APPENDIX "G"

United States Department of Labor

Wage and Hour Division

Wage and Hour Division (WHD)

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Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Whether an employee has more than one employer is important in ensuring that the employee receives all of the rights and protections afforded by the FLSA and MSPA, and that the employers are aware of and accountable for compliance with their obligations under these Acts. Accordingly, this fact sheet provides general information concerning the meaning and applicability of joint employment under the FLSA and MSPA.

What is Joint Employment?

Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, to the employee for compliance with a statute.

The FLSA and MSPA share the same definition of employment. This definition, which includes "to suffer or permit to work," was written to have as broad an application as possible.

Under these laws, it is possible for a worker to be employed by two (or more) joint employers who are both responsible for compliance. Joint employment is included in the laws' definition of employment – therefore, joint employment is also defined broadly.

WHD considers joint employment in hundreds of investigations every year, including in the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

Determining if Joint Employment Exists

The most likely scenarios for joint employment are

1. Where the employee has two (or more) technically separate but related or associated employers, or
2. Where one employer provides labor to another employer and the workers are economically dependent on both employers.

An FLSA regulation, 29 CFR 791.2, provides guidance regarding the first scenario for joint employment, and a MSPA regulation, 29 CFR 500.20(h)(5), provides guidance regarding the second scenario. Because the FLSA and MSPA share the same definition of employment, both types of joint employment can exist under either the FLSA or MSPA.

1) Where the employee has two or more technically separate but related or associated employers.

Joint employment exists where two (or more) employers benefit from the employee's work and they are sufficiently related to or associated with each other. For example:

- The employers have an arrangement to share the employee's services;

- One employer acts in the interest of the other in relation to the employee; or
- The employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

The focus of this type of joint employment is the degree of association between the two (or more) employers, and it is sometimes called horizontal joint employment by the courts. For example, joint employment may exist where an employee works for two restaurants that are technically separate but have the same managers, jointly coordinate the scheduling of the employee's hours, and both benefit from that employee's work.

In these cases, it is important to consider facts that shed light on the degree of association between the two (or more) employers and how these employers may jointly control the employee. Although not all or even most of these facts need to be present for there to be joint employment, some facts to consider include:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?
- Do the employers share supervisory authority over the employee?
- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

2) Where one employer provides labor to another employer and the workers are economically dependent on both employers.

Joint employment also exists where a worker is, as a matter of economic reality, economically dependent on two employers: an intermediary employer (such as a staffing agency, farm labor contractor (FLC), or other labor provider) and another employer who engages the intermediary to provide workers. The workers are employees of the intermediary, and the issue is whether they are also employed by the employer who engaged the intermediary to provide the labor. This type of joint employment is common not only in agriculture, but also in other industries that use subcontracting, staffing agencies, or other intermediaries, such as construction, warehouse and logistics, and hotels. This type of joint employment exists in both FLSA and MSPA cases.

For example, in agriculture, a grower may contract with an FLC to provide farm workers. In another example, a higher-tier contractor may contract with a subcontractor to provide construction workers for a project. In these types of relationships, the question is whether the employees (farm workers or construction workers) are jointly employed by the other employer (the grower or higher-tier contractor).

The focus of this type of joint employment is the employee's relationship with the other employer (as opposed to the intermediary employer). This type of joint employment analysis must include an examination of the economic realities of the relationship to determine the degree of the employee's economic dependence on the other employer – the potential joint employer. Some courts have called this vertical joint employment.