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DOL Guidance Suggests Many Independent Contractors are Misclassified and Should be Covered by The FLSA

July 20, 2015

On July 15, the Department of Labor's Wage Hour Division (WHD) issued guidance on how to identify employees who are misclassified as independent contractors. In a 15-page administrator's interpretation (AI), WHD head David Weil addressed what the Department of Labor (DOL) perceives as a "serious problem" regarding the misclassification of employees as independent contractors, and explained that most workers qualify as employees under the Fair Labor Standards Act (FLSA)'s broad definition of employment. The AI emphasized that the key inquiry in determining whether a worker is an employee or independent contractor under the FLSA is whether the worker is economically dependent on the employer or is in business for him or herself. If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor. The AI made clear that a multi-factor "economic realities" test should be used to guide

the classification assessment. These factors typically include:

- the extent to which the work performed is an integral part of the employer's business;
- the worker's opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skill and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer.

The guidance points out that all of the factors have equal weight and should not be "analyzed mechanically or in a vacuum." While the economic realities test is not new, the DOL's emphasis on all factors having equal weight can be deemed a definitive shift in the way it applies the test. Although the DOL's AI was not published following a formal rulemaking process and is technically nonbinding, a recent Supreme Court decision suggests that courts can give it deference. In *Perez v. Mortgage Bankers Association*, the Supreme Court held that agencies do not need notice-and-comment rulemaking to change interpretive regulations. This broad ruling exempts agency interpretations of laws and regulations from any notice and comment requirements of the Administrative Procedures Act, allowing agencies to substantially alter interpretations without notice. Simply put, the DOL's guidance signifies that misclassification is an enforcement priority for the agency, with the agency being of the view that far too many workers are currently being misclassified. Employers should reevaluate their compliance with the independent contractor classification.

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