

DOL Withdraws Administrator's Interpretations on Independent Contractors and Joint Employment

On June 7, 2017, the Department of Labor ("DOL") announced the withdrawal of the sub-regulatory guidance issued by the DOL in 2015 and 2016 (Administrator's Interpretations No. 2015-01 (July 15, 2015 on independent contractors) and No. 2016-01 (January 20, 2016 on joint employment)).

Administrator's Interpretation No. 2015-01 addressed the classification of independent contractors as employees under the Fair Labor Standards Act ("FLSA") stating that "most workers are employees under the FLSA's broad definitions," essentially creating a presumption of employment for all workers.

Administrator's Interpretation No. 2016-01 established new standards for determining joint employment under the FLSA and the Migrant Seasonal Agricultural Worker Protection Act ("MSPA"). The DOL took the position that "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA."

In 2010, the DOL began issuing Administrator's Interpretations, broad pronouncements of the agency's views on issues, in a significant departure from its prior practice of issuing guidance in the form of regulations and opinion letters. Critics of the Administrator's Interpretations viewed them as a way for federal agencies to circumvent the traditional rulemaking process in furtherance of a pro-worker agenda, departing from case law, statutes and regulations on their subjects. The 2015 and 2016 Administrator's Interpretations were specifically criticized for creating informal standards outside of the notice-and-comment process required for formal agency rulemaking.

The withdrawal of the 2015 and 2016 Administrator's Interpretations is the first major sign that the DOL intends to undo some of the pro-worker activism of the prior administration. It is expected that this withdrawal will eventually be followed by opinion letters, possibly on the issue of joint employment and independent contractors.