

## **Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)**

Whether an employee has more than one employer is important in ensuring that the employee receives all of the rights and protections afforded by the FLSA and MSPA, and that the employers are aware of and accountable for compliance with their obligations under these Acts. Accordingly, this fact sheet provides general information concerning the meaning and applicability of joint employment under the FLSA and MSPA.

### **What is Joint Employment?**

Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, to the employee for compliance with a statute.

The FLSA and MSPA share the same definition of employment. This definition, which includes “to suffer or permit to work,” was written to have as broad an application as possible.

Under these laws, it is possible for a worker to be employed by two (or more) joint employers who are both responsible for compliance. Joint employment is included in the laws’ definition of employment – therefore, joint employment is also defined broadly.

WHD considers joint employment in hundreds of investigations every year, including in the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

### **Determining if Joint Employment Exists**

The most likely scenarios for joint employment are

- 1) Where the employee has two (or more) technically separate but related or associated employers, or
- 2) Where one employer provides labor to another employer and the workers are economically dependent on both employers.

An FLSA regulation, 29 CFR 791.2, provides guidance regarding the first scenario for joint employment, and a MSPA regulation, 29 CFR 500.20(h)(5), provides guidance regarding the second scenario. Because the FLSA and MSPA share the same definition of employment, both types of joint employment can exist under either the FLSA or MSPA.

*1) Where the employee has two or more technically separate but related or associated employers.*

Joint employment exists where two (or more) employers benefit from the employee’s work and they are sufficiently related to or associated with each other. For example:

- The employers have an arrangement to share the employee’s services;
- One employer acts in the interest of the other in relation to the employee; or
- The employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

The focus of this type of joint employment is the degree of association between the two (or more) employers, and it is sometimes called *horizontal joint employment* by the courts. For example, joint employment may exist where an employee works for two restaurants that are technically separate but have the same managers, jointly coordinate the scheduling of the employee's hours, and both benefit from that employee's work.

In these cases, it is important to consider facts that shed light on the degree of association between the two (or more) employers and how these employers may jointly control the employee. Although not all or even most of these facts need to be present for there to be joint employment, some facts to consider include:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?
- Do the employers share supervisory authority over the employee?
- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

2) *Where one employer provides labor to another employer and the workers are economically dependent on both employers.*

Joint employment also exists where a worker is, as a matter of economic reality, economically dependent on two employers: an intermediary employer (such as a staffing agency, farm labor contractor (FLC), or other labor provider) and another employer who engages the intermediary to provide workers. The workers are employees of the intermediary, and the issue is whether they are also employed by the employer who engaged the intermediary to provide the labor. This type of joint employment is common not only in agriculture, but also in other industries that use subcontracting, staffing agencies, or other intermediaries, such as construction, warehouse and logistics, and hotels. This type of joint employment exists in both FLSA and MSPA cases.

For example, in agriculture, a grower may contract with an FLC to provide farm workers. In another example, a higher-tier contractor may contract with a subcontractor to provide construction workers for a project. In these types of relationships, the question is whether the employees (farm workers or construction workers) are jointly employed by the other employer (the grower or higher-tier contractor).

The focus of this type of joint employment is the employee's relationship with the other employer (as opposed to the intermediary employer). This type of joint employment analysis must include an examination of the economic realities of the relationship to determine the degree of the employee's economic dependence on the other employer – the potential joint employer. Some courts have called this *vertical joint employment*.

In these cases, it is important to consider factors that demonstrate whether a worker is economically dependent on, and therefore employed by, the other employer. The MSPA regulation provides the following economic realities factors to consider:

- Does the other employer direct, control, or supervise (even indirectly) the work?
- Does the other employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
- How permanent or lengthy is the relationship between the employee and the other employer?

- Does the employee perform repetitive work or work requiring little skill?
- Is the employee's work integral to the other employer's business?
- Is the work performed on the other employer's premises?
- Does the other employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance, or, in agriculture, providing housing or transportation?

Any other evidence that indicates economic dependence should be considered as well; these seven factors are not exhaustive. Moreover, there are likely other economic realities factors that, consistent with the broad scope of employment under the FLSA and MSPA, may be considered when determining whether vertical joint employment exists. The analysis, however, 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.

This joint employment analysis is necessary in cases where the FLC, staffing agency, or intermediary employer is an independent contractor, as opposed to an employee, of the other employer (the potential joint employer). This joint employment analysis is not necessary in cases where the FLC, staffing agency, or intermediary employer is not an independent contractor but is him/herself or itself an *employee* of the other employer. In that situation, the intermediary and his/her/its employees are all employed by the other employer.

### **Responsibilities of Joint Employers**

Joint employers (whether vertical or horizontal) are responsible, both individually and jointly, for compliance with the FLSA and MSPA.

*Under the FLSA*, each of the joint employers must ensure that the employee receives all employment-related rights under the FLSA (including payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one-half the regular rate of pay for hours worked over 40 in a workweek, unless an exception or exemption applies). Furthermore, joint employers must combine all of the hours worked by the employee in a workweek to determine if the employee worked more than 40 hours and is due overtime pay.

*Under MSPA*, each of the joint employers must ensure that the employee receives all employment-related rights granted by MSPA, such as accurate and timely disclosure of the terms and conditions of employment, written payroll records, and payment of wages when due.

However, a joint employer is not necessarily responsible for complying with MSPA housing and/or transportation requirements. An employer is responsible for MSPA-covered housing only if it "owns or controls" the housing occupied by a migrant agricultural worker. An employer is responsible for transportation requirements only if it is "using or causing to be used" any vehicle for providing transportation.

The analysis for determining joint employment under the Family and Medical Leave Act (FMLA) is the same as under the FLSA. For information about how joint employment affects FMLA coverage and eligibility determinations and the FMLA responsibilities of primary and secondary employers, see [Fact Sheet 28N](#).

### **Where to Obtain Additional Information**

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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