NEW U.S. DOL MEMO CONCLUDES MOST WORKERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS

Labor & Employment Alert
July 15, 2015

On July 15, 2015, David Weil, the administrator of the U.S. Department of Labor, Wage and Hour Division, issued a highly anticipated Administrator's Interpretation that provides insight into the DOL's current position on the question of whether a worker is an employee or independent contractor[1] under the Fair Labor Standards Act (FLSA). In its 15-page Interpretation, the DOL confirms that it utilizes a broad "economic realities" test to determine whether workers are employees for wage and hour purposes; the common law control test is not applied. In fact, the Interpretation repeatedly emphasizes that a putative employer's lack of "control" over a worker should not play an "oversized role" or be given "undue weight" in determining whether the worker is an employee or independent contractor. Instead, for wage and hour purposes, the focus should always be on whether the worker is economically dependent upon the putative employer or is in business for him or herself (i.e., economically independent from the putative employer). The Interpretation notes that a worker is an employee of an employer even if the employer does not exercise the requisite control over the worker, so long as the worker is economically dependent on the employer.

In making the economic dependence/independence determination, the Interpretation lists the following six factors, which it states must be considered in all cases, and provides guidance on how the DOL weighs each factor:

1. The extent to which the work performed is an integral part of the putative employer's business.

- The DOL notes that this factor is "compelling" since a worker who performs work that is integral to a putative employer's business is more likely to be economically dependent, whereas a bona fide independent contractor is unlikely to be integral to the putative employer's business.

2. The worker's opportunity for profit or loss, depending on his or her managerial skill.

- The DOL opines that the proper focus of this factor is whether the worker's managerial skill with respect to matters such hiring others, purchasing materials

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and equipment, advertising, renting space, and managing timetables can affect his or her profit and loss — not on the worker's ability to work more hours.

3. The extent of the relative investments of the employer and the worker.

- The DOL stresses that even seemingly significant investments by a worker may not pass muster under this factor. Instead, it is the relative investments that are key. According to the DOL, the worker's investment should not be "relatively minor" compared with the employer's investment in its "overall business" — not just the employer's investment in the particular job performed by the worker.

4. Whether the work performed requires special skill and initiative.

- The DOL states that analysis of this factor should be based on the worker's business skills, judgment, and initiative — not his or her technical or specialized skills. The DOL opines that the fact that a worker possesses technical or specialized skills is not indicative of independent contractor or employee status.

5. The permanency of the relationship.

- According to the DOL, even a working relationship that lasts weeks or months instead of years may be viewed as sufficiently permanent or indefinite to weigh in favor of an employment relationship. Also, a lack of permanence of indefiniteness does not automatically suggest an independent contractor relationship. Similarly, the DOL suggests that working for other employers and not relying on the employer as his or her primary source of income does not necessarily make a worker an independent contractor. Rather, the reason for the lack of permanence or indefiniteness must be considered. The DOL takes the position that the key is whether the lack of permanence or indefiniteness is due to "operational characteristics intrinsic to the industry" (e.g., employers who hire part-time workers or use third-party staffing agencies) or the worker's own business initiative.

6. The degree of control exercised or retained by the employer.

- The Interpretation states that a worker must control "meaningful aspects of the work performed" such that it is possible to view the worker as a person conducting his or her own business, and that such control must be more than theoretical — it must actually be exercised. The fact that a worker can control the hours during which he or she works and is subject to little direct supervision is not necessarily indicative of independent contractor status. Also, the Interpretation confirms that control a putative employer exercises over workers, whether such control is exercised due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied, still indicates that the worker is an employee. The economic reality inquiry is not concerned with why a putative employer exercises control. According to one case cited favorably in the Interpretation, "If the nature of a business requires a company to exert control over the workers…then the company must hire employees, not independent contractors."

The Interpretation notes that all other relevant factors must be considered, too, and that no one factor is determinative (especially the "control" factor). But it cautions that the economic realities test cannot be applied in a "mechanical" or "quantitative" fashion. Rather, the factors should be considered qualitatively, with an understanding that they are simply

indicators or guideposts for the broader concept of economic dependence: "Ultimately, the goal is not to simply tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor)." Moreover, the Interpretation confirms that an agreement between the putative employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status.

According to the Interpretation, proper application of the economic realities test, with an eye to the FLSA's expansive definition of "employ," will yield a finding that "most workers are employees under the FLSA."

In a recent interview, Administrator Weil stated that the Interpretation was part of a larger DOL initiative that has been in place for years to deal with the "growing problem" of misclassification. In his blog post that accompanied the release of the Interpretation, Administrator Weil reaffirmed that the DOL was continuing to attack the worker misclassification "problem head on through a combination of a robust education and outreach campaign, and nationwide, data-driven strategic enforcement across industries." The DOL would, according to Administrator Weil, "continue to work with the IRS and 22 states on this issue in a variety of ways – through, for example, information sharing and coordinated enforcement."

Recommendation

Businesses that classify workers as independent contractors or non-employees should review the Interpretation and carefully examine their non-employee classifications. While the Interpretation does not radically recast worker classification law under the FLSA, it does restate and refocus certain aspects of it in a manner that is more likely to yield a finding of employee status. Businesses should expect that the DOL will utilize the economic realities test, as articulated in the Interpretation, when examining whether workers are properly classified. The Interpretation also confirms that the DOL continues to receive "numerous complaints" from workers alleging misclassification and leaves little doubt as to its view on the merits of such claims by concluding that "most workers are employees under the FLSA." Businesses that proactively address worker classification issues can often achieve far better outcomes than those who find themselves defending individual or class claims or under audit.

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1 The Interpretation notes that most "misclassified employees" are labeled as "independent contractors," but notes that the DOL has seen an increase in the number of cases where employees are labeled as something else, such as "owners," partners," or "members of a limited liability company." According to the DOL, the same economic realities test is applied to determine whether such workers are – in fact – employees under the FLSA.