Biden DOL Rescinds Trump Administration's Joint Employer Rule

By Janet A. Hendrick and Phoebe B. Mitchell

On July 29, 2021, the Department of Labor (DOL) rescinded the Trump Administration's joint employer rule under the Fair Labor Standards Act (FLSA). This pro-worker change makes it more likely that an employer will be considered a "joint employer" and liable for another employer's actions under the FLSA.

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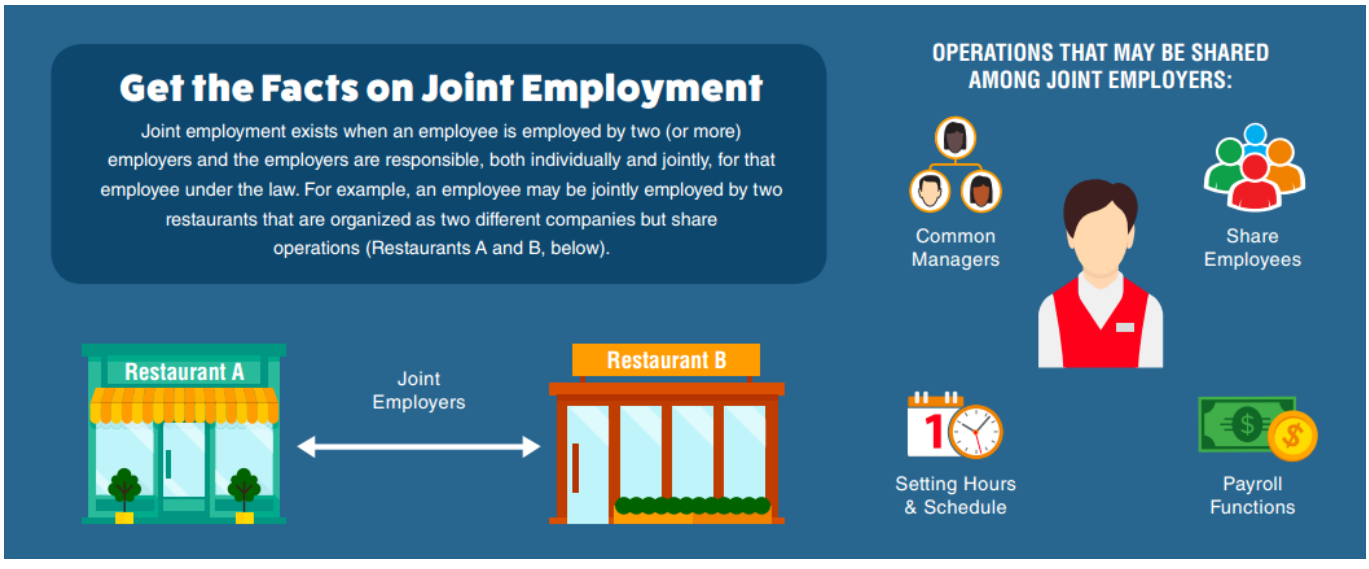
In its press release, the DOL explained the importance of the joint employer rule: "Under the FLSA, an employee can have more than one employer for the work they perform. Joint employment applies when – for the purposes of minimum wage and overtime requirements – the department considers two separate companies to be a worker's employer for the same work. For example, a joint employer relationship could occur where a hotel contracts with a staffing agency to provide cleaning staff, which the hotel directly controls. If the agency and the hotel are joint employers, they are both responsible for worker protections."

Under the previous rule, the DOL would consider four factors to determine whether a company is a joint employer: whether the company (1) hires and fires the employee; (2) supervises and controls employees' work schedules or conditions of employment to a substantial degree; (3) determines employees' rate and method of payment; and (4) obtains employment records.

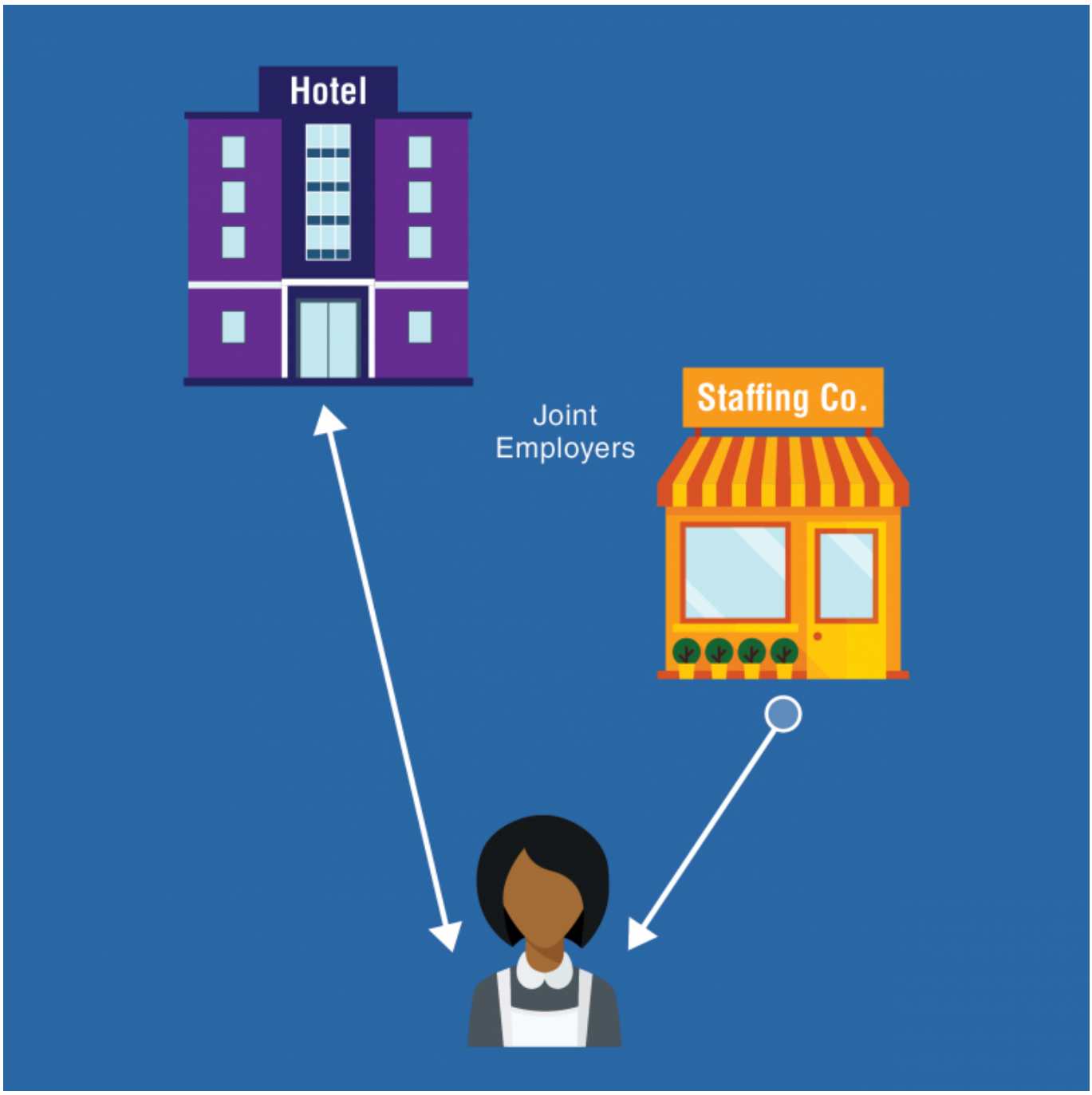
The DOL stated that this former rule "included a description of joint employment contrary to statutory language and Congressional intent." The new rule states that rescinded rule "intertwined the horizontal joint employment provision with the vertical joint employment provisions," while the new final rule asserts that horizontal and vertical joint employment are separate concepts.

Under the new rule, horizontal joint employment exists where an employee is separately employed by and works separate hours in a workweek for more than one employer, and the employers are "sufficiently associated with or related to each other with respect to the employee."



Vertical joint employment exists where "an employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer)," another employer is "receiving the

benefit of the employee's labor," and "the economic realities show that the employee is economically dependent on, and thus employed by," the other employer.



The new rule goes into effect on September 28, 2021.

Phillips Murrah's labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients regarding the DOL's new rules.

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