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How many employees are on your field location (for purposes of the FLSA)?

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By now you have probably heard that on December 1 the salary threshold required for employees to qualify for the executive, professional or administrative exemptions allowed by the Fair Labor Standards Act (FLSA) will double. While certainly significant, this recent update to the overtime regulations was not unexpected, as the salary threshold has not been increased since 2004.

This change is of course not the only recent wage and hour development of which oil and gas employers must be aware. In addition to the fact that Wage and Hour Division of the United States Department of Labor (DOL) has been specifically targeting the oil and gas industry since 2012, there are other, far less distinct trends that have been taking shape over the past year. The DOL and the National Labor Relations Board (NLRB) have announced new rules and cases that could increase employee headcounts and expand the concept of joint employment. In short, for purposes of the FLSA, some oil and gas employers may actually have more employees than their payrolls indicate.

Determining whether independent contractors are actually employees

In response to the trend of increasing employee misclassification investigations and private wage and hour lawsuits, last summer the DOL issued a 15-page interpretative memorandum with an aim to provide "additional guidance" for determining who is an employee and who is an independent contractor under the FLSA. Although classification as an independent contractor can be advantageous (or even preferable) for workers and businesses alike, improperly classified workers do not receive certain workplace protections such as the minimum wage, overtime compensation, unemployment insurance and workers' compensation. Improper classification also frequently results in lower tax revenues for the government and an unfair advantage against those employers that do properly classify their workers.

The FLSA broadly defines the word "employ" as "to suffer or permit to work." According to the United States Supreme Court in U.S. v. Rosenwasser, 323 U.S. 360 (1945), and as acknowledged in the DOL's interpretive memorandum, the "suffer or permit" standard is the broadest definition that has ever been included in any one act and it was designed to ensure as broad a scope of statutory coverage as possible.

The economic realities test determines whether an individual is an employee or an independent contractor. It involves a balancing of several factors, including whether the potential joint employer controls the supposed independent contractor and the employment conditions; the permanency of the relationship; the repetitiveness of the work being performed; whether the work is integral to the potential joint employer's business; whether the work is performed on the potential joint employer's premises; and whether the work qualifies as routine administrative work. According to the DOL, these factors should not be analyzed "in a vacuum, and no single factor, including control, should be over-emphasized." The ultimate determination to be made is whether the individual at issue is in business for him or herself or is instead economically dependent on the employer. According to the DOL, many companies misapply this "broader concept" of the economic realities test and as a result "most workers are employees under the [FLSA]."

NLRB's expanded joint employer test

Just over one year ago, in August 2015, the NLRB applied an expanded joint employer test in *Browning Ferris Industries*, et al., 362 NLRB No. 186 (2015), a case in which it held that, for the purpose of a union representation election, Browning Ferris Industries was a joint employer with Leadpoint, a staffing agency. The decision was based upon the concept that it is the "existence, extent and object" of the putative joint employer's control that matters, not whether that control is actually exercised. Though the *Browning Ferris* decision is limited to union representation elections, regulatory agencies and the plaintiffs' bar may attempt to apply a similarly expansive joint employer concept for purposes beyond collective bargaining, such as wage and hour matters. Moreover, many temporary employee and contractor arrangements have been structured in reliance of the NLRB's pre-*Browning Ferris* emphasis on the actual exercise of control as the determinative factor rather than the potential for such control. Those arrangements may now be susceptible to attack under the more expansive *Browning Ferris* test.

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DOL's joint employment guidance

Earlier this year, the DOL issued enforcement guidance on the topic of joint employment. Many employers have decreased the size of their workforce in recent years by relying upon staffing firms to provide temporary employees or by outsourcing certain job functions entirely through contracts with independent businesses. Despite this, employers may still face potential liabilities under the joint employment doctrine. As the traditional direct employment model has changed, these so called "fissured workplaces" have been targeted as alleged joint employers. As a result, traditional labor and employment laws and regulations might be applied to businesses that do not view themselves as the "employer" of temporary or contracted employees.

Many oil and gas employers may be surprised to know that they may be jointly responsible for paying workers overtime along with the entity that actually issues the workers a Form W2. Regardless of whether the potential joint employment involves a horizontal or vertical arrangement, joint employers are jointly responsible for adhering to wage and hour laws. Horizontal joint employment involves workers who are employed by two technically separate yet related or intermingled entities. Vertical joint employment, on the other hand, is the classic staffing agency model.

Very recently, oil and gas workers have begun to file complaints against only one (but not all) of the alleged joint employers. For instance, one plaintiff recently alleged that an operator "or its client" violated a wage and hour law. Another alleged that an operator "or its contractor" misclassified the plaintiff. Perhaps this strategy is the result of genuine confusion as to which entity was the plaintiff's actual employer. A more likely conclusion may be that plaintiffs are targeting the entity they presume to have deeper pockets. Regardless of plaintiffs' intentions, oil and gas employers should be aware of the possibility that, for purposes of the FLSA, they may be responsible for workers who do not appear on their payrolls. ¦

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