

§825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. See §825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. See §825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

839-007-0005

Jointly Employed Employees

(1) All joint employers are responsible, both individually and jointly, for ensuring compliance with the provisions of OL Ch. 537, 2015 and these rules. The bureau will be guided by joint employment standards found in Title 29, Code of Federal Regulations, Part 791, Section 2 and Part 825, Section 106.

(2) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality.

(3) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon the facts and circumstances.

(4) In joint employment relationships, the primary employer is responsible for giving required notices to its employees, providing sick time leave and other leave and maintenance of health benefits. Factors to be considered in determining which employer is the primary employer include but are not limited to: authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

OREGON RETIREMENT SAVINGS PROGRAM

170-080-0001

Notice Rule for Rulemaking, Model Rules of Procedure

(1) Notice Rule for Rulemaking. Before adopting, amending or repealing any permanent rule, the Board will give notice of the intended action:

- (a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days before the effective date of the rule;
- (b) By e-mailing a copy of the notice to persons on the Board's mailing list established pursuant to ORS 183.335(8) at least 28 days before the effective date of the rule;
- (c) By mailing a copy of the notice to the legislators specified in ORS 183.335(15) at least 49 days before the effective date of the rule; and
- (d) By mailing or furnishing a copy of the notice to the list of interested parties compiled and maintained by the State Treasurer.

(2) Model Rules of Procedure. The Attorney General's Model Rules of Procedure as set forth in OAR 137, Divisions 1 through 4, are adopted as rules of procedure for administrative rulemaking and other administrative law functions as exercised by the Board in respect to the Program.

(3) Collaborative Dispute Resolution Model Rules. The Attorney General's Collaborative Dispute Resolution Model Rules, as set forth in OAR 137 Division 5, to the extent not inconsistent with the Act or the Code, are adopted by the Board as its rules for dispute resolution.
Stat. Authority: ORS 183.335, 183.341, 183.502
Stat. Implemented: ORS 183.341, 183.502, 178.220 to 178.245
Hist.:

170-080-0002

Confidentiality and Inadmissibility of Mediation Communication

The policies and procedures of the Oregon State Treasurer set forth in OAR 170 in regard to confidentiality and inadmissibility of mediation communication, to the extent not inconsistent with the Act or the Code, are adopted as the policies and procedures of the Board.

Stat. Authority: ORS 36.224, 183.335, 183.341, 183.502

Stat. Implemented: ORS 36.224, 36.228, 36.230, 36.232

Hist.:

170-080-0005

Inspection, Certification or Copying Public Records

The policies and procedures of the Oregon State Treasurer set forth in OAR 170, Division 2 in regard to inspection, certification or copying of public records, to the extent not inconsistent with the Act or ORS Chapter 178, are adopted as the policies and procedures of the Board.

Stat. Auth.: 178.050

Stats. Implemented: ORS Chapter 183, ORS 192.410 to 192.505

Hist.:

170-080-0010

Administration

(1) **Policy.** The Board intends that, consistent with ORS Section 178.210(1)(p), the Program be operated, and these rules be construed, in a manner consistent with applicable guidance provided by the U.S. Department of Labor relating to payroll deduction IRA programs that are not pension plans under Title I of the Employee Retirement Income Security Act (ERISA) including, but not limited to, 29 CFR Sections 2509.99-1, 2510.3-2(d).

(2) **Definitions.** All capitalized terms used in these rules shall be as defined in the Act. Where a conflict is found to exist between a definition stated in these rules and the corresponding definition in the Act, the statutory definition shall apply. As used in these rules, unless the context indicates otherwise:

(a) “Act” means ORS 178.200 to 178.245, as amended from time to time.

(b) “Beneficiary” means the individual(s), person(s), or entity(ies) entitled to receive the proceeds of an individual retirement account (IRA).

(c) “Board” means the Oregon Retirement Savings Board established in ORS 178.200(1).

(d) “Certificate of Exemption” means a truthful statement by an authorized representative of an Employer that it offers a Qualified Plan to some or all of its Employees.

(e) “Code” means the Internal Revenue Code and any regulations, rulings, announcements, or other guidance issued thereunder, as amended.

(f) “Compensation” means W-2 wages, as defined in 26 CFR 1.415(c)-2(d)(4).

(g) “Distribution” means any distribution of funds from an individual retirement account (IRA) established pursuant to the Program.

(h) “Employee” means any person 18 years of age and older working in an Employment, as defined herein.

(i) “Employer” means any employing unit which employs one or more individuals in an Employment in each of 18 separate weeks during any calendar year, or in which the employing unit’s total payroll during any calendar quarter amounts to \$1,000 or more.

(j) “Employment” means any employment subject to ORS Chapter 657 provided that, notwithstanding the exemptions from the definition of Employment contained in Chapter 657, for the purposes of the Program, Employment includes:

(A) Agricultural labor, as defined in ORS 657.045; and

(B) Commissioned positions, as defined in ORS 657.085, 657.087(1) and (2), and 657.090.

(k) “Enrollment Date” means either:

(A) the Initial Enrollment Date, for Participating Employees hired on or before the Facilitating Employer’s required Registration Date; or

(B) a date not more than 60 days following start of employment, for Participating Employees hired after the Facilitating Employer’s required Registration Date.

(l) “Executive Director” means the Executive Director of the Oregon Retirement Savings Program.

(m) “Exempt Employer” means an Employer who has filed a valid and current Certificate of Exemption pursuant to procedures established by the Board.

(~~nm~~) “Facilitating Employer” means an Employer whose Registration Date has passed and who is not an Exempt Employer.

(~~on~~) “Initial Enrollment Date” means the date not more than 60 days after the Facilitating Employer’s required Registration Date, by which a Facilitating Employer must initially enroll its Participating Employees.

(~~pe~~) “Individual Retirement Account” or “IRA” means the individual retirement account established by or for a Participating Employee under the Program.

(~~qp~~) “IRS” means the Internal Revenue Service of the United States Treasury Department. “Number of Employees” means the number of employees as submitted on the Employer’s most recently filed Oregon Quarterly Tax Report (Form OQ): Number of covered workers for Unemployment Insurance.

(~~rq~~) “Participating Employee” means any person who has established (or has had established on their behalf) and maintains a Program IRA.

(~~sf~~) “Payroll Date” means the date that an Employee’s Compensation is paid to the Employee by the Employer through the payment of cash, issuance of a check, electronic funds transfer or other method.

(~~ts~~) “Program” means the Oregon Retirement Savings Program established by the Board pursuant to ORS 178.205(1).

(~~ut~~) “Program Administrator” means a third party administrator chosen by the Board to assist in carrying out the requirements of the Act.

(~~vh~~) “Qualified Plan” means a retirement plan tax-qualified under the Code, section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p) or a governmental plan under section 457(b). For purposes of this rule, a payroll deduction IRA program as defined in 29 CFR 2510.3-2(d) is not a Qualified Plan.

(~~wv~~) “Registration Date” means, for each Employer, the date by which the Employer is required to register with the Program or file a Certificate of Exemption, in accordance with Rule 0015.

(~~xw~~) “Roth IRA” means an individual retirement account as defined in the Code section 408(A).

(~~yx~~) “Standard Elections” means the default Program elections applicable to a Participating Employee who has not opted for different elections, as specified in Rule 0030.

(~~zy~~) “Target Date Fund” means a professionally-managed fund containing a mix of investments that invests based on the employee’s age and/or projected retirement date.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0011

Executive Director

The Executive Director is responsible for the day-to-day operations of the Program and for carrying out such duties and responsibilities as assigned by the Board.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200to 178.245

Hist:

170-080-0015

Employer Registration and Enrollment

(1) Registration

(a) On or before the Registration Date, each Employer shall register with the Program or file a Certificate of Exemption.

(b) The Registration Date for an Employer shall be as follows:

(A) An Employer employing one hundred (100) or more Employees: November 15, 2017

(B) An Employer employing at least fifty (50) but no more than ninety-nine (99) Employees: May 15, 2018

(C) An Employer employing at least twenty (20) but no more than forty-nine (49) Employees: December 15, 2018

(D) An Employer employing at least ten (10) but no more than nineteen (19) Employees: May 15, 2019

(E) An Employer employing at least five (5) but no more than nine (9) Employees: November 15, 2019

(F) An Employer employing four (4) or fewer Employees: May 15, 2020

(c) In determining the Number of Employees for purposes of this section, Employers shall use data as submitted on the most recently filed Oregon Quarterly Tax Report (Form OQ): Number of covered workers for Unemployment Insurance. Employers with no Employees reported on Form OQ: Number of covered workers for Unemployment Insurance will have a Registration Date of May 15, 2020.

(d) To register with the Program, a Facilitating Employer shall use the internet portal established by the Program Administrator to provide the following information:

(A) Employer name and assumed business name, if any;

(B) Employer Identification Numbers (Federal Employer Identification Number and Business Identification Number);

(C) Employer mailing address;

(D) Name, title, telephone number and email address of an individual designated by the Employer as the Program's point of contact;

(E) Number of Employees; and

(F) Any other information reasonably required by the Program for the purposes of administering the Program.

(e) New Employers: the Registration Date for an Employer who first meets the definition of Employer after July 1, 2017, shall be the later of:

(A) the date specified in subsection (2) above, or

(B) 90 days after the Employer first meets the definition of Employer.

(f) The Initial Enrollment Date for each Facilitating Employer shall be a date that is not more than 60 days after the Employer's required Registration Date.

(g) A Facilitating Employer who lacks access to the internet may register with the Program by alternate means established by the Program Administrator, but no earlier than 30 days in advance of the Facilitating Employer's required Registration Date.

(2) Enrollment

(a) On or before the Initial Enrollment Date, and on or before the Enrollment Date for each subsequently hired Employee, a Facilitating Employer shall enroll its Employees using the Program Administrator's internet portal or other means of data transmittal specified and validated by the Program Administrator. For each Employee, the Facilitating Employer shall provide the following information:

(A) Full legal name;

(B) Social security number or taxpayer ID number;

(C) Date of birth;

(D) Mailing address;

(E) Employee's designated email address; and

(F) Any other information reasonably required by the Program for the purposes of administering the Program.

(b) In order to allow for Employees to establish an IRA through an automatic enrollment process, the Board shall establish procedures with the Plan Administrator for the execution or adoption of such documents as are necessary or appropriate to establish an IRA for such Employee. If the Employee has not established an IRA after notice and an opportunity to opt out has been sent to the Employee using the contact information on file with the Program, an IRA will be established for such Employee at the Board's directive.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0020

Employer Exemptions

(1) An authorized representative of an Employer may file a Certificate of Exemption with the Program by certifying, through the Program Administrator's internet portal or other means of data transmittal specified and validated by the Program Administrator, that the Employer offers a Qualified Plan to some or all of its Employees.

(2) A Certificate of Exemption is valid for three (3) years from the date the Employer files the Certificate with the Program Administrator, so long as the Employer continues to offer a Qualified Plan to some or all of its Employees. A Certificate of Exemption may be renewed by following a process of recertification to be established by the Board not later than December 31, 2019.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0025

Joint Employment, Co-Employment, and Tri-Party Employment Circumstances

Reserved

170-080-0030

Standard and Alternate Elections for Contributions; Automatic Increases; Ceasing Contributions; Requesting Participation

(1) Standard Elections

(a) An Employee who has not provided notice as specified in this section shall be enrolled using the following Standard Elections:

(A) Contribution to the Program at an initial rate of 5% of Compensation;

(B) Auto-escalation at the rate of an additional 1% of Compensation each year until a maximum of 10% is reached;

(C) Investments:

(i) The first \$1,000 in contributions to be invested in a capital preservation investment as selected by the Board;

(ii) All subsequent contributions to be invested in a Target Date Fund; and

(D) The Program account will be a Roth IRA and contributions will occur on a post-tax basis.

(2) Alternate Elections

(a) An Employee who does not wish to enroll using the Standard Elections shall notify the Facilitating Employer, in a form or format established by the Program, and within 30 days of receipt of the informational materials provided by the Facilitating Employer enrollment in the Program, that:

(A) The Employee wishes to participate in the Program:

(i) at an initial contribution rate different from the Standard Elections, which shall be a percentage of available Compensation expressed as any whole number (i.e. three (3) percent but not three and one-half (3.5) percent). The minimum contribution rate is 1% and the maximum contribution rate is 100% of available Compensation, up to the IRS annual contribution limits.

(ii) at an initial contribution rate different from the Standard Elections, expressed as a specific dollar amount. The minimum contribution rate is \$1.00 and maximum contribution rate is 100% of available Compensation, up to the IRS annual contribution limits.

(iii) at an initial contribution rate consistent with the Standard Elections but without auto-escalation; or

~~(iv)~~ at an initial contribution rate different from the Standard Elections and without auto-escalation.

(B) The Employee does not wish to participate and is opting out of the Program.

(a) After enrollment, a Participating Employee may change contribution elections by notifying the Facilitating Employer of the change request, in a form or format established by the Program. This change shall be effected on the Participating Employee's payroll as soon as administratively practicable, but within 30 days of receipt of a notice of change. Employers may limit the processing of contribution election changes to one change per month per Participating Employee.

(b) An Employee who wishes to select an investment option other than that provided by the Standard Elections shall notify the Program Administrator, in a form or format established by the Program, that the Employee wishes to participate in the Program by investing future contributions directly into another fund or funds offered by the Program, which selection shall be effected as soon as administratively practicable.

(c) After enrollment, a Participating Employee may change investment elections for any portion of the balance of the Program by notifying the Program Administrator of a requested change in investment elections, either in writing, electronically, or in any other form permitted by the IRS, to be effected as soon as administratively possible.

(3) Ceasing Contributions or Requesting Participation

(a) A Participating Employee may cease contributions to the Program by notifying the Facilitating Employer of intent to cease making contributions and revoking the authorization of the Facilitating Employer to make contributions on their behalf. The Participating Employee will give notice of this revocation, in a form or format established by the Program, to the Facilitating Employer at least 30 days before the effective date.

(b) An Employee of a Facilitating Employer who initially opted out of participation in the Program may become a Participating Employee by completing and delivering, in a form or format established by the Program, instructions to initiate participation to the Facilitating Employer. The request shall be effective on the Employee's payroll following notification as soon as administratively practicable, not to exceed 30 days.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0035

Contributions

(1) On each Payroll Date following the Enrollment Date, and in accordance with a Participating Employee's election, the Facilitating Employer shall transfer from the Participating Employee's Compensation for contribution to the Participating Employee's IRA:

(a) 5% of Compensation; or

(b) The Participating Employee's elected contribution rate, if different from the Standard Elections; or

(c) The auto-escalated percentage of Compensation for that Participating Employee.

(2) Notwithstanding subsection (1), amounts deducted by the Facilitating Employer pursuant to this Rule shall not exceed the amount of the Participating Employee's Compensation remaining after any payroll deductions required by law to have higher precedence, including a court order, are made by the Facilitating Employer.

(3) Amounts deducted by the Facilitating Employer pursuant to this rule shall be transmitted to the Program Administrator as specified by the Program, as soon as administratively possible, not to exceed seven (7) business days from the date of deduction. Failure to transmit the amount as required constitutes an unlawful deduction under ORS 652.610(4).

(4) Beginning January 1, 2019, the Facilitating Employer shall increase the deduction specified in subsection (1) of this Rule for each Participating Employee who has not opted out of auto-escalation.

(a) For a Participating Employee who elected a percentage of available Compensation expressed as any whole number, the Facilitating Employer shall increase the amount by an additional 1% of Compensation per year until the total deduction has reached 10% of Compensation~~for each Participating Employee who had not opted out of auto-escalation.~~

(b) For a Participating Employee who elected an initial contribution rate expressed as a specific dollar amount, the Facilitating Employer shall increase the amount to the next higher percentage of available Compensation expressed as a whole number. In each subsequent year, the Facilitating Employer shall increase the amount by an additional 1% of Compensation per year until the total deduction has reached 10% of Compensation.

(5) Auto-escalation will occur on January 1 each year for Participating Employees who:

(a) Are contributing less than 10% of Compensation; and

(b) Have been enrolled in the Program for a period greater than 180 calendar days.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0040

Distributions and Distribution Requests

(1) A Participating Employee may request a Distribution of funds from an IRA by submitting a completed distribution request to the Program Administrator, in a form or format established by the Program.

(2) An IRA Distribution shall be subject to any applicable state and federal income tax obligations.

Stat. Auth.: ORS 178.215(7)

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0045

Program Administration Fees and Expenses

(1) The Board will charge each IRA a Program administrative fee not to exceed the rate of 1.05% per annum, to defray the costs of operating the Program, including internal and external administration, and operational and investment costs, including for professional investment management services.

(2) The Board will from time to time review, adjust, and notify Participating Employees of changes to Program Administration fees.

Stat. Auth.: ORS 178.225

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0050

Employer Guidelines

(1) Facilitating Employers shall:

(a) Collect contributions and remit those amounts promptly to the Program Administrator or its designee;

(b) Provide information to the Program Administrator, as described in Rules 0015, 0020, and 0030;

(c) Retain the notice of any Employee elections or election changes pursuant to any action defined in Rule 0030 for a period not less than three (3) years from the date of the notice.

Facilitating Employers may choose to comply with this requirement by allowing the Program Administrator to maintain such documentation on their behalf, either electronically, or in any other medium allowable under applicable law;

(d) Record the Participating Employee's elections and election changes in its payroll system in a manner that enables the Facilitating Employer to make accurate deductions from the Participating Employee's paycheck; and

(e) Make clear that the Facilitating Employer's involvement in the Program is limited to collecting contributions and remitting them to the Program Administrator or its designee, and that the Facilitating Employer does not provide any additional benefit or promise any particular investment return on Employee savings.

(2) Facilitating Employers shall not:

(a) Contribute to the Program;

(b) Endorse or disparage the Program; and

(c) Execute any discretionary authority, control, or responsibility with respect to the Program.

(3) Facilitating Employers may, if they choose:

(a) Provide additional general information and other educational materials that explain the advisability of retirement savings, including the advantages of contributing to an IRA; and

(b) Answer Employee inquiries about the mechanics of the IRA payroll deduction.

(4) Facilitating Employers should refer other inquiries to the Program Administrator or as otherwise directed by the Board.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0055

Distribution of Materials to Employees

(1) ~~At least 60 days before the Initial Enrollment Date,~~ The Program Administrator will provide a Facilitating Employer a set of informational materials about the Program immediately upon completion of the Facilitating Employer's registration in the online portal. The Program Administrator will provide the materials to the Facilitating Employer by supplying the internet location where such materials may be downloaded or, upon request of the Facilitating Employer, will provide the materials in hard copy form.

(2) The informational materials will include the following information:

- (a) The benefits and risks associated with making contributions to a Program IRA;
- (b) Instructions describing how to make contributions to the Program, including the Standard Elections applicable if the Participating Employee does not make other elections;
- (c) A description of the other elections available under the Program, including how to opt out of the Program;
- (d) Investment alternatives available under the Program and instructions describing how to make or change an investment election;
- (e) The process for requesting a Distribution of retirement savings from the Program;
- (f) How to obtain additional information about the Program, including the fees associated with the Program;
- (g) That the Facilitating Employer does not endorse or recommend the Program;
- (h) That Employees and Participating Employees seeking financial advice should contact financial advisers, that Facilitating Employers are not in a position to provide financial advice, and that Facilitating Employers are not liable for decisions Employees and Participating Employees make regarding the Program;
- (i) That the Program is not an employer-sponsored retirement plan;
- (j) That Employee participation in the Program is completely voluntary;
- (k) That information on IRAs outside of the Program is available from other sources;
- (l) That neither the value of a Program IRA, nor the rate of return are guaranteed by the state, the Facilitating Employer, or anyone else; and
- (m) That by standard election, contributions under the Program are made to a Roth IRA, and that a Roth IRA may not be appropriate for all individuals.

(3) At least 30 days before the Initial Enrollment Date, the Facilitating Employer will provide each of its Employees with the informational materials provided by the Program Administrator.

(4) For subsequently hired Employees, within 30 days of hire, the Facilitating Employer shall provide the informational materials provided by the Program Administrator.

(5) Facilitating Employers shall provide informational materials either directly, or by supplying the Employee with the internet location where the information may be found, along with Board - provided instructions about how to obtain the information if the Employee does not have internet access.

(6) The Facilitating Employer shall document that the informational materials were given to the Employee. Documentation may consist of a notation in the Facilitating Employer's records identifying the Employee and the date the materials were distributed. Facilitating Employers may choose to comply with the requirement to document the delivery of informational materials

to Employees if the Program Administrator maintains such documentation on their behalf, either electronically or in any other medium allowable under applicable law. The Facilitating Employer may request that the Employee acknowledge receipt of the informational materials but shall not request or require that the Employee take any additional steps, including returning any forms to the Facilitating Employer.

(7) Notwithstanding anything in this Rule to the contrary, where the Facilitating Employer timely provides the Program Administrator with the contact information (e.g., designated email address(es)) of Participating Employees, the Facilitating Employer may choose to satisfy its obligations to provide the informational materials to Participating Employees by allowing the Program Administrator to do so on its behalf. Delivery by the Program Administrator must be at such time and in such manner as is otherwise specified in this Rule.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0060

Technical Assistance to Employers

The Program Administrator will provide a range of tools and technical assistance for Employer use. Facilitating Employers shall advise the Program Administrator if they desire technical assistance in completing Program requirements.

Stat. Auth.: ORS 178.200 to 178.245

Stats. Implemented: ORS 178.200 to 178.245

Hist.:

170-080-0065

Confidentiality

(1) Confidentiality. The Board will treat Individual IRA account information as confidential, including without limitation, names, addresses, telephone numbers, personal identification information, contributions, and earnings.

(2) Written release.

(a) The Board may disclose Individual IRA account information to persons or entities other than those described in subsection (4) of this Rule if it receives a signed release from the Participating Employee consenting to disclosure of some or all of the Individual IRA account information to a specific person or entity. For purposes of this paragraph Individual IRA account information includes information pertaining to:

(A) the Participating Employee's IRA account;

(B) Beneficiary designations;

(C) Distributions; or

(D) other information contained in any draft court order.

(b) A written authorization to release information is valid indefinitely, unless a specific end date is provided in the written statement.

(3) Subpoena. A subpoena for information available from the Program must be made out to the State of Oregon, Oregon Retirement Savings Program. The Program reserves the right to object to any subpoena on the grounds that the subpoena fails to provide a reasonable time for

preparation and travel, is otherwise unreasonable or oppressive, or that service was improper, in addition to any other basis legally available. To facilitate prompt processing, copies of subpoenas should be served at the Office of the State Treasurer. Faxed subpoenas are not acceptable.

(4) Disclosure. The Board may disclose aggregated anonymized data which does not include information that is identifiable to an individual Participating Employee or Employer for purposes of research associated with the Program. The Board may disclose information that it is required to disclose under the Oregon Public Records Law. The Board may disclose Individual IRA account information to the Plan Administrator, the providers of investments for the Program, regulatory agencies to the extent disclosure is required by law, and to other persons or entities to the extent the Board determines disclosure is necessary to administer the Program.

Stat. Auth.: ORS 178.220

Stats. Implemented: ORS 178.200 to 178.245

Hist.:



Administrator's Interpretation No. 2016-1

January 20, 2016

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.

Through its enforcement efforts, the Department of Labor's Wage and Hour Division (WHD) regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. As a result, the traditional employment relationship of one employer employing one employee is less prevalent.¹ WHD encounters these employment scenarios in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

The growing variety and number of business models and labor arrangements have made joint employment more common.² In view of these evolving employment scenarios, the Administrator believes that additional guidance will be helpful concerning joint employment

¹ For example, a corporate hotel chain may contract out to another business the management, catering, or housekeeping services at one of its hotels. Workers who perform these services at the hotel may wear uniforms with the name of the hotel chain or the other business and may perform tasks dictated by the hotel chain, the other business, or both.

² WHD considers joint employment in hundreds of investigations every year. WHD has determined, for example, that maritime fabrication facilities jointly employed welders, pipefitters, and other workers hired by staffing agencies; that hotels and hotel operating companies jointly employed housekeeping and guest services workers hired by staffing agencies; and that growers and farm labor contractors jointly employed farmworkers. *See also Perez v. Lantern Light Corp.*, 2015 WL 3451268, at *17 (W.D. Wash. May 29, 2015) (finding that satellite television provider was a joint employer of the installers employed by the company with whom the provider contracted to install its services).

under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.*, and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801, *et seq.*³

Whether an employee has more than one employer is important in determining employees' rights and employers' obligations under the FLSA and MSPA. It is a longstanding principle under both statutes that an employee can have two or more employers for the work that he or she is performing. When two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA.⁴ Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.

Certainly, not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment. This Administrator's Interpretation (AI) provides guidance on identifying those scenarios in which two or more employers jointly employ an employee and are thus jointly liable for compliance under the FLSA or MSPA. This AI first discusses the broad scope of the employment relationship under the FLSA and MSPA.⁵ It then discusses the concepts of horizontal and vertical joint employment and relevant joint employment regulations.

Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the

³ In June 2014, WHD issued Administrator's 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" (Home Care AI), available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf. Although the Home Care AI was directed toward a particular employment scenario in a specific industry, the legal analyses in the Home Care AI and this Administrator's Interpretation are harmonious and are intended to be read in conjunction with one another.

⁴ In other words, each joint employer is individually responsible, for example, for the entire amount of wages due. If one employer cannot pay the wages because of bankruptcy or other reasons, then the other employer must pay the entire amount of wages; the law does not assign a proportional amount to each employer.

⁵ In July 2015, WHD issued 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" (Misclassification AI), available at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. In the Misclassification AI, the Administrator also discussed the FLSA's broad statutory definitions; that AI addressed the issue of the misclassification of employees as independent contractors and provided guidance regarding determining whether a worker is an employee or independent contractor.

employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. This AI explains that guidance provided in the FLSA joint employment regulation – which focuses on the relationship between potential joint employers – is useful when analyzing potential horizontal joint employment cases.

Vertical joint employment exists where 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. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee’s labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. This AI explains that guidance provided in the MSPA joint employment regulation is useful when analyzing potential vertical joint employment. The structure and nature of the relationship(s) at issue in the case, reflecting potentially horizontal or vertical joint employment or both, should determine how each case is analyzed.

I. The FLSA and MSPA Broadly Define the Employment Relationship and Thus the Scope of Joint Employment

The scope of employment relationships subject to the protections of the FLSA and MSPA is broad. The FLSA defines “employee” as “any individual employed by an employer,” 29 U.S.C. 203(e)(1), and “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee,” 29 U.S.C. 203(d). The FLSA’s definition of “employ” “includes to suffer or permit to work.” 29 U.S.C. 203(g). The “suffer or permit” definition of employment is “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong. Rec. 7657 (1938)). MSPA defines “employ” in exactly the same way as the FLSA, and the scope of employment relationships under MSPA is thus the same as it is under the FLSA. *See* 29 U.S.C. 1802(5) (“The term ‘employ’ has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)].”); 29 C.F.R. 500.20(h)(1); *see also* 29 C.F.R. 500.20(h)(2)-(3) (the terms “employer” and “employee” under MSPA are also given their meaning as found in the FLSA).

The FLSA and MSPA both “specifically cover ‘joint employment’ relationships.” *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996). The FLSA regulations explicitly state that a single worker may be “an employee to two or more employers at the same time.” 29 C.F.R. 791.2(a); *see also Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (“The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act.”). The MSPA regulations provide that MSPA’s definition of the term “employ” includes the FLSA’s joint employment principles. *See* 29 C.F.R. 500.20(h)(5); *see also Antenor*, 88 F.3d at 929 (MSPA makes clear that a worker can be jointly employed by more than one entity at the same time). “Joint employment under the Fair Labor Standards Act is joint employment under the MSPA.” 29 C.F.R. 500.20(h)(5)(i) (emphasis omitted).⁶

⁶ The Department amended the MSPA joint employment regulation in 1997.

The concept of joint employment, like employment generally, “should be defined expansively” under the FLSA and MSPA. *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *see also* Misclassification AI, 3-4. The concepts of employment and joint employment under the FLSA and MSPA are notably broader than the common law concepts of employment and joint employment, which look to the amount of control that an employer exercises over an employee. *See Antenor*, 88 F.3d at 933. Unlike the common law control test, which analyzes whether a worker is an employee based on the employer’s control over the worker and not the broader economic realities of the working relationship, the “suffer or permit” standard broadens the scope of employment relationships covered by the FLSA. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (FLSA’s definitions are “comprehensive enough to require its application” to many working relationships which, under the common law control standard, may not be employer-employee relationships); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (FLSA’s “suffer or permit” standard for employment “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”). The test for joint employment under the FLSA and MSPA is thus different, for example, than the test under other labor statutes, such as the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* Indeed, in FLSA and MSPA cases, “courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees.” *Antenor*, 88 F.3d at 933 n.10.

Moreover, prior to the FLSA’s enactment, “suffer or permit” or similar phrasing was commonly used in state laws regulating child labor and was “designed to reach businesses that used middlemen to illegally hire and supervise children.” *Antenor*, 88 F.3d at 929 n.5. A key rationale underlying the “suffer or permit” standard was that an employer should be liable for the child labor if it had the opportunity to detect work being performed illegally and the ability to prevent it from occurring. *See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29-31 (N.Y. 1918). Thus, the “suffer or permit to work” standard was designed to expand child labor laws’ coverage beyond those who controlled the child laborer, counter an employer’s argument that it was unaware that children were working, and prevent employers from using “middlemen” to evade the laws’ requirements.

In sum, the expansive definition of “employ” as including “to suffer or permit to work” rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.

II. Horizontal and Vertical Joint Employment Analyses in FLSA and MSPA Cases

The FLSA and MSPA regulations provide relevant and complementary guidance on joint employment. The structure and nature of the relationship(s) at issue should determine whether a particular case should be analyzed under horizontal or vertical joint employment, or both.⁷

⁷ Given the potential complexity of employment relationships, aspects of both horizontal and vertical joint employment may be present in a single joint employment relationship. For example, both forms of joint employment could potentially exist where two warehouses share employees and use a staffing agency to provide them with labor.

Joint employment may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. *See* 29 C.F.R. 791.2. This type of joint employment is sometimes referred to as horizontal joint employment. In a possible horizontal joint employment situation, there is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer. Thus, the focus of a horizontal joint employment analysis is the relationship between the two (or more) employers. The FLSA regulation provides guidance on horizontal joint employment. *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917-18 (9th Cir. 2003) (citing FLSA regulation). Examples of horizontal joint employment may include separate restaurants that share economic ties and have the same managers controlling both restaurants, *see Chao v. Barbeque Ventures, LLC*, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007), or home health care providers that share staff and have common management, *see A-One Med. Servs.*, 346 F.3d at 918.

Joint employment may additionally exist when an employee of one employer (referred to in this AI as an “intermediary employer”) is also, with regard to the work performed for the intermediary employer, economically dependent on another employer (referred to in this AI as a “potential joint employer”).⁸ *See* 29 C.F.R. 500.20(h)(5); *A-One Med. Servs.*, 346 F.3d at 917 (describing vertical joint employment as possible in circumstances where “a company has contracted for workers who are directly employed by an intermediary company”). This type of joint employment is sometimes referred to as vertical joint employment. The vertical joint employment analysis is used to determine, for example, whether a construction worker who works for a subcontractor is also employed by the general contractor, or whether a farmworker who works for a farm labor contractor is also employed by the grower.⁹ Unlike in horizontal joint employment cases, where the association between the potential joint employers is relevant, the vertical joint employment analysis instead examines the economic realities of the relationships between the construction worker and the general contractor, and between the farmworker and the grower, to determine whether the employees are economically dependent on those potential joint employers and are thus their employees. The MSPA regulation provides a set of factors to apply an economic realities analysis in vertical joint employment cases. Although they do not all apply the same factors, several Circuit Courts of Appeals have also adopted an economic realities analysis for evaluating vertical joint employment under the FLSA. Regardless of the exact factors, the FLSA and MSPA require application of the broader

⁸ Depending on the industry, the “intermediary employer” in a vertical joint employment relationship could be, for example, a staffing agency, farm labor contractor, subcontractor, or other labor provider, supplier, or broker, and the “potential joint employer” could be a parent corporation, farm owner, higher-tier contractor, or client of the staffing agency or labor provider, supplier, or broker.

⁹ As discussed below, a threshold determination in those examples would be whether the subcontractor or farm labor contractor itself is an independent contractor or whether it has an employment relationship with the general contractor or grower.

economic realities analysis, not a common law control analysis, in determining vertical joint employment.

The joint employment approaches described in the FLSA and MSPA regulations interpret the same definition of employment. MSPA borrowed the FLSA's definition of the term "employ" "with the deliberate intent" of adopting the FLSA's joint employer doctrine "as the 'central foundation' of MSPA and 'the best means by which to insure that the purposes of this MSPA would be fulfilled.'" 29 C.F.R. 500.20(h)(5)(ii) (quoting MSPA's legislative history); *see also* 29 C.F.R. 500.20(h)(5)(i) ("Joint employment under the Fair Labor Standards Act is joint employment under the MSPA.") (emphasis omitted). Therefore, the FLSA regulation is useful when analyzing potential horizontal joint employment cases, whether arising under the FLSA or MSPA. Likewise, the factors identified in the MSPA regulation are useful when analyzing potential vertical joint employment cases, whether arising under MSPA or the FLSA.¹⁰ This is not to say that the MSPA joint employment regulation itself applies in FLSA cases; however, the MSPA joint employment regulation and its economic realities factors are useful guidance in an FLSA case because of the shared definition of employment and the coextensive scope of joint employment between the FLSA and MSPA.¹¹ For the reasons explained above, including the common definitions, using the joint employment factors identified in the MSPA regulation in an FLSA case is consistent with both statutes and regulations. It is also consistent with WHD's prior guidance. *See* Home Care AI, 3 (economic realities factors identified in the MSPA regulation should be considered when determining joint employment under the FLSA, citing 29 C.F.R. 500.20(h)); May 11, 2001 WHD Opinion Letter (identifying MSPA regulation's economic realities factors as relevant factors when determining joint employment under the FLSA, citing 29 C.F.R. 500.20(h)) (available at 2001 WL 1558966). Many potential joint employment cases arising under the FLSA will involve vertical joint employment, and an economic realities analysis of the type described in the MSPA joint employment regulation should be applied in those cases.

A. Horizontal Joint Employment and the Association of Potential Joint Employers

¹⁰ Courts have long turned to an economic realities analysis in analyzing vertical joint employment under the FLSA. The MSPA regulation itself cites to FLSA cases in defining joint employment. *See, e.g.*, 29 C.F.R. 500.20(h)(5)(ii) (citing *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973)).

¹¹ In *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176-78 (11th Cir. 2012), the court applied an economic realities analysis primarily based on the pre-1997 version of the MSPA joint employment regulation and correctly recognized that "in considering a joint-employment relationship, we must not allow common-law concepts of employment to distract our focus from economic dependency." Yet, because the case arose under the FLSA, not MSPA, the court declined to use the factors in the current MSPA joint employment regulation despite the fact that the FLSA and MSPA define the scope of employment in the same way. *See id.* at 1177 ("Although [MSPA] defines joint employment by reference to the definition provided in the FLSA, that does not mean that the reverse holds true—that joint employment under the FLSA is invariably defined by [MSPA] regulations.").

Horizontal joint employment should be considered when an employee is employed by two (or more) technically separate but related or overlapping employers.¹² For example, the horizontal joint employment analysis would apply where a waitress works for two separate restaurants that are operated by the same entity and the question is whether the two restaurants are sufficiently associated with respect to the waitress such that they jointly employ the waitress; or where a farmworker picks produce at two separate orchards and the orchards have an arrangement to share farmworkers. In these scenarios, there would already be an established employment relationship between the waitress and each restaurant, and between the farmworker and each orchard. This joint employment analysis focuses on the relationship of the employers to each other.

In cases where joint employment is established, the employee's work for the joint employers during the workweek "is considered as one employment," and the joint employers are jointly and severally liable for compliance, including paying overtime compensation for all hours worked over 40 during the workweek. 29 C.F.R. 791.2(a).

Example:¹³ Casey, a registered nurse, works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week. If Springfield and Riverside are joint employers, Casey's hours for the week are added together, and the employers are jointly and severally liable for paying Casey for 40 hours at her regular rate and for 10 hours at the overtime rate. Casey should receive 10 hours of overtime compensation in total (not 10 hours from each employer).

In determining whether a horizontal joint employment relationship exists, the focus should be on the relationship (and often the degree of association) between the two (or more) potential joint employers with respect to the employee and all of the relevant facts of the particular case. See 29 C.F.R. 791.2(a). According to 29 C.F.R. 791.2(b), "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist" in situations such as: (1) arrangements between the employers to share or interchange the employee's services; (2) where one employer acts directly or indirectly in the

¹² Even where two establishments are sufficiently related that they are part of a single enterprise (as defined in 29 U.S.C. 203(r)(1)) for FLSA coverage purposes, a separate determination is necessary to determine whether the establishments are joint employers. See 29 C.F.R. 779.203; *A-One Med. Servs.*, 346 F.3d at 917 ("Whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers . . . are technically separate issues."). As explained by the case law, although the two analyses may require similar fact-finding and have similar considerations, determining that an employer is part of an enterprise to ascertain coverage under the FLSA is different from determining that the employer is a joint employer that is liable for minimum wages and overtime. See, e.g., *Patel v. Wargo*, 803 F.2d 632, 635 (11th Cir. 1986).

¹³ The addition or alteration of any of the facts in any of the examples in this AI could change the resulting analysis.

interest of another employer in relation to the employee; or (3) where the employers are associated “with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.” *Id.* at 791.2(b). In *Schultz v. Capital International Security, Inc.*, for example, the court looked to the FLSA regulation and concluded that security workers were jointly employed by a security firm and the individual that the workers were hired to protect because the two employers were associated with respect to the employment of the workers and shared common control over them. *See* 466 F.3d 298, 306 (4th Cir. 2006) (“the entire employment arrangement fits squarely within the third example of joint employment in the regulation”). Specifically, the court explained that the employers were both involved in the hiring of the workers, played some role in scheduling, discipline, and terminations, and shared responsibility for supplying the workers with equipment. *See id.*

The following facts may be relevant when analyzing the degree of association between, and sharing of control by, potential horizontal 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.

See, e.g., 29 C.F.R. 791.2(b); June 14, 2005 WHD Opinion Letter (identifying a number of the above facts as relevant in finding joint employment) (available at 2005 WL 6219105); April 11, 2005 WHD Opinion Letter (identifying a number of the above facts in finding joint employment) (available at 2005 WL 2086804); *Barbeque Ventures*, 2007 WL 5971772, at *1, 5-6 (separate legal entities who employed employees at five different restaurants were joint employers given common ownership, management and control; the same manager owned one legal entity, was the majority owner and manager of the other entity, and supervised the Area Director for all five restaurants). This is not an all-inclusive list of facts that could potentially be relevant to the analysis. Moreover, not all or most of the foregoing facts need to be present for joint employment to exist. Rather, these facts can help determine if there is sufficient indication that the potential joint employers are associated with respect to the employee and thus share control of the employee.

Joint employment does not exist, however, if the employers “are acting entirely independently of each other and are completely disassociated” with respect to an employee who works for both of them. 29 C.F.R. 791.2(a). In that event, each employer may disregard all work performed by the employee for the other when determining its own responsibilities under the law. *See id.* There are many workers who have multiple jobs with multiple employers who are not joint employers. For example, a high school teacher may also work a part-time job as an instructor for a standardized test preparatory company; the high school and the preparatory company would not be joint employers. In sum, the focus of the horizontal joint employment analysis is the degree of association between the two potential joint employers even if they are formally separate legal entities and the degree to which they share control of the employee.

Example: An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities (Employers A and B). The same individual is the majority owner of both Employer A and Employer B. The managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee’s hours. The two employers use the same payroll processor to pay the employee, and they share supervisory authority over the employee. These facts are indicative of joint employment between *Employers A and B.*

In contrast, an employee works at one restaurant (Employer A) in the mornings and at a different restaurant (Employer B) in the afternoons. The owners and managers of each restaurant know that the employee works at both establishments. The establishments do not have an arrangement to share employees or operations, and do not otherwise have any common management or ownership. These facts are not indicative of joint employment between *Employers A and B.*

B. Vertical Joint Employment and Economic Dependence on the Potential Joint Employer

The vertical joint employment inquiry focuses on whether the employee of the intermediary employer is also employed by another employer – the potential joint employer. In vertical joint employment situations, the other employer typically has contracted or arranged with the intermediary employer to provide it with labor and/or perform for it some employer functions, such as hiring and payroll. There is typically an established or admitted employment relationship between the employee and the intermediary employer. That employee’s work, however, is typically also for the benefit of the other employer.

In contrast to the horizontal joint employment analysis, where the focus is the relationship between the employers, the focus in vertical joint employment cases is the employee’s relationship with the potential joint employer and whether that employer jointly employs the employee. Examples of situations where vertical joint employment might arise include garment workers who are directly employed by a contractor who contracted with the garment manufacturer to perform a specific function, *see Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003); nurses placed at a hospital by staffing agencies, *see Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 143-49 (2d Cir. 2008); or warehouse workers whose labor

is arranged and overseen by layers of intermediaries between the workers and the owner or operator of the warehouse facility, *see Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc.*, 2014 WL 183956, at *9-15 (C.D. Cal. Jan. 14, 2014). *See also A-One Med. Servs.*, 346 F.3d at 917; *Lantern Light*, 2015 WL 3451268, at *3 (where company has contracted for workers who are directly employed by an intermediary, court applies vertical joint employment analysis to relationship between company and workers); *Berrocal v. Moody Petrol., Inc.*, 2010 WL 1372410, at *11 n.16 (S.D. Fla. Mar. 31, 2010) (vertical joint employment may exist when “an employer hires laborers through a third party labor contractor”).

A threshold question in a vertical joint employment case is whether the intermediary employer (who may simply be an individual responsible for providing labor) is actually an *employee* of the potential joint employer. Where there is vertical joint employment, there is likely a contract or other arrangement – but not necessarily an employment relationship – between the intermediary employer and the potential joint employer.¹⁴ If the intermediary employer is an employee of the potential joint employer, then all of the intermediary employer’s employees are employees of the potential joint employer too, and there is no need to conduct a vertical joint employment analysis. For example, if a farm labor contractor is not actually an independent contractor but is an employee of the grower (i.e., is economically dependent on the grower as a matter of economic reality), then all of the farm labor contractor’s farmworkers are also employees of the grower. *See* 29 C.F.R. 500.20(h)(4). Likewise, if a drywall subcontractor is not actually an independent contractor but is an employee of the higher-tier contractor, then all of the drywall subcontractor’s workers are also employees of the higher-tier subcontractor. In sum, it is critical to first determine whether the intermediary employer is an employee of the potential joint employer before proceeding with the vertical joint employment analysis.¹⁵

Once it is determined that the intermediary is not an employee, the vertical joint employment analysis should be applied to determine whether the intermediary employer’s employees are also employed by the potential joint employer. Because it is an employment relationship analysis under the FLSA or MSPA, the vertical joint employment analysis must be an economic realities analysis and cannot focus only on control. As WHD has explained, the Supreme Court and the Circuit Courts of Appeals apply an economic realities analysis to determine the existence of an employment relationship under the FLSA and MSPA. *See, e.g., Home Care AI; Misclassification AI; Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Cop., Inc.*, 366 U.S. 28, 33 (1961) (the economic realities of the worker’s relationship with the employer are the test of employment); 29 C.F.R. 500.20(h)(5)(iii). The particular economic

¹⁴ The contract between the potential joint employer and the intermediary employer may purport to disclaim or deny any responsibility by the potential joint employer as an employer. However, that type of contractual provision is not relevant to the economic realities of the working relationship between the potential joint employer and the employee.

¹⁵ The intermediary employer will be either an independent contractor or employee of the potential joint employer under the FLSA or MSPA. The Misclassification AI discusses the analysis for determining whether a worker is an employee or independent contractor. *See also* 29 C.F.R. 500.20(h)(4).

realities factors relied upon differ somewhat depending on the court, and courts routinely note that other additional relevant factors may be considered, but regardless, it is not a control test.

The MSPA regulation, describing seven economic realities factors in the context of a farm labor contractor acting as an intermediary employer for a grower, provides useful guidance to analyze any vertical joint employment case. *See* 29 C.F.R. 500.20(h)(5)(iv). These factors are probative of the core question of whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work. As courts have cautioned, the factors in an economic realities analysis should not be considered mechanically or in a vacuum; rather, they are guides for resolving the ultimate inquiry whether the employee is economically dependent on the potential joint employer. *See Antenor*, 88 F.3d at 932-33; Misclassification AI, 5-6.¹⁶ Accordingly, these factors should be applied in a manner that does not lose sight of that ultimate inquiry or the expansive definition of employment under the FLSA and MSPA. *See Antenor*, 88 F.3d at 932-33 (“the factors are used because they are indicators of economic dependence” and should be viewed “qualitatively to assess the evidence of economic dependence”). The seven factors are:

- A. Directing, Controlling, or Supervising the Work Performed. To the extent that the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer. The potential joint employer’s control can be indirect (for example, exercised through the intermediary employer) and still be sufficient to indicate economic dependence by the employee. *See Torres-Lopez*, 111 F.3d at 643 (“indirect control as well as direct control can demonstrate a joint employment relationship”) (citing pre-1997 MSPA regulation); *Antenor*, 88 F.3d at 932, 934; 29 C.F.R. 500.20(h)(5)(iv). Additionally, the potential joint employer need not exercise more control than, or the same control as, the intermediary employer to exercise sufficient control to indicate economic dependence by the employee.¹⁷

¹⁶ The vertical joint employment economic realities factors overlap some with the economic realities factors used to determine whether a worker is an employee or an independent contractor, as discussed in the Misclassification AI. However, the exact factors applicable when determining whether a worker is an employee or an independent contractor cannot apply in a vertical joint employment case because they focus on the possibility that the worker is in business for him or herself (and thus is an independent contractor). In a vertical joint employment case, the worker is not in business for him or herself, but is an employee of the intermediary employer, and may also be employed by the potential joint employer.

¹⁷ This point holds true for the vertical joint employment analysis in general. It is not necessary for the employee to be more economically dependent on the potential joint employer than the intermediary employer for there to be joint employment. *See Antenor*, 88 F.3d at 932-33. The focus is the employee’s relationship with the potential joint employer and not a comparison of that relationship with the employee’s relationship with the intermediary employer. *See id.*

- B. Controlling Employment Conditions. To the extent that the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer. Again, the potential joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.
- C. Permanency and Duration of Relationship. An indefinite, permanent, full-time, or long-term relationship by the employee with the potential joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue. For example, if the work in the industry is by its nature seasonal, intermittent, or part-time, such industry condition should be considered when analyzing the permanency and duration of the employee's relationship with the potential joint employer.
- D. Repetitive and Rote Nature of Work. To the extent that the employee's work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training, those facts indicate that the employee is economically dependent on the potential joint employer.
- E. Integral to Business. If the employee's work is an integral part of the potential joint employer's business, that fact indicates that the employee is economically dependent on the potential joint employer. Whether the work is integral to the employer's business has long been a hallmark of determining whether an employment relationship exists as a matter of economic reality. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947).
- F. Work Performed on Premises. The employee's performance of the work on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer. The potential joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the potential joint employer, as the lessee, controls the premises.
- G. Performing Administrative Functions Commonly Performed by Employers. To the extent that the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, those facts indicate economic dependence by the employee on the potential joint employer.

See 29 C.F.R. 500.20(h)(5)(iv).

Courts have applied many of the above factors to vertical joint employment scenarios in FLSA cases, though they have not explicitly relied on the MSPA regulation. *See, e.g., Carrillo v. Schneider Logistics*, 2014 WL 183956, at *6 (applying Ninth Circuit's joint employment

economic realities analysis). In *Carrillo*, for example, warehouse workers sued the companies that operated the distribution warehouses and the company that owned the warehouses. The owner of the warehouses argued that it was not a joint employer of the warehouse workers. In denying the owner's motion for summary judgment, the court noted that there was evidence of possible joint employment for the following reasons: the owner exercised control over the warehouse workers' employment conditions because it approved staffing levels at the warehouse, directed that employees be shifted to an alternative workweek schedule, closely monitored productivity levels, and established various operating metrics; the work was performed on premises owned or leased by the owner, who provided all of the equipment necessary to perform work at its warehouses; the work consisted primarily of conventional manual labor, requiring little skill; and the work was an integral part of the owner's corporate strategy. *See id.* at *9-15. As the court did in *Carrillo*, applying these or similar factors will help to determine whether the employee is economically dependent on the potential joint employer.

As noted, the economic realities factors to apply vary somewhat depending on the court, but any formulation must address the "ultimate inquiry" of economic dependence. In applying any other relevant factors, the broad scope of joint employment under the FLSA and MSPA must be recognized. For example, in analyzing joint employment, the Second Circuit applies six economic realities factors: (1) use of the potential joint employer's premises and equipment for the work; (2) whether the intermediary employer has a business that can or does shift from one potential joint employer to another; (3) whether the employee performs a discrete line-job that is integral to the potential joint employer's production process; (4) whether the potential joint employer could pass responsibility for the work from one intermediary to another without material changes for the employees; (5) the potential joint employer's supervision of the employee's work; and (6) whether the employee works exclusively or predominantly for the potential joint employer. *See Zheng*, 355 F.3d at 71-72.

The Ninth Circuit applies factors from different sources: *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (four factor test primarily assessing potential joint employer's control of employment conditions); the pre-1997 version of the MSPA joint employment regulation; and the eight economic realities factors set forth in *Torres-Lopez*, 111 F.3d at 640-41. *See, e.g., Lantern Light*, 2015 WL 3451268, at *2-17 (applying both the *Bonnette* and *Torres-Lopez* factors and finding that satellite television provider was a joint employer of the installers employed by the company with whom the provider contracted to install its services); *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d 1037, 1061-62 (D. Or. 2010) (applying both the *Bonnette* and *Torres-Lopez* factors). Thus, there are several formulations of the economic realities factors used to determine the employee's economic dependence on a potential joint employer that are consistent with the broad scope of employment under the FLSA.

Some courts, however, apply factors that address only or primarily the potential joint employer's control (power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records). *See, e.g., Baystate Alt. Staffing*, 163 F.3d at 675; *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012). This approach is not consistent with the breadth of

employment under the FLSA. “Measured against the expansive language of the FLSA,” addressing only the potential joint employer’s control “is unduly narrow” and “cannot be reconciled with the ‘suffer or permit’ language in the [FLSA], which necessarily reaches beyond traditional agency law.” *Zheng*, 355 F.3d at 69. Indeed, the Second Circuit explained that, although satisfaction of the four “formal control” factors can be sufficient to establish joint employment, it has “never held ‘that a positive finding on those four factors is *necessary* to establish an employment relationship.’” *Barfield*, 537 F.3d at 143 (quoting *Zheng*, 355 F.3d at 69) (emphasis in original); *see also Zheng*, 355 F.3d at 69 (“[T]he broad language of the FLSA, as interpreted by the Supreme Court in *Rutherford*, demands that a district court look beyond an entity’s formal right to control the physical performance of another’s work before declaring that the entity is not an employer under the FLSA.”). As explained above, the FLSA rejected control as the standard for determining employment, and any vertical joint employment analysis must look at more than the potential joint employer’s control over the employee.¹⁸

Example: A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers’ compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer’s schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor’s construction projects, whether through ABC Drywall or another intermediary. *These facts are indicative of joint employment of the laborer by the General Contractor.*

Example: A worker is hired by a farm labor contractor (FLC) to pick produce on a Grower’s farm. The FLC hired and pays the worker. The Grower dictates the timing of the harvest, which fields the worker should harvest, and the schedule each day. The work is unskilled, and any training is provided by the Grower. The Grower keeps track of the amount of produce that the worker picks per

¹⁸ *Enterprise Rent-A-Car* involved whether a parent company was a joint employer of its subsidiaries’ employees. *See* 683 F.3d at 464. The Third Circuit acknowledged the breadth of employment under the FLSA and that indirect control can show joint employment, but it nonetheless ruled that joint employment in that case was determined by whether the parent exercised significant control. *See id.* at 467-68. The Third Circuit recognized that the control factors “do not constitute an exhaustive list of all potential relevant facts” and should not be blindly applied; rather, a joint employment determination must consider the employment situation in totality, including the economic realities of the working relationship. *Id.* at 469 (emphasis in original). The Third Circuit seemed to leave open the possibility that, in a case involving an intermediary employer providing labor to another employer, it would consider applying economic realities factors beyond the control factors applied in *Enterprise Rent-A-Car* to determine whether that other employer is a joint employer.

hour. The Grower provides the buckets for the produce, transports the produce from the field, and stores the produce. The Grower pays the FLC per bucket of produce picked, and withholds money to cover workers' compensation insurance. The worker has been continuously working on the Grower's farm during the harvest seasons, whether through this FLC or another farm labor contractor. *These facts are indicative of joint employment of the worker by the Grower.*

Example: A mechanic is employed by Airy AC & Heating Company. The Company has a short-term contract to test and, if necessary, replace the HVAC systems at Condor Condos. The Company hired and pays the mechanic and directs the work, including setting the mechanic's hours and timeline for completion of the project. For the duration of the project, the mechanic works at the Condos and checks in with the property manager there every morning, but the Company supervises his work. The Company provides the mechanic's benefits, including workers' compensation insurance. The Company also provides the mechanic with all the tools and materials needed to complete the project. The mechanic brings this equipment to the project site. *These facts are not indicative of joint employment of the mechanic by the Condos.*

III. Conclusion

As a result of continual changes in the structure of workplaces, the possibility that a worker is jointly employed by two or more employers has become more common in recent years. In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases, particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer.

Whether to apply a horizontal or vertical joint employment analysis (or both analyses) depends on the circumstances of the case. The focus of a horizontal joint employment analysis is the relationship and association between the two (or more) potential joint employers, and the FLSA joint employment regulation provides guidance in evaluating such cases. The focus of the vertical joint employment analysis is the relationship between the employee and the potential employer and whether an employment relationship exists between them. The analysis must determine whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer. The economic realities factors in the MSPA regulation provide guidance for analyzing vertical joint employment cases, although additional or different economic realities factors that are consistent with the broad scope of employment under the FLSA and MSPA may be helpful as well.

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 and MSPA. As with all aspects of the employment relationship under the FLSA and MSPA, the expansive definition of "employ" as including "to suffer or permit to work" must be considered when determining joint employment, so as to further the statutes' remedial purposes.

Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA)

INTRODUCTION

[The Family and Medical Leave Act](#) (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Generally, private employers with at least 50 employees are covered by the FMLA. Government agencies (including local, state and federal employers) and public and private elementary and secondary schools are covered by the FMLA, regardless of the number of employees. Only eligible employees are entitled to take FMLA leave. To be eligible, an employee must: have worked for the employer for at least 12 months; have worked at least 1250 hours during the 12 months preceding the start of leave; and be employed at a worksite where the employer has at least 50 employees within 75 miles. See [Fact Sheet #28](#).

Two (or more) businesses may simultaneously employ an employee, making them joint employers of the employee. Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible for compliance with the FMLA. The analysis for determining joint employment under the FMLA is the same as under the Fair Labor Standards Act (FLSA). For more information on joint employment under the FLSA, see [Fact Sheet #35](#).

Joint employment is important in determining employer coverage and employee eligibility under the FMLA. Joint employers' responsibilities under the FMLA vary depending on whether they are the primary or secondary employer of the employee taking FMLA leave. This fact sheet explains how joint employment affects FMLA coverage and eligibility determinations and the FMLA responsibilities of primary and secondary employers.

PRIMARY AND SECONDARY EMPLOYERS UNDER THE FMLA

When an individual is employed by two employers in a joint employment relationship under the FMLA, in most cases one employer will be the primary employer while the other will be the secondary employer. Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation.

Factors to consider include:

- who has authority to hire and fire, and to place or assign work to the employee;
- who decides how, when, and the amount that the employee is paid; and,
- who provides the employee's leave or other employment benefits.

In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

Employer Coverage and Employee Eligibility Under the FMLA

Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls.

For purposes of employee eligibility, in determining whether a jointly-employed employee works at a worksite where the employer employs at least 50 employees within 75 miles, the employee's worksite is the primary

employer's office from which the employee is assigned or to which the employee reports. However, if the employee has physically worked for at least one year at a facility of a secondary employer, then the employee's worksite is that location.

Responsibilities of Primary Employers

Under the FMLA, the primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. The primary employer is prohibited from interfering with a jointly-employed employee's exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. Primary employers must keep all records required by the FMLA with respect to primary employees.

A primary employer must meet all of its obligations under the FMLA even when a secondary employer is not in compliance with the law or does not provide support to the primary employer in meeting these responsibilities.

Responsibilities of Secondary Employers

The secondary employer, whether an FMLA-covered employer or not, is prohibited from interfering with a jointly-employed employee's exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. The secondary employer is responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave, such as when the secondary employer is a client of a placement agency and continues to use the services of the agency and the agency places the employee with that client employer. Secondary employers must keep basic payroll and identifying employee data with respect to any jointly-employed employees.

A covered secondary employer is also responsible for compliance with all the provisions of the FMLA for its regular, permanent workforce.

Example: "Staffing Company ABC"

A large medical staffing company, Staffing Company ABC, places registered nurses in jobs at public and private hospitals operating in several U.S. states. For purposes of this example, Staffing Company ABC is an FMLA-covered employer, and the nurses meet all of the FMLA eligibility requirements. The nurses are placed at various hospitals throughout the year.

Staffing Company ABC pays the nurses and provides them with retirement and insurance benefits. When the employees need leave, they call Staffing Company ABC to request time off. At the hospitals, the nurses are given their job assignments and are supervised by hospital staff. The nurses treat hospital patients, use hospital equipment, and are obliged to follow the same work protocols day to day as the hospital's regular workforce.

In this example, the nurses are jointly employed by Staffing Company ABC and the client hospitals. Staffing Company ABC is the primary employer and therefore is responsible for following all of the FMLA requirements of FMLA-covered employers, including giving FMLA notices, providing FMLA leave, and maintaining health benefits. Each hospital is the secondary employer of the Staffing Company ABC's employees that are placed at that hospital. Each hospital must keep and maintain payroll records for the employees placed at that hospital, as well as count the temporary registered nurses placed at each hospital as employees for their own FMLA coverage and employee eligibility tests. The hospitals are prohibited from interfering with Staffing Company ABC's employees' FMLA rights, or from retaliating or discriminating against Staffing Company ABC's employees.

Chart: Comparing Joint Employer Responsibilities Under the FMLA

(Note that the chart assumes both employers are FMLA-covered and that the employee is eligible for FMLA leave.)

FMLA Responsibilities of Joint Employers	Primary Employer	Secondary Employer
Count jointly-employed employees for coverage and eligibility determinations (Fact Sheet #28)	Yes.	Yes.
For employee-eligibility determination, use its worksite for the eligibility test (50 employees within 75-miles of the worksite) (Fact Sheet #28)	Yes, unless the employee has physically worked at the secondary employer's facility for at least one year.	No, unless the employee has physically worked at the secondary employer's facility for at least one year.
Provide FMLA notices to the jointly-employed employee (Fact Sheet #28D)	Yes.	No; however the secondary employer must provide FMLA notices to its own employees.
Provide FMLA leave to the jointly-employed employee (Fact Sheet #28F)	Yes.	No; however the secondary employer must provide FMLA leave to its own eligible employees.
Maintain benefits for the jointly-employed employee (Fact Sheet #28A)	Yes.	No; however the secondary employer must maintain benefits for its own employees who take FMLA leave.
Restore the jointly-employed employee to work (Fact Sheet #28A)	Yes.	No, unless the secondary employer is continuing to use the placement agency and the agency places the employee with that secondary employer.
Not retaliate, discriminate or interfere (Fact Sheet #28A and Fact Sheet #77B)	Yes.	Yes.
Keep records	Yes, the primary employer keeps all required records.	Yes, the secondary employer keeps payroll data and identifying employee information.

ENFORCEMENT

It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA. *See [Fact Sheet #77B](#)*. The Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress. If you believe that your rights under the FMLA have been violated, you may file a complaint with the Wage and Hour Division or file a private lawsuit against your employer in court.

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).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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