay band.

What can we do?

Altogether, while the proposed rules will not require employers to gather data they are not already collecting, they will require many employers (67,146 filers in 2014) to face additional reporting burdens relating to an estimated total of 63 million employees. In the meantime, however, the proposed rules are not yet final. The public has until April 1, 2016 to take advantage of the opportunity to impact the rules' final form by submitting comments.

Haze Lifting on Employer's Rights and Medical Marijuana

by Aimee E. Delaney

The fast expansion of the medical marijuana movement has brought with it growing confusion on the line between a workers' rights to take advantage of the rights afforded by these state statutes and an employer's right to enforce its anti-drug policies. Last month, a New Mexico District Court decision added to the recent list of opinions to tackle this issue and, in doing so, came down on the side of the employer.

New Mexico passed its Compassionate Use Act in 2007. Under this Act, the state's medical marijuana program is authorized. Individuals meeting the statutory and regulatory criteria for participation in the program are eligible to receive Patient Identifications Cards, which permit the medical use of medical marijuana when prescribed by a physician.

The plaintiff in this case, captioned *Garcia v. Tractor Supply Co.* (CV-15-735), had been diagnosed with HIV/AIDS, which is a serious medical condition as defined by the New Mexico Human Rights Act. He properly obtained a Patient Identification Card and had been prescribed marijuana for treatment of his condition. This individual subsequently applied for a job, and during his interview with the prospective employer, disclosed his medical condition as well as his participation in the medical marijuana program. He was hired and sent for a drug test pursuant to the company's policy.

As you might have guessed, the drug test returned positive for marijuana. As a result of that positive test, the new employee was terminated, leading to the perfect storm of legal issues between medical marijuana rights, state discrimination statutes and federal law. As the court itself explained, "[t]his case turns on whether New Mexico's Compassionate Use Act combined with the New Mexico Human Rights Act provides a cause of action for Mr. Garcia. Ever present in the background of this case is whether the Controlled Substances Act preempts New Mexico state law."

The employee sued under the state's Human Rights Act asserting disability discrimination for failure to accommodate, specifically, that medical marijuana is an accommodation that must be provided by an employer under New Mexico's Human Rights Act.

Relying on support from recent Colorado decisions addressing similar issues under that state's statute, the employer argued that the state medical marijuana law offers users of medical marijuana limited protection against state criminal prosecution and does not impose any duty on employers to accommodate medical marijuana. The court

agreed, noting that the employee was not terminated on the basis of his medical condition. Nor was his positive drug test because of his serious medical condition. Perhaps most important, the court agreed with the employer that the state medical marijuana statute could not require employers to accommodate what the Controlled Substance Act specifically prohibits under federal law. The employee was not seeking immunity under state law for his marijuana use, but to affirmatively require an employer to accommodate the use under disability law, and, as such, his claim was dismissed.

As with any state decision on this issue, the language of the actual statute in question is important to assessing how far an employee's rights will go when intersecting with an employer's rights and obligations to accommodate disabilities. No affirmative requirements mandating an employer to accommodate medical marijuana cardholders appears in the New Mexico statute (unlike Delaware and Vermont). However, this decision, along with the Colorado decisions and other precedent cited in the opinion will continue to provide employers in states with medical marijuana statutes firmer ground when seeking to enforce their anti-drug policies against applicants and employees.

U.S. Supreme Court Rules Employers Cannot Avoid Class Actions By Offering Complete Relief to Plaintiffs

by Elizabeth A. Odian

In a 5-3 decision, the United States Supreme Court affirmed the Ninth Circuit's decision in *Campbell-Ewald Co. v. Gomez*, holding that an unaccepted settlement offer or offer of judgment providing an individual plaintiff complete relief does not moot a class action complaint, resolving a split among circuits. Notably, the Court limited its holding by declining to address "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." The Court's dissenting opinions and concurring opinions suggest actual tender would moot the plaintiff's claim.

The upshot from this decision is that employers can no longer avoid class action complaints by merely offering the individual plaintiff complete relief before class certification. The question remains open as to whether employers can avoid class actions by tendering payment to the plaintiff before class certification.