



**LESSONS YOU SHOULD LEARN FROM OTHER EMPLOYERS' FORM I-9 AND DISCRIMINATION VIOLATIONS**



**Susan S. Davis**.....

*"OCAHO decisions in 2015 illustrate that making mistakes in Form I-9 compliance can be expensive."*

When an employer violates the I-9 paperwork or discrimination requirements, either USCIS (for paperwork violations) or the Office of Special Counsel for Immigration-Related Unfair Employment Practices (for discrimination violations) will initiate an action for penalties against the employer. The employer has the opportunity to settle or to fight. If the employer chooses to fight, the case will be tried before an administrative law judge in the Office of Chief Administrative Hearing Officer (OCAHO).

OCAHO decisions in 2015 illustrate that making mistakes in Form I-9 compliance can be expensive. In *Employer Solutions Staffing Group*, the employer's representative who reviewed the original employee documents for purposes of completing Form I-9, Section 2 did not sign Section 2. Instead, another employer's representative signed Section 2 based on review of document photocopies. OCAHO imposed a penalty of \$227,252 for these violations. In *Niche, Inc.*, OCAHO fined the employer \$63,850 because it continued to employ workers after their Employment Authorization Documents (EADs) had expired and the employer failed to re-verify these workers who, in fact, had timely acquired new EADs. In *Hartmann Studios*, the employer's failure to sign I-9 Section 2 certification on almost 800 occasions substantially contributed to an OCAHO penalty of \$605,250.

Other common mistakes that resulted in penalties included: (1) failing to ensure the completion of Section 1 by the employee, (2) failing to complete Section 2 properly, (3) backdating Form I-9, (4) failing to prepare or present Form I-9 in a timely manner, (5) failing to provide a document number or issuing authority in Section 2, and (6) failing to list documents from Lists A or B and C.

Another OCAHO decision demonstrates that an employer should have a verifiable, consistent and non-discriminatory business reason for each hiring or termination decision. In *U.S. v. Estopy Farms*, OCAHO ruled that the employer discriminated against a qualified U.S. citizen in favor of hiring qualified foreign workers because the employer provided a series of "shifting, inconsistent, and mutually contradictory explanations" to justify its decision not to hire the U.S. citizen.

An employer can reduce the risk of penalties from paperwork violations by conducting periodic (at least annual) audits of its Form I-9s. An employer can reduce the risk of immigration-related discrimination claims by training its personnel who are involved in hiring and termination. An employer also should rely on legal counsel who is experienced in these matters to make sure that all hiring and termination procedures comply with applicable law.

A few employers choose to litigate immigration penalty cases not only on the merits, but also on the excessiveness of the penalties. A review of recent cases suggests that OCAHO decisions do lower imposed penalties by an average of almost 50%, the most common reason being that the penalty should be adjusted to the mid-range of penalties and not be disproportionate to the employer's resources. There is also a *Small Business Regulatory Enforcement Fairness Act* that OCAHO has cited in a number of cases.

*Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*





**Jerome D. Pinn....**

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## WAGE-HOUR ISSUES GUIDANCE ON JOINT EMPLOYER LIABILITY

Attorneys and clients are familiar with cases in which a plaintiff sues a group of defendants, hoping that the plaintiff can find a “deep pocket” so that at least one of the defendants will pay off the damage claim. A recent example of this on the federal employment level is the ruling of the NLRB last August in *Browning-Ferris Industries*, 362 NLRB No. 186, which expanded joint employer liability under the National Labor Relations Act. Similarly, last July the Wage-Hour Division (WHD) of the U.S. Department of Labor published guidance on independent contractor misclassification. More recently, on January 20, 2016, WHD issued guidance on joint employer liability under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) as pertains to joint employment.

According to WHD, joint employment exists when an individual is employed by two (or more) employers such that the employers are responsible, both individually and jointly, for compliance with the statute. This leads to situations where 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. Further, when two or more employers jointly employ an employee, the employee’s hours worked for all the joint employers during the work week are aggregated and considered as one employment, including for purposes of calculating whether overtime is due.

According to WHD, it regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers for the work. WHD therefore published this guidance to provide additional information concerning joint employment under two particular laws, the FLSA and MSPA. WHD acknowledged that the joint employment analysis in FLSA and MSPA cases is not the same as the analysis applied under other laws and by the Labor Board. The reason is that the FLSA and MSPA apply a very “expansive definition of employee” which “insures that the scope of employment relationships and joint employment” under these two laws is as broad as possible. In particular, it may not apply the same principles as WHD as these other statutes focus on the “economic realities test” of the situation, while most other laws focus on the common law test of the right to control the manner of performing the work.

WHD states that its investigators have come across employment scenarios where there might be joint employment in all industries, including, as examples:

- Home healthcare agencies that share staff and common management;
- Construction (workers who work for a subcontractor and possibly a general contractor);
- Agriculture (farm workers who work for a farm labor contractor and possibly a grower);
- Warehousing and logistics;
- Staffing (providing labor to multiple industries); and
- Hospitality.

While franchising is not a focus of the guidance, it also has a potential to create joint employment relationships between franchisors and franchisees. For example, there are a series of cases pending before the Labor Board alleging that McDonald’s shares responsibility with franchise owners for the employees of the franchisees.

WHD believes that more and more businesses are varying organizational and staffing models by sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. WHD acknowledges that not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment. It admits that the varying use of factors creates a sea of uncertainty for employers.

WHD discusses its approach as an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, so WHD will consider the possibility of joint employment 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.

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It discusses that several analyses may be applied depending on the circumstances of the case, most commonly either a *horizontal* or *vertical joint employment analysis*.

The focus of a *horizontal joint employment analysis* is the relationship and association between the two (or more) potential joint employers. 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. An analysis must determine whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer. 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, a farm owner, higher-tier contractor, or client of the staffing agency or labor provider, supplier or broker.

Even if the contract between a potential joint employer and the intermediary employer may purport to disclaim or deny any responsibility by the potential joint employer as an employer, that type of contractual provision may not be recognized by WHD as to the economic realities of the working relationship between the potential joint employer and the employee.

As one of the many scenarios discussed by WHD, a situation involving labor employed by a dry wall company which is an independent subcontractor on a construction project is cited. The general contractor reserves the right to remove the laborer from the project, controls the laborer’s schedule, provides assignments on site, and both the dry wall and the general contractor supervise the laborer. 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 the workers on the project). Under these factual patterns, WHD suggests that the laborer has been continuously working on the general contractor’s construction projects, whether through the dry wall or another intermediary, and the facts are indicative of joint employment of the laborer by the general contractor.

*Editor’s Notes: Readers may note the close relationship between the issue of joint employment to that of misclassification of employees as independent contractors. The two concepts are closely related. While the concepts in the January 20, 2016 guidance are not new, they probably are the most extreme advocacy of the use of “economic reality” rather than the common law right to control, that has traditionally governed employee and joint employer issues. The guidance does not constitute a rule of law and it is unknown to what extent judges will defer to the WHD’s new guidance. There is no question, however, that plaintiff’s lawyers will seize upon the language in guidance to argue for new methods of finding joint-employer relationships. Some say that the “big picture” issues relate to the current Administration’s attempts to restrict outsourcing and other emerging forms of work, such as Uber, etc.*

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*“All the attorneys are fantastic!”*

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# ADMINISTRATION TO PROMOTE PAY EQUALITY BY REQUIRING NEW EEO-1 INFORMATION TO BE FILED



**Jerome D. Pinn**....

"[E]mployers are concerned because legitimate reasons other than unlawful discrimination might account for pay differences within the bands, including willingness to work overtime and other factors."

For several years, equal employment agencies have been pursuing requirements that employers collect and report pay data categorized by race, sex and ethnicity in order to better apply the equal pay and other discrimination laws. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) proposed an "equal pay report" to seek such information from federal contractors under Executive Order 11246. On February 1, 2016, the Equal Employment Opportunity Commission (EEOC) published a proposal to require employers of more than 100 employees to include such information on EEO-1 reports beginning September 30, 2017. A sixty-day public comment period on the proposal will end April 1, 2016.

Secretary of Labor Thomas Perez said that the Administration is best able to promote equal pay when it receives more comprehensive information about earnings. The DOL believes that the data collection will help employers evaluate their own pay practices to prevent discrimination and compensation, and that the data collection gives DOL a more powerful tool for enforcement. While their proposal is clear on how employers should assemble and submit the requested data, the EEOC has not yet indicated how it will use the information. Presumably, the EEOC will develop various statistical tools to determine whether there is evidence of discrimination.

Currently employers must collect EEO-1 data from any pay period occurring in the months of July through September of the current survey year, and file the EEO-1 Form with the government by September 30 of the same year. These deadlines would continue after the addition of the pay data, which would be required to be submitted electronically. W-2 data would be used in 12-pay bands for the 10 EEO-1 job categories. Employers would count and report the number of employees in each pay band and also the total number of hours worked by the employees included in each EEO-1 pay band cell. The data would be used to allow analysis of pay differences while considering aggregate variations in hours. The EEOC seeks

employer input with respect to how to report hours worked for salaried employees.

The EEOC and OFCCP plan to develop a software tool that would allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing the firm's or establishment's data to aggregate industry or metropolitan-area data. This application would highlight statistics of interest.

Obviously, employers are concerned because legitimate reasons other than unlawful discrimination might account for pay differences within the bands, including willingness to work overtime and other factors. Some employers are concerned that the pay data submitted to the EEOC would not be kept confidential, as it might be subject to Freedom of Information Act requests and disclosure. Some believe the EEOC should also have a plan as to how such data could be used before requiring it from employers. In this regard, in December 2015, Congress directed OFCCP to cease strict and exclusive use of statistical insignificant tests for evaluating hiring practices, and similar concerns may exist for pay practices.



## PLEASE JOIN US IN WELCOMING MARIANA JABLONSKI!

MARIANA JABLONSKI is an Associate in the Knoxville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in December 2015. Marianna's practice includes an emphasis in insurance defense, workers' compensation, employment law, and general civil defense litigation. Marianna received a Bachelor of Science from the University of Tennessee, graduating magna cum laude in 2008. She then attended the University of Tennessee College of Law where she worked in both the Domestic Violence and Advocacy clinics. Prior to joining the Firm, Marianna

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