Suggested U.S. Department of Labor Regulatory Priorities for 2017

1. **Rescind *Administrator's Interpretation No. 2015-1* (Jul. 15, 2015), issued by Wage and Hour Division Administrator David Weil – Restating "Economic Realities" Test for Worker Status.**
    a. This item of administrative guidance was issued outside of the notice and comment rulemaking process created by the Administrative Procedure Act ("APA"), without any advance notice to, or input from, the regulated community.
    b. The guidance, if not rescinded, would significantly broaden the definition of "employee" for purposes of the Fair Labor Standards Act of 1938 ("FLSA").
    c. The FLSA imposes minimum-wage, overtime and record-keeping requirements on an employer with respect to its "employees," but the FLSA does not apply to independent contractors.
    d. Courts commonly apply an "economic realities" test to determine whether an individual is an "employee" for purposes of the FLSA. This "economic realities" test has been characterized as "the broadest definition that has ever been included in any one act."[1]
    e. While the scope of coverage under the "economic realities" test is extremely broad to begin with, the restatement of this test contained in *Administrator's Interpretation No. 2015-1* would expand its scope of coverage even more. The restated test has created much uncertainty for individuals who are self-employed (and do not seek employment) and for their clients, as neither these individuals nor their clients can predict with any degree of certainty whether their independent-contractor relationship will be respected for purposes of the FLSA.

2. **Rescind *Administrator's Interpretation No. 2016-1* (Jan. 20, 2016), issued by Wage and Hour Division Administrator David Weil – Restating "Joint Employer" Test.**
    a. This is another item of administrative guidance that was issued outside of the notice and comment rulemaking process created by the APA, without any advance notice to, or input from, the regulated community.
    b. This guidance, if not rescinded, would significantly broaden the criteria for establishing "joint employment" for purposes of the FLSA.
    c. "Joint employment" is a concept recognized for purposes of certain labor and employment laws that permits more than one person to be deemed an "employer" of an employee. A company deemed a "joint employer" of the employees of another entity becomes jointly responsible for the other entity's FLSA compliance relative to the other entity's employees.
    d. The writings of Wage and Hour Administrator David Weil forecast his intention to "clarify" the laws governing the criteria for establishing "joint employment" for purposes of the FLSA.[2] This *Administrator's Interpretation* would accomplish that by expanding the reach of "joint employment."
    e. *Administrator's Interpretation No. 2016-1* has created significant uncertainty among companies that contract with other entities to provide services, as such companies are now under greater risk of being determined to be a "joint employer" for purposes of the FLSA of the employees of such other entities.

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[1] E.g., *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).
[2] David Weil, *Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division of the Department of Labor* (2010), at pp. 79-80.

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