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Section 7 of the National Labor Relations Act ("NLRA") protects both union activity and "other concerted activities for the purpose of . . . mutual aid and protection". See 29 U.S.C. § 157. The National Labor Relations Board ("NLRB") has taken the position that employer policies that restrict an employee's use of social media violate the NLRA if the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights". See National Labor Relations Board, *Memorandum* OM 12-59, at 3 (May 30, 2012), *available at* https://www.nlrb.gov/reports-guidance/operations-management-memos (the "NLRB May 2012 Memorandum"). Per the NLRB, an employer's social media policy may be unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *See id.*

The NLRB is continuing to take great interest in employer restrictions on employee social media use. For example, a recent NLRB decision on the issue, *Chipotle Servs. LLC D/B/A Chipotle Mexican Grill*, 364 NLRB No. 72 (2016), involved three "tweets" an employee of Chipotle posted on his Twitter account regarding the working conditions at Chipotle. These tweets were as follows:

- The employee tweeted the employer's communication director, Chris Arnold, a news article about people having to work on 'snow days', when public transportation was closed, and commented: "Snow days for 'top performers', Chris Arnold?"
- A customer tweeted: "Free Chipotle is the best thanks." The employee tweeted in response, "nothing is free, only cheap #labor. Crew members make only $8.50hr how much is that steak bowl really?"
- A customer posted a tweet about guacamole. In response, the employee tweeted: "it's extra not like #Qdoba, enjoy the extra $2". *Id.* at *7.

The employee deleted the tweets after the employer asked him to remove them from his account. *Id.* As part of a larger unfair labour practice case, the NLRB Administrative Law Judge ("ALJ") evaluated whether Chipotle violated the NLRA by directing the employee to delete his tweets. *Id.* In assessing whether Chipotle prevented the employee from exercising his Section 7 right "to engage in concerted activities for the purpose of mutual aid or protection", the NLRB ALJ noted that although the employee acted alone in posting the tweets, the tweets related to wages and working conditions, which are issues that concern all Chipotle employees. *Id.* Therefore, since the tweets were not about the employee's "individual concerns" or "wholly personal issues", the ALJ found that the employee had engaged in concerted activity. *Id.*

On appeal, a majority of the NLRB panel rejected the ALJ's reasoning, ruling that the employee's tweets did not constitute concerted activity and, therefore, Chipotle did not violate the NLRA by asking the employee to delete the tweets. *Id.* at *1 n.3. Although the NLRB did not provide any reasoning for its reversal, the decision is good news for employers because had the ALJ's decision been affirmed, practically any post by an employee in a social media forum relating to his terms and conditions of employment would constitute "concerted activity" under Section 7 of the NLRA. Still, employers should be careful when dealing with employees' personal social media accounts.

Employers seeking to craft social media policies compliant with the NLRA should continue to consider the following guidelines:

- Avoid policies containing ambiguous rules "as to their application to Section 7 activity". *See* NLRB May 2012 Memorandum at 20.
- Ensure that all policies provide specific rules that contain "limiting language or context to clarify that the rules do not restrict Section 7 rights". *Id.*
- Provide clear rules with "examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity". *Id.* This will help to clarify and restrict the scope of the employer's policies.

Employees will not be protected by the NLRA, however, if their conduct advocates insubordination. In *Richmond Dist. Neighborhood Ctr.*, 361 NLRB No. 74 (2014), the NLRB held that employees who exchanged Facebook posts detailing their plans for insubordination forfeited NLRA protections. The Facebook posts described their plans to neglect their duties, disrupt the workplace, and ignore the employer's policies. *Id.* at *3. Although the NLRB found the employees' Facebook discussion constituted concerted activity, the Board concluded that their conduct was not protected by the NLRA because of the "pervasive advocacy of insubordination in the Facebook posts". *Id.*

Business protection and restrictive covenants

Defend Trade Secrets Act of 2016

The Defend Trade Secrets Act of 2016 ("DTSA"), which took effect on May 11, 2016, federalizes and strengthens trade secrets law. 18 U.S.C. § 1836. Under the DTSA, employers can now file civil lawsuits for trade secrets theft under the Federal Economic Espionage Act ("EEA"). Prior to the enactment of the DTSA, prosecutors could bring criminal cases under the EEA for trade secrets misappropriation, but private civil cases had to be brought under State law. Now, for the first time, there is also Federal jurisdiction over civil causes of action for trade secret misappropriation. The DTSA does not preempt State law; rather, the DTSA will exist alongside existing State laws. Employers can therefore pursue relief in either Federal or State court.

The DTSA's *ex parte* seizure provision provides a new powerful tool in trade secret litigation. The provision allows a trade secret owner to ask the court for an *ex parte* seizure order to prevent the dissemination of a trade secret. 18 U.S.C. § 1836(b)(2). This extreme remedy gives a trade secret owner the right, "in extraordinary circumstances", to seize property of a competitor without providing any notice. *Id.* The court obtains custody of the property and is then required to hold a seizure hearing during which the party who obtained the seizure order has the burden to prove the facts underlying the order. *Id.* To prevent potential abuse of this procedure, the DTSA allows parties to seek damages if they are harmed by a "wrongful or excessive seizure". *Id.*

In addition to seizures, courts may grant other types of relief, including:

- an injunction;
- monetary damages, including damages for the actual loss suffered by the trade secret owner and unjust enrichment caused by the trade secret theft;
- "exemplary damages" if the misappropriation was wilful and malicious; and
- reasonable attorney's fees to the prevailing party.

18 U.S.C. § 1836(b)(3).

However, if an employer did not provide notice of the DTSA's immunity provisions to the misappropriating employee, the employer cannot recover exemplary damages or attorney's fees. The immunity provisions, which allow employees in certain circumstances to avoid liability for the disclosure of a trade secret, should therefore be included in new or updated employment and independent contractor agreements. The provisions are as follows:

> (b) Immunity from liability for confidential disclosure of a trade secret to the Government or in a court filing.
>
> (1) Immunity.—An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—
>
> (A) is made—
>
> (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and
>
> (ii) solely for the purpose of reporting or investigating a suspected violation of law; or
>
> (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
>
> (2) Use of trade secret information in anti-retaliation lawsuit.—An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—
>
> (A) files any document containing the trade secret under seal; and
>
> (B) does not disclose the trade secret, except pursuant to court order.

18 U.S.C. § 1833(b).

DOJ and FTC issue Antitrust Guidance for Human Resource Professionals

On October 20, 2016, the Department of Justice Antitrust Division (the "DOJ") and the Federal Trade Commission (the "FTC") released guidance to inform human resource ("HR") specialists how antitrust laws apply in the employment context. *See* Department of Justice Antitrust Division & Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016), *available at* https://www.justice.gov/atr/file/903511/download. The guidance advised that HR professionals should not enter into agreements with competing firms concerning terms of employment. *Id.* at 3. Specifically, naked wage-fixing and no-poaching agreements are illegal under the antitrust laws. *Id.* The guidance states:

"An individual likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements); or

- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called 'no-poaching' agreements)." *Id.*

The DOJ and FTC announced in the guidance that for the first time the DOJ is going to proceed criminally against naked wage-fixing and no-poaching agreements. *Id.* at 4. This decision reflects that these agreements hinder competition in the same way as agreements to fix prices or allocate customers, which have traditionally been subject to criminal prosecution. *Id.* In light of this guidance, it is important that HR professionals review their companies' practices and existing agreements to ensure they are in compliance with the antitrust laws.

It is important to note though that wage-fixing and no-poaching agreements can still be lawful when they are not "naked restraints" on competition. A "naked restraint" is generally an agreement that serves no purpose other than to hamper competition. *Id.* at 3. An "ancillary restraint", on the other hand, has a legitimate business purpose and, therefore, would likely not be criminally prosecuted. For example, restraints on trade made in pursuit of a legitimate commercial interest, such as a merger or acquisition, would be considered ancillary, rather than naked restraints on trade.

Discrimination protection

Sexual orientation discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2. While Title VII does not explicitly include sexual orientation as a protected class, the Equal Employment Opportunity Commission (EEOC) has taken the position that sexual orientation discrimination is sex discrimination under Title VII. *See Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

On March 1, 2016, the EEOC filed its first two sex discrimination cases based on sexual orientation. U.S. Equal Employment Opportunity Commission, *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination* (March 1, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm. In the District of Maryland, Baltimore Division, the Federal agency brought a lawsuit against Pallet Companies, dba IFCO Systems NA, a provider of reusable plastic containers, and in a separate action in the Western District of Pennsylvania, the EEOC brought a lawsuit against Scott Medical Health Center, a provider of pain management and weight loss services. *Id.*

In its suit against IFCO Systems, the EEOC alleged that a lesbian employee was harassed by her manager due to her sexual orientation. *Compl., EEOC v. Pallet Companies D/B/A IFCO Sys. North Am., Inc.,* No. 1:16-cv-00595-CCB (D. Md. Mar. 3, 2016), ECF No. 1. Her manager regularly made inappropriate comments regarding her sexual orientation, such as "I want you to like men again", and "Are you a girl or a man?" *Id.* at 3. He also quoted biblical passages stating a woman should be with a man. *Id.* According to the complaint, after the employee complained to human resources and others at work about the harassment, she was fired in retaliation for her complaints. *Id.* at 1, 3-4. The lawsuit settled on June 28, 2016. Consent Decree, *EEOC v. Pallet Companies D/B/A IFCO Sys. N. Am., Inc.,* No. 1:16-cv-00595-CCB (D. Md. June 28, 2016), ECF No. 9. As part of the settlement agreement, IFCO agreed to pay $202,200 in damages. *Id.* at 3-4. The consent decree also requires, among other injunctive relief, that IFCO retain a subject matter expert on sexual orientation, gender identity, and transgender training to assist in developing a program to train IFCO's staff on LGBT issues in the workplace. *Id.* at 5.

In its suit against Scott Medical Health Center, the EEOC alleged that a gay employee was constructively discharged due to a hostile work environment because of his sexual

orientation. Mem. Order, *EEOC v. Scott Med. Health Ctr.,* P.C., No. 2:16-cv-00225-CB (W.D. Pa. Nov. 4, 2016), ECF No. 48. The agency said that the employee's manager routinely referred to him using anti-gay slurs and made other offensive statements about the employee's sex life with his partner. *Id.* at 2. The employee reported his manager's conduct to defendant's president, who refused to take any steps to end the harassment. *Id.* at 3. The employee resigned as a result. *Id.* The EEOC set forth three lines of reasoning to show why Title VII covers sexual orientation discrimination: "(1) [The employee] was targeted because he is a male, for had he been female instead of a male, he would not have been subject to discrimination for his intimate relationships with men; (2) [The employee] was targeted and harassed because of his intimate association with someone of the same sex, which necessarily takes [the employee]'s sex into account; and (3) [The employee] was targeted because he did not conform to his harasser's concepts of what a man should be or do." *Id.* at 8. The court was persuaded and, on November 4, 2016, held that Title VII's "because of sex" provision encompasses sexual orientation discrimination, finding "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." *Id.* at 8, 10.

This decision is an important one for the LGBT community. While Title VII sex discrimination claims have been fairly successful for LGBT plaintiffs when the harassment alleged is based on the plaintiffs' noncompliance with gender stereotypes, courts have been reluctant to explicitly say that sexual orientation discrimination is prohibited under the law. With the filing of these lawsuits, the EEOC has demonstrated its commitment to fighting against sexual orientation discrimination in the workplace.

Employee privacy

Ban-the-box legislation

At least 24 states and over 150 cities and counties have passed so-called "ban-the-box" legislation, which generally prohibits public employers from requesting criminal history information on an initial employment application, with the specifics varying by jurisdiction. National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions* (October 2016), *available at* http://nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf. At least nine states have extended "ban-the-box" to private employers. *Id.* at 1.

On May 3, 2016, Vermont became one of the latest states to "ban-the-box" when Governor Peter Shumlin signed a bill into law that prohibits an employer from requesting "criminal history record information on its initial employee application form". Vt. Stat. Ann. tit. 21, § 495j (effective July 1, 2017); "Vermont 'Bans The Box' So Employers Cannot Ask Questions About Applicants' Prior Criminal Convictions," 40 No. 15 Construction Contracts Law Report NL 9 (July 15, 2016). An employer is required to wait to "inquire about a prospective employee's criminal history record during an interview or once the prospective employee has been deemed otherwise qualified for the position". tit. 21, § 495j.

The law does not apply, however, in the following two circumstances: "(A)(i) the prospective employee is applying for a position for which any Federal or State law or regulation creates a mandatory or presumptive disqualification based on a conviction for one or more types of criminal offenses; or (ii) the employer or an affiliate of the employer is subject to an obligation imposed by any Federal or State law or regulation not to employ an individual . . . who has been convicted of one or more types of criminal offenses; and (B) the questions on

the application form are limited to the types of criminal offenses creating the disqualification or obligation." *Id.*

Vermont's ban-the-box law goes into effect on July 1, 2017. *Id.* A civil penalty of up to $100 per violation may be imposed if an employer violates the law. *Id.* As the "ban-the-box" trend continues to spread, employers should monitor developments in this area of the law and consider removing questions about criminal history on job locations.

The Federal government has also joined the nationwide ban-the-box movement. On April 29, 2016, President Obama signed the "Presidential Memorandum—Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals." The Office of Personnel Management is currently working on rules to carry out the Presidential Memorandum. Betty J. Boyd, *Buster Got Busted, But Not on Employment Applications*, Bus. L. Today, August 2016.

New OSHA accident reporting rules

Many employers conduct drug and alcohol testing after an accident in the workplace, irrespective of whether there is any reason to believe that an employee's impairment was to blame. However, recent action by the Occupational Safety and Health Administration ("OSHA") now limits the circumstances under which an employer may require post-accident testing. OSHA's new accident reporting rules became effective on August 10, 2016. Employee Involvement, 29 CFR § 1904.35.

The text of the final rule provides: "You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." 29 CFR § 1904.35(b)(1)(i). One of the goals of the final rule is to promote accurate record keeping of work-related injuries and illnesses by preventing the under-recording that results when employees are deterred from reporting these incidents. Improve Tracking of Workplace Injuries and Illnesses, 81 FR 29624-01 (May 12, 2016).

Along with the publication of the rule, OSHA provided the following commentary: "Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting." *Id.* at 29672-73. To lessen that deterrent effect, OSHA instructs that employers' drug testing policies should limit post-accident testing to those circumstances in which it is likely that drug use "contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use". *Id.* at 29673. In other words, in order for an employer to have the right to mandate drug testing, there should be a reasonable possibility that an employee's drug use was a causal factor of the reported injury or illness. Therefore, blanket post-injury drug testing policies, which require testing regardless of the specific circumstances, are prohibited. OSHA's commentary provides specific examples of situations in which it would be unreasonable to drug-test: where an employee "reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction". *Id.*

OSHA clarifies in its comments that employers who are required to drug-test under State or Federal laws or regulations, such as the U.S. Department of Transportation regulations, can continue testing under the new OSHA rule because the motive for conducting testing in those circumstances is not retaliatory. *Id.* For all other employers, in light of OSHA's new rule, it is important to review existing workplace accident and illness policies and make any

necessary revisions as soon as possible to ensure compliance with the law. Employers face monetary penalties if found to have violated the rule: a maximum penalty of $12,471 for each violation and over $124,709 for wilful or repeat violations. United States Department of Labor, *OSHA Penalties Adjusted as of August 2016*, *available at:* https://www.osha.gov/penalties/.

Other recent developments in the field of employment and labour law

Updates to FLSA regulations

On May 18, 2016, President Obama and Thomas Perez, the Secretary of Labor, announced the publication of the Department of Labor's highly-anticipated final rule (the "Final Rule") updating the overtime regulations under the Fair Labor Standards Act (the "FLSA"). United States Department of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act*, *available at* https://www.dol.gov/WHD/overtime/final2016/. The Final Rule primarily updates the salary and compensation levels used to determine whether executive, administrative, and professional employees are exempt from the FLSA's overtime pay protections. *Id.*

Specifically, the Final Rule:

1. "Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week; $47,476 annually for a full-year worker);
2. sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and
3. establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption." *Id.*

In addition, "[T]he Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level." *Id.*

Within the first year of implementation, more than four million workers will become newly entitled to overtime protections. *Id.* The Final Rule takes effect on December 1, 2016. *Id.* On that day, the new standard salary level and HCE total compensation requirement will become effective. *Id.* There will be updates to these thresholds numbers every three years, beginning on January 1, 2020. *Id.*

In light of the upcoming changes to the FLSA's overtime rule, employers will have the following three options: they can raise employee salaries to the new threshold for exemption, pay any additional overtime necessary, or limit employees' work to 40 hours per week. United States Department of Labor, *Overtime for White Collar Workers: Overview and Summary of Final Rule*, *available at* https://www.dol.gov/sites/default/files/overtime-overview.pdf.

Employee misclassification as independent contractors

Over the last few years, employee misclassification lawsuits have been on the rise, with a number of high-profile cases grabbing headlines. In June 2016, FedEx Ground Package System Inc. agreed to pay drivers in 20 states $240m to settle a legal dispute over whether they should have been classified as employees rather than independent contractors. *In re*

FedEx Ground Package System Inc. Employment Practices Litigation, No. 05-cv-527 (N.D. Ind. June 16, 2016). In April 2016, Uber said it would pay up to $100m to settle a lawsuit brought by drivers in California and Massachusetts who claimed they were misclassified as independent contractors and wrongfully denied the payment of tips and reimbursement for expenses. *See* Uber lawsuit website, *available at* http://uberlawsuit.com/. The court declined to approve the settlement in August 2016, so the case is ongoing. *Id.* Lyft, a ride-sharing business, is defending a similar lawsuit in California brought by its drivers who say they have been misclassified as independent contractors. *Cotter et al. v. Lyft Inc.*, No. 13-cv-4065 (N.D. Cal.).

The effect on misclassified employees is profound as they lose workplace protections, such as, for example, the right to join a union and overtime pay. Various Federal labour and employment statutes have their own definitions of "employee". In order for a worker to be protected by the FLSA's minimum wage and overtime requirements, for example, the worker must be considered an "employee" under the DOL's "economic reality test". The following factors are used to determine whether a worker is an employee or an independent contractor under the FLSA: (1) the degree of control that the employer has over the working relationship; (2) the worker's opportunity for profit or loss affected by his managerial skill; (3) the worker's investment in facilities, equipment, and materials; (4) the degree of skill and initiative required for the job; (5) the permanency of the working relationship; and (6) the degree to which the worker's services are an integral part of the employer's business. U.S. Department of Labor, *Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, *available at* https://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

The common-law agency test is used to establish whether a worker is an "employee" or "independent contractor" under the NLRA. The factors courts look at include "the extent of control which, by the agreement, the master may exercise over the details of the work; the kind of occupation; whether the worker supplies the instrumentalities, tools, and the place of work; the method of payment, whether by the time or by the job; the length of time for which the person is employed; whether the work is a part of the regular business of the employer; and the intent of the parties." Robin Perry, *Proving the Existence of an Employment Relationship*, American Jurisprudence Proof of Facts 3d (November 2016 Update). Although the definitions are similar, employers must be careful to note the differences between the various statutes. A worker might be considered an employee for purposes of the FLSA, but an independent contractor under the NLRA.

Joint employment

The question of whether a joint employment relationship exists arises in various contexts. The simple employment relationship where an employee has one employer is becoming less common, as more companies are using different organisational and staffing structures to meet their workforce needs. Examples include using a staffing agency, temporary workers, or independent contractors. There are various tests for determining joint employer status under labour and employment laws. Most tests look at factors indicating the economic realities of the parties' relationship and/or the extent to which the secondary employer exercises control over the employee.

In a recent New York case, *Brankov v. Hazzard*, the First Department of the Appellate Division applied the "immediate control" test to determine whether there was a joint employer relationship. 142 A.D.3d 445 (1st Dep't 2016). The plaintiff was employed by Euro Lloyd, which provides travel agency services for various companies, including

formerly for WestLB. Plaintiff was assigned to work at WestLB and alleged that while there she was subjected to sexual harassment and retaliation in violation of New York State and New York City Human Rights Laws. Because the law only allows a plaintiff to bring such claims against an employer, the issue before the court was whether WestLB could properly be considered the plaintiff's joint employer.

Under the "immediate control" test, a joint employer relationship may exist where the defendant has immediate control over the other company's employees, particularly over the terms and conditions of employment. *Id.* at 446. The courts look at the following factors: hiring, firing, discipline, pay, insurance, records, and supervision. *Id.* The most important factor is the extent to which the employer controls the means and manner of the worker's performance. *Id.* In *Brankov*, the court held that WestLB was not the plaintiff's joint employer because Euro Lloyd "hired plaintiff, paid her salary and bonuses, controlled where she was assigned to work, and placed her at WestLB and later transferred her to other locations. A Euro Lloyd employee supervised plaintiff on a day-to-day basis. WestLB had no say in the end of plaintiff's employment with Euro Lloyd years after she had been transferred to another location." *Id.*

On January 20, 2016, the Wage and Hour Division of the U.S. Department of Labor ("DOL") released an Administrator's Interpretation ("AI") on joint employment under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). United States Department of Labor, *Administrator's Interpretation No. 2016-1* (January 20, 2016), *available at* https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf. In the context of the FLSA and MSPA, courts look at the economic realities of the working relationship. *Id.* at 5-6. In the AI, the DOL pointed to seven factors courts should look to in these contexts: (1) the extent to which the work performed by the employee is controlled or supervised by the potential joint employer; (2) the permanency and duration of the relationship; (3) whether the employee's work is integral to the business; (4) whether the work is performed on the potential joint employer's premises; (5) whether the potential joint employer performs administrative functions commonly performed by employers, such as handling payroll; (6) the repetitive and rote nature of the work; and (7) the controlling employment conditions, such as whether the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay. *Id.* at 11-12. The DOL acknowledged that there are other factors that courts may consider in determining whether the worker is economically dependent on the secondary employer, but stated that "[R]egardless, it is not a control test." *Id.* at 10-11.

Employers must be mindful that depending on the context, different joint employer tests are applied. Employers should examine their relationships with business partners and individuals working for them to determine whether they have found themselves in a joint employer relationship.

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Strategic partner