

OCTOBER 2016

THAT WILL BE \$15 FOR YOUR KID'S MEAL: WELCOME TO THE NEW WORLD OF DOL REGULATIONS

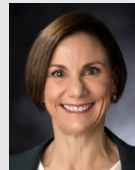
HELEN R. HOLDEN

I. Introduction

The Fair Labor Standards Act ("FLSA") has, for nearly eight (8) decades, provided for payment of employee minimum wages and overtime. Certain employees are exempt from these requirements, including executive, administrative, and managerial employees. In 2015, the United States Department of Labor ("DOL" or the "Department") proposed new regulations for these exemptions. In announcing these new regulations, the Department noted that the proposed regulations "will automatically extend overtime pay protections to over 4 million workers within the first year of implementation." U. S. Dept. of Labor Wage and Hour Division, *Final Rule: Overtime* available at <http://www.dol.gov/whd/overtime/nprm2015/>. In May, 2016, the final rule updating the overtime regulations was published, announcing an effective date for the final rule of December 1, 2016.

The Wage and Hour Division of the Department of Labor has also promulgated recent interpretive guidance regarding the Final Rule. Two significant pieces of interpretive guidance relate to the test for establishing employee status under the FLSA and the Department's view of joint employment under the FLSA. The proposed regulations and the guidance present a clear message: enforcement of the FLSA is a priority.

Not only must employers face increased scrutiny by regulators, but employers also face increased risk of litigation as the number of lawsuits asserting claims under the FLSA has risen exponentially over the past two decades. See Richard L. Alfred, *FLSA Suits Continue to Skyrocket: New Record High in 2015, More Than 9,000 Expected in 2016*, Seyfarth Shaw, LLP Firm News (November 20, 2015), available at www.seyfarth.com/news/FLSA-Suits-Skyrocket. For example, in the fiscal year ended



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Helen R. Holden, a shareholder with Sacks Tierney, P.A., focuses her practice on assisting businesses of all sizes with both counselling and litigation involving a wide range of human resources and employment law issues. Helen's litigation experience includes success in state and federal courts and has included bringing and defending restrictive covenant litigation, defending discrimination and harassment matters, and defending complex commercial and business disputes. She also regularly represents employers in connection with state and federal regulatory and administrative actions.

Helen is a founding member of the Employee Misclassification Compliance Assistance Program Arizona Working Group and, in that context, has written and spoken extensively on the topic of employee misclassification. She also writes and speaks regularly on a variety of other employment law issues. Some of her more recent presentations include "The Joy of Pregnancy: Pregnancy Discrimination" (podcast), West LegalEdcenter, 2015; "Recent Developments in Employee Handbooks" (moderator and presenter), Practical Law (Thomson Reuters), 2015; and "The NLRB and Joint Employment" (webinar), C.O.R.E. Training, 2015. Helen currently serves as a board member for Raising Special Kids, an Arizona non-profit which is focused on improving the lives of children with a full range of disabilities, from birth to age 26, by providing support, training, information and individual assistance so families can become effective advocates for their children.

Helen obtained her undergraduate degree with honors from Bryn Mawr College, followed by her J.D. from the Arizona State University College of Law in 1990. After a judicial clerkship at the Arizona Court of Appeals with then Chief Judge Noel A. Fidel, Helen began practicing in commercial litigation and labor and employment law. She is rated as AV-Preeminent by Martindale-Hubbell, and has served for a number of years as a member of the State Bar of Arizona Civil Practice and Procedure Committee.

This article was part of a presentation at a recent FDCC meeting concerning the new DOL regulations. The presentation also included a panel discussion moderated by Paul M. Finamore (Niles Barton & Wilmer, LLP in Baltimore, Maryland). The panelists were M. Reid Estes, Jr. (Dickson Wright, PLLC in Nashville, Tennessee), Steve Goldstein (Betts, Patterson & Mines, P.S. in Seattle Washington), Michele Ballard Miller (Miller Law Group in San Francisco, California) and Jean Faure (Faure Holden in great Falls, Montana).

September 30, 2000, fewer than 2000 lawsuits alleging FLSA claims were filed in federal court. By September 30, 2015, that number had risen to nearly 9000. *Id.* What accounts for the dramatic increase? As a depression-era law, the reach of the FLSA is broad, while the language of the statute itself is poorly defined and somewhat circular. Moreover, the statute's broad remedial purpose, the availability of class-wide relief through the use of collective actions, and the remedies available under the statute (including liquidated damages and attorneys' fees) make fertile grounds for the plaintiff's bar. In many (if not most) states, state laws also address the issues, often providing additional protections for employees.

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From a client's perspective, the failure to understand the reach of the FLSA, the impact of recent regulatory changes, and the dramatic explosion of claims under the FLSA and similar state statutes can be extremely costly. This article addresses a number of issues relating to employee classification under the FLSA and parallel state laws before turning to the DOL's Proposed Rulemaking and the potential impact of the new regulations.

II. Employee Misclassification as Independent Contractors

Since the mid-1990s, it has been widely reported that the "contingent workforce" is rapidly expanding. See U.S. Government Accountability Office Report, *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, (April 20, 2015), available at <http://www.gao.gov/assets/670/669899.pdf>. Subsection A below focuses upon the issue of employee classification under the FLSA from a regulatory perspective and addresses the standard for determining employment status in light of regulatory trends. The second section, Subsection B, addresses the misclassification issue from a state law perspective. Although a state-by-state survey of the law is beyond the scope of this article, the discussion below highlights a few of the higher profile cases in this arena.

A. Economic Realities Test: Regulatory Developments

The FLSA contains a broad definition of employment: "Employ' includes to suffer or permit to work." 29 U.S.C. §203(g). To apply this definition and determine whether a worker is an employee under the

FLSA, courts generally utilize the "economic realities" test. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); 29 U.S.C. §§206 (Minimum Wage) and 207 (Maximum Hours).

In July, 2015, the U.S. Wage and Hour Administrator issued Administrator's Interpretation No. 2015-1, which addresses the issue of misclassification of workers as independent contractors, notes that "most workers are employees under the FLSA," and discusses the economic realities test at length. See U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent*

Contractors, p. 2 (July 15, 2015), available at <https://www.dol.gov/WHDOpinion/adminInterprtnFLSA.htm> (hereinafter referred to as the "Misclassification AI"). It should be noted that the United States Supreme Court recently held that the Administrator's Interpretations applying the FLSA have, in effect, the force of law. See *Perez v. Mortgage Bankers Ass'n*, ___ U.S. ___, 135 S. Ct. 1199, 191 L.Ed.2d 186 (2015).

As indicated above, the Misclassification AI addresses the economic realities test in detail, including summarization of prior decisions and providing a number of examples of real-world application. Under the economic realities test, the focus in determining whether a worker qualifies as an employee or an independent contractor is on whether the worker is economically dependent on the company or truly in business for himself/herself. *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 523 (6th Cir. 2011); *Hopkins v. Cornerstone America, et al.*, 545 F.3d 338, 343 (5th Cir. 2008). No one factor is determinative of whether the individual should be appropriately classified as an employee. *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009). Rather, the determination depends upon all of the facts and circumstances involved. *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008) ("...employment for FLSA purposes [is] a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances"). The following six factors are commonly addressed by the courts in distinguishing between employees and independent contractors under the FLSA:

- The degree of the potential employer's right to control the manner in which the work is to be performed;
- The potential employee's opportunity for profit or loss depending on his managerial skill;
- The potential employee's investment in materials, equipment, or the assistance of others to perform the services;
- The degree of skill required to perform the services;

- The longevity and permanence of the working relationship; and
- Whether the service provided is an integral part of the potential employer's business.

... that the final factor – whether the services performed are “integral to the employer's business” – should always be analyzed in misclassification cases. Courts have found this “integral” factor to be “compelling.”

Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754 (9th Cir. 1979); *Hopkins, supra*. 545 F.3d at 343; *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013). The Misclassification AI also notes that the final factor – whether the services performed are “integral to the employer's business” – should always be analyzed in misclassification cases. Courts have found this “integral” factor to be “compelling.” See Administrator's Interpretation 2015-1 at 6 (citing *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989); *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 1537-38 (7th Cir. 1987)). The Misclassification AI provides several examples to illustrate the “integral” factor analysis and show that work can be integral to the employer's business even if the work is performed away from the employer's premises and even if the services are only one component of the business. In an example referencing a construction company that frames residential homes, the misqualifications AI notes that the workers who actually perform the framing services are integral to the employer's business (even though the work is performed away from the employer's premises), but the software developer who creates a program to assist the residential construction company with tracking bids and scheduling may not be integral to the business.

B. Employee v. Independent Contractor: Recent FLSA Cases

In several recent cases, federal courts have addressed whether particular groups of workers should be appropriately classified as employees or independent contractors under the FLSA. A few of these decisions are highlighted below.

Eberline v. Media Net, L.L.C., 636 Fed.Appx. 225 (5th Cir. 2016): In this collective action, a class of satellite television technicians and installers sued Media Net, a company that provides installation services for DirecTV satellites, alleging that they were improperly classified as independent contractors. The case proceeded to jury trial, and the jury found in favor of the company – i.e., that the television technicians and

installers were appropriately classified as independent contractors. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision and held that the television technicians and installers were not so economically dependent on MediaNet as to be considered employees. Instead, the evidence presented in the case indicated that the technicians and installers exerted independent control over meaningful aspects of their business life and had the ability to exercise initiative within the business. Specifically, the technicians and installers were able to:

- (1) determine and control the days and hours they worked;
- (2) perform custom work or additional services outside of the normal installation scope of work for customers to earn extra profits; and
- (3) hire assistants to help with the installation assignments.

Id. at 229; see also *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015) (The Court recognized that the determination of whether plaintiff was an employee under the FLSA was a mixed question of law and fact. The Court further held that genuine issues of material fact as to the factors of the economic realities test precluded summary judgment in favor of the employer.).

Randolph v. PowerComm Constr. Inc., 309 F.R.D. 349 (D. Md. 2015): Collective action by a group of “flaggers” (also known as traffic controllers) against an electrical utility construction company seeking designation as employees under the FLSA and recovery of appropriate overtime wages and other job benefits. The court analyzed the six factors of the economic realities test and found that the “flaggers” were entitled to employee status under the FLSA.

Perez v. Super Maid, LLC, 55 F.Supp.3d 1065 (N.D. Ill. 2014): In this enforcement action, the Secretary of Labor brought suit against Super Maid, LLC, a company providing cleaning services to households and businesses. The court found that the individuals who actually performed the cleaning services were misclassified as independent contractors. With respect to the “integral part of the business” factor, the Court noted that the maids performed the primary work of the alleged employer. As a result, the Court held that the maids qualified as employees under the FLSA, and granted summary judgment in favor of the Department of Labor. *Id.* at 1078.

Applying the economic realities test, courts in multiple jurisdictions have held that exotic dancers are employees of the clubs that employ them. See *Mason v. Fantasy, LLC*, 2015 WL 4512327 (D.Colo. 2015); *Clinicy v. Galardi S. Enterprises, Inc.*, 808 F.Supp.2d 1326, 1343 (N.D.Ga. 2011) (collecting cases and noting the weight of authority finding such dancers to be employees under the FLSA).

C. State Law Implications: Beyond the FLSA

It is important to understand that, in addition to the FLSA, there are other statutory and common law implications when employers classify their workers as either employees or independent contractors. A few of the laws which may come into play are federal and state tax laws, state overtime issues, state minimum wage issues, compliance with state worker's compensation statutes, and state unemployment compensation. There may be other statutory schemes which need to be addressed, such as contractor licensing statutes which require certain construction work to be completed by licensed subcontractors. The common law doctrine of *respondet superior* also applies to employees,

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but not independent contractors. Addressing each these issues in a comprehensive manner is beyond the scope of this article, but a few important cases decided under state law are highlighted below.

Across the country, FedEx drivers have sued to prove they qualify as employees under the FLSA and secure job benefits including, but not limited to, overtime pay. In *Craig v. FedEx Ground Package Sys., Inc.*, 300 Kan. 788, 335 P.3d 66 (2014), the Kansas Supreme Court noted that determination of worker status under applicable law is a close case by design because the company carefully crafted the drivers' operating agreements in order to label the drivers as independent contractors and gain a competitive advantage. In *Gray v. FedEx Ground Package Sys.*, 799 F.3d 995 (8th Cir. 2015), the court summarized the results of the various decisions as follows:

Some courts, in various legal and procedural postures, have found employee status. See *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014); *Schwann v. FedEx Ground Package Sys., Inc.*, No. 11-11094, 2013 U.S. Dist. LEXIS 93509, 2013 WL 3353776 (D.Mass. July 3, 2013), withdrawn in relevant part, 2015 U.S. Dist. LEXIS 13826, 2015 WL 501512 (D.Mass. Feb. 5, 2015); *Craig*, 300 Kan. 788, 335 P.3d 66; *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App.4th 1, 64 Cal.Rptr.3d 327 (2007). Other courts, again in various postures, have found independent-contractor status. See *FedEx Home Delivery v. NLRB*, 385 U.S.App.D.C. 283, 563 F.3d 492 (D.C.Cir. 2009); *Johnson v. FedEx Home Delivery*, No. 04-CV-4935, 2011 U.S. Dist. LEXIS 142425, 2011 WL 6153425 (E.D.N.Y. Dec. 12, 2011). Another certified the question. See

Craig v. FedEx Ground Package Sys., Inc., 686 F.3d 423 (7th Cir.2012) (per curiam). Still others have concluded simply that summary judgment was inappropriate. *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir.2015); *Mailhot v. FedEx Ground Package Sys., Inc.*, No. 02-00257, 2003 U.S. Dist. LEXIS 15087, 2003 WL 22037314 (D.N.H. Aug. 29, 2003). And a multidistrict-litigation proceeding has come to mixed results under the relevant laws of dozens of states. *In re FedEx*, 758 F.Supp.2d at 734. The multidistrict-litigation court has been partially reversed in some of the cases cited above.

Gray, 799 F.3d at 997, n.1.

O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015): A class of drivers initiated a lawsuit against Uber Technologies, Inc. alleging that Uber misclassified the drivers as independent contractors. Following its analysis of the issues presented under applicable California law, the Court noted that the traditional tests for employment status appear to be outmoded in the current economic environment:

The application of the traditional test of employment – a test which evolved under an economic model very different from the new “sharing economy” – to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test [The *Borello* test is the employment relationship test developed by the California Supreme Court, and it enumerates certain factors for consideration which are similar to the factors of the economic realities test]. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called “sharing economy.” Until then, this Court is tasked with applying the traditional multifactor test of *Borello* and its progeny to the facts at hand. For the reasons stated above, apart from the preliminary finding that Uber drivers are presumptive employees, the *Borello* test does not yield an unambiguous result. The matter cannot on this record be decided as a matter of law. Uber's motion for summary judgment is therefore denied.

Id. at 1153. In April 2016, the parties sought to settle the Uber litigation for approximately \$84 million, plus an additional \$16 million contingent upon valuation of an initial public offering, and significant

non-monetary terms. Under the proposed settlement agreement, Uber would continue to classify its drivers as independent contractors. However, in August 2016, the Court refused to approve the proposed settlement on the basis that “the settlement as a whole as currently

... the “proper question” when determining the employment status of unpaid interns is “whether the intern or the employer is the primary beneficiary of the relationship.”

structured is not fair, adequate and reasonable.” One of the Court’s primary concerns was the settlement’s inclusion of claims under the Private Attorney General Act (“PAGA”) and the massive reduction in the potential penalties which could be recovered in PAGA Claims. See Order Denying Plaintiffs’ Motion for Preliminary Approval filed in *O’Connor v. Uber Techs, Inc.*, Case No.: 13-cv-03826-EMC, D.E. 748 (N.D.Cal. August 18, 2016); Julia Carrie Wong, *Uber v. Drivers: Judge Rejects “Unfair” Settlement in US Class Action Lawsuit*, The Guardian (August 18, 2016), available at <https://www.theguardian.com/technology/2016/aug/18/uber-drivers-class-action-lawsuit-settlement-rejected>.

Terry v. Sapphire/Sapphire Gentlemen’s Club, 336 P.3d 951 (Nev. 2014): This case involved a class of exotic dancers in Nevada. The Nevada Supreme Court applied the economic realities test to determine employment status in the context of Nevada’s minimum wage statute. In support of its analysis and decision, the Court noted that a “larger national pattern of laws ... ha[s] emerged to deal with common problems in the minimum wage context and many other states have adopted the economic realities test to determine whether an employment relationship exists under their respective state minimum wage laws.” *Id.* at 956.

III. Interns

Another area that has seen growth in the number of FLSA claims alleged involves unpaid interns or trainee programs. Courts, as well as regulators, have struggled to define when internships or trainee programs are appropriately unpaid and when such programs are subject to the minimum wage and overtime requirements of the FLSA. The Second Circuit addressed this issue in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir.2016). In *Glatt*, a class of unpaid student interns brought suit against Fox and claimed that they qualified as employees under FLSA and were, therefore, entitled to compensation. The students had performed certain production-related work on a movie set or worked in Fox’s corporate offices. Fox argued that the individuals were not employees, but were appropriately classified as unpaid interns or trainees. All of the parties in the case agreed that

there were some circumstances in which someone labeled as an unpaid intern is actually an employee. The parties further agreed that there were also circumstances in which an unpaid intern or trainee did not qualify as an employee under the FLSA. However, the parties disputed the factors which should be considered and the standards for identifying these factors. Ultimately, the Court agreed with Fox and stated that the “proper question” when determining the employment status of unpaid interns is “whether the intern or the employer is the primary beneficiary of the relationship.” *Id.* at 536. The court identified the following non-exhaustive list of factors for consideration:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Id. at 536-37.

Courts in other jurisdictions have applied a similar approach to modern internships and training programs. One example is *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015), a case in which the court discussed claims by student registered nurse anesthetists who sought pay for clinical hours required for their professional certification program. The Court noted that the factors identified by the Second Circuit in *Glatt, supra*, “effectively tweak the Supreme Court’s consid-

erations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here.” *Schumann*, 803 F.3d at 1212.

With respect to horizontal joint employment, the focus of the inquiry is the relationship between the potential joint employers. ... With respect to vertical joint employment, the focus of the inquiry is the employee’s relationship with the potential joint employer and whether that employer jointly employs the employee.

IV. Joint Employment

The FLSA provides for broad reach over employment relationships, defining “employer” (perhaps circuitously) to include “any person acting directly or indirectly in the interest of an employer in relation to an employee...” 29 U.S.C. § 203(d). As with the definition of “employee,” the “employer” definition and the concept of joint employment are defined and interpreted “expansively” under the FLSA. *Chao v. A-One Med. Servs. Inc.*, 346 F.3d 908, 917 (9th Cir. 2003). Accordingly, employees may have more than one employer under the statute, each of whom may be held jointly and severally liable for insuring compliance with the FLSA. *Baystate Alternative Staffing v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

In the past few years, the Wage and Hour Division of the Department of Labor (“WHD”) has addressed joint employment in two separate Administrator’s Interpretations. In June 2014, WHD issued an Administrator’s Interpretation addressing joint employment in the context of home care workers. Administrative Interpretation No. 2014-2, *Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act*, available at https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.htm (hereinafter referred to as the “Home Care AI”). Then, in January 2016, WHD issued Administrator’s Interpretation No. 2016-1, entitled “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” and available at: https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf (hereinafter referred to as the “Joint Employment AI”).

The Joint Employment AI discusses and distinguishes between “horizontal” and “vertical” joint employment. The AI defines horizontal joint employment as the circumstance in which “the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.” Joint Employment AI at 2-3.

Vertical joint employment is defined as the circumstance in which “the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work.” Joint Employment AI at 3.

With respect to horizontal joint employment, the focus of the inquiry is the relationship between the potential joint employers. The Joint Employment AI identifies the following factors for consideration in assessing the degree of association between and sharing of control by potential joint employers:

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners);
- do the potential joint employers have any overlapping officers, directors, executives, or managers;
- do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- are the potential joint employers’ operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- does one potential joint employer supervise the work of 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.

Joint Employment AI at 8 (internal citations omitted).

With respect to vertical joint employment, the focus of the inquiry is the employee’s relationship with the potential joint employer and whether that employer jointly employs the employee. The Joint Employment AI discusses seven economic realities factors to consider in assessing whether vertical joint employment exists, noting that these factors should be “applied in a manner that does not lose sight of [the] ultimate inquiry [of whether the employee is economically dependent on the potential joint employer] or the expansive definition of employment under the FLSA...” Joint Employment AI at 11. These factors are:

- whether the potential joint employer directs, controls, or supervises the work beyond a reasonable degree of contract performance oversight;

In June 2015, the Department of Labor published a Notice of Proposed Rulemaking (“NPRM”) to amend regulations defining and delimiting the EAP and “highly compensated” employee exemptions.

- whether the potential joint employer controls employment conditions, has the power to hire and fire, and/or has the power to determine the rate or method of pay;
- the permanency and duration of the relationship;
- the repetitive nature of the work and the degree of skill required to perform the work;
- whether the work is integral to the business of the potential joint employer;
- whether the work is performed on premises owned or controlled by the potential joint employer; and
- whether the potential joint employer is performing administrative functions (i.e. payroll worker’s compensation insurance, etc.) for the employee.

Joint Employment AI at 11-12 (internal citations omitted). The Joint Employment AI concludes that “WHD will continue to consider the possibility of joint employment to ensure that all responsible employers are aware of their obligations and to ensure compliance with the FLSA...” *Id.* at 15.

V. Exemptions from Minimum Wage and Overtime Requirements

The FLSA contains certain statutory exemptions from its overtime and minimum wage requirements. Among the most common of these exemptions is the exemption for employees working “in a bona fide executive, administrative, or professional capacity...” 29 U.S.C. § 213(a)(1) (the “EAP Exemptions”). The EAP Exemptions are further defined by regulations promulgated by the Secretary of Labor. In order to qualify for the exemption, the employees must meet certain thresholds regarding primary job duties, compensation on a salary basis, and the total amount of compensation. As of April 2016, the threshold total compensation amount is \$455 per week. 29 C.F.R. §541.600(a). Employees performing office or non-manual work may also be treated as exempt from the FLSA’s overtime requirement if the

employee “customarily and regularly performs any one or more of the exempt duties” and is “highly compensated.” See 29 C.F.R. §541.601. Currently, an employee who performs the responsibilities of an executive, administrative or professional employee and is paid a total annual compensation of at least \$100,000 is deemed highly compensated. *Id.*

In June 2015, the Department of Labor published a Notice of Proposed Rulemaking (“NPRM”) to amend regulations defining and delimiting the EAP and “highly compensated” employee exemptions. See <http://www.dol.gov/whd/overtime/nprm2015/ot-nprm.pdf>. Among the most significant of the proposed changes was an increase in the minimum weekly salary and the threshold amount for highly compensated employees. The initial proposed changes also provided that the threshold amount of salary under either the standard EAP Exemptions or for highly compensated employees would automatically adjust each year.

Along with the NPRM, the Department of Labor also published a list of Frequently Asked Questions about the proposed changes. See <http://www.dol.gov/whd/overtime/NPRM2015/faq.htm#s2>. In its responses to the FAQs, the DOL provided the following comment explaining the rationale for the proposed standard salary levels:

The Department believes that the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees. This amount effectively distinguishes between employees who may meet the duties requirements of the white collar exemptions and those who likely do not, without necessitating a return to the more detailed “long” duties test that existed before 2004. This salary level minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test.

Id. at Response to Salary Level Question 2. The NPRM did not contain any changes in the scope of job duties portion of the exemption rules. Even so, it was widely speculated that the final rule might nonetheless contain such a change, but none was proposed in the final rulemaking.

The Department of Labor received over 270,000 comments on the proposed rules. In March 2016, the final rules went to the Office of Management and Budget. Subsequently, on May 18, 2016, the final rule updating overtime regulations was announced, with an effective date of December 1, 2016. The Final Rule provides for the following major changes:



1. The standard salary level will now be set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which is currently the South. This amount is now \$913 per week or \$47,476 annually.
2. The total annual compensation requirement for highly compensated employees subject to the minimal duties test will now be set to the annual equivalent of the 90th percentile of full-time salaried workers nationally. This amount is now \$134,004.
3. A mechanism was established to automatically update the salary and compensation levels every three years.
4. The salary basis test was amended to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

Employers must also address the impact of the new salary basis regulations. It is important to review the salary paid to any employees which an employer classifies as exempt from the FLSA's overtime requirements.

In light of the over 100% increase in the salary basis threshold, the new regulations may have a significant impact on the bottom line for employers. In the Frequently Asked Questions published with the final rule, the DOL estimated that 4.2 million white collar workers will become newly entitled to overtime protection because of the increase in the salary level. See <https://www.dol.gov/whd/overtime/final2016/faq.htm#2>.

VI. Is the \$15 Kids Meal on the Horizon?

Faced with robust enforcement efforts, increased regulation, and ever-increasing litigation by the plaintiff's bar, employers must be proactive. A number of steps are recommended.

Employers should carefully review their independent contractor relationships, particularly those in which the services provided are "integral to" the company's business. Given the potential for joint employment liability, employers should also take steps to ensure that the other companies with which they are working are compliant in their classification of workers as employees and independent contractors. Likewise, internship programs should be reviewed to ensure compliance with applicable standards.

Employers must also address the impact of the new salary basis regulations. It is important to review the salary paid to any employees which an employer classifies as exempt from the FLSA's overtime requirements. If any of these employees do not meet the new and increased threshold salary basis amounts, then, as of December 1, 2016, these employees will be eligible for overtime for hours worked in excess of forty (40) hours in a week. If there are executive, administrative or professional employees who do not meet the new threshold salary, employers have a choice: (1) raise the salary level of the employees to meet the increased thresholds; or (2) prepare to pay overtime to a large group of employees. If there are employees whose classification is changed from exempt EAP employee to non-exempt and eligible for overtime, then employers may face a significantly increased burden in record-keeping because they are obligated to maintain accurate records of hours worked for their employees. This challenge is significant and may require employers to make changes in policies or practices, such as providing for electronic timekeeping or limiting employee access to email during nonworking hours. In addition to the economic consequences, the changes in the FLSA overtime regulations may also have significant non-economic consequences relating to employees' subjective perceptions about any changed practices, policies and/or procedures.

No matter the path chosen, one thing is certain: the cost to the employer will likely increase. As a result, the \$15 fast food meal presaged in the title of this article is just around the corner.