

# JOINT EMPLOYMENT

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U.S. Department of Labor has expanded application of "joint employer" doctrine to apply to more situations and employers.

US DOL's Wage and Hour Division Administrator's Interpretation No. 2016-1, issued on January of 2016 defines "**employee**" as "any individual employed by an employer," and "**employer**" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Definition of "**employ**" includes "to suffer or permit to work," which is "**broadest definition** that has ever been included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

DOL regulations provide that single worker may be "employee to two or more employers at the same time." 29 C.F.R. 791.2(a).

The "**suffer or permit**" standard allows courts to find "economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees." *Antenor v. D&S Farms*, 88 F.3d 925, 933 n.10 (11th Cir. 1996).

# TWO WAYS OF FINDING JOINT EMPLOYMENT

## **“Horizontal” Joint Employment**

When two or more employers each separately employ an employee, and are sufficiently associated with or related to each other with respect to the employee. See 29 C.F.R. 791.2.

## **“Vertical” Joint Employment**

When an employee of one employer is also, with regard to the work performed for that employer, also economically dependent on another employer. See 29 C.F.R. 500.20(h)(5).

# FACTORS FOR HORIZONTAL JOINT EMPLOYMENT

who owns the potential joint employers;

do the potential joint employers have any overlapping management;

do the potential joint employers share control over operations;

are the potential joint employers' operations inter-mingled;

does one potential joint employer supervise the work for the other;

do the potential joint employers share supervisory authority for the employee;

do the potential joint employers treat the employees as a pool of employees available to both of them;

do the potential joint employers share clients or customers;

and are there any agreements between the potential joint employers

# FACTORS FOR VERTICAL JOINT EMPLOYMENT

Focus is on relationship between **intermediate employer** and potential **joint employer**.

“Economic realities” factors used to determine if intermediate employer is “employee” of higher-tier entity.

# WHY IT MATTERS

If a company is deemed to be a joint employer, then **all obligations** owed to employee attach to **that company**.

Company is required to pay minimum wage, overtime, and provide benefits (including under ACA).

Worker must have payroll taxes withheld, with employer contributions for SS and Medicare.

Company may be required to have workers' comp insurance to cover worker.

# OTHER RISKS

Liability for employment discrimination  
Liability for sexual harassment  
Liability for unfair labor practices

**Example:** Skanska was held responsible by EEOC for racial employment discrimination by subcontractor under this doctrine, and Sixth Circuit Court of Appeals upheld finding.