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The U.S. DOL Warns Employers That Most Workers are Employees – Not Independent Contractors

Legal Update

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The United States Department of Labor (DOL) issued an Administrator's Interpretation on July 15, 2015, warning employers against misclassifying workers as independent contractors rather than employees under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act. (Practically speaking, if a worker is an employee under one law, he or she must be treated as an employee for all purposes). The DOL explains that when employers improperly classify workers as independent contractors as opposed to employees, the worker does not receive important workplace protections such as minimum wage, overtime compensation, unemployment insurance, and workers' compensation. The DOL also notes that misclassification results in lower tax revenues for the government and an uneven playing field for employers who properly classify their workers as employees.

The DOL instructs businesses to apply the "economic realities" test to determine if a worker is an employee or independent contractor, warning that "most workers are employees" and that the factors under the economic realities test must be applied in the context of the FLSA's "very broad" definition of "employ" – "to suffer or permit to work." While no one factor is controlling, the factors under the economic realities test are:

1. Is the work an integral part of the employer's business? If yes, employee status is indicated.
2. Does the worker's managerial skill affect the worker's opportunity for profit or loss? If no, employee status is indicated.
3. How does the worker's relative investment in his or her business compare to the employer's investment? If the worker's investment is minimal as compared to the employer's investment, employee status is indicated.
4. Does the work performed require special skill and initiative? If no, employee status is indicated.

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5. Is the relationship between the worker and the employer permanent or indefinite? If yes, employee status is indicated.
6. What is the nature and degree of the employer's control over the worker? If control is asserted by the employer, employee status is indicated.

The DOL states that these factors should be used as guides to answer the ultimate question of whether the worker has economic dependence on the employer (and thus is an employee) or is really in business for him or herself (and thus may be an independent contractor). The DOL provides examples of workers who do and do not qualify for independent contractor classification and provides the following cautionary notes:

- The label given to a worker and/or the agreement of the parties is not determinative. A worker cannot waive employee status.
- A worker's receipt of a Form 1099-MISC is not controlling.
- Work can be integral to a business even if it is just one component of the business, it is interchangeable with many other workers, and/or it is performed away from the employer's business such as at the worker's home or a customer site.
- A worker's opportunity for profit or loss does not refer to hours worked or wages earned, but rather the worker's independent decisions about running his or her business that can result in profit or loss (e.g., hiring others, advertising, purchasing equipment, renting space).
- The worker's investment in his or her business must be significant in nature and meaningful relative to the employer's investment in its overall business. A worker buying some required equipment, tools or clothing alone usually is not considered a significant investment.
- The fact that a worker is skilled in some regard is not indicative of independent contractor status. For independent contractor status, the relevant skills are with regard to running a business such as business skills, judgment and initiative.
- A worker may be an employee even if the relationship is intended to last just weeks or months. Temporary and seasonal workers may be employees.
- An independent contractor typically markets his/her business widely and provides services to multiple entities.
- Working from home, under little supervision, or with discretion to set hours does not make a worker an independent contractor.
- Control that is exercised due to outside influences (e.g., quality control, regulatory requirements, customer satisfaction) is still control and indicates employee status.

Employers are urged to use caution when classifying workers and to view independent contractor status as a narrow exception to employee classification. According to the DOL, it is working with the IRS and many states, including Minnesota, Wisconsin and Iowa, to combat employee misclassification in a variety of

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ways, including information sharing and coordinated enforcement efforts with other government agencies. The DOL reports that its efforts to date have been successful in securing hundreds of millions of dollars for workers.

For assistance with employee or independent contractor classification matters, please contact an attorney in Fredrikson & Byron's Employment & Labor Law Group.