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U.S. Department of Labor States Its Interpretation of "Employee" vs. "Independent Contractor"

On July 15, 2015, Dr. David Weil, Administrator of the Wage and Hour Division of the U.S. Department of Labor, issued a memorandum that identified the Department's interpretation of federal law concerning whether a worker should be classified as an "employee" or an "independent contractor". The Department clearly set forth its interpretation that *most* workers qualify as "employees" under the broad definitions of the Fair Labor Standards Act ("FLSA").

The Department of Labor Stakes its Claim that Most Workers are Employees

The Department of Labor's analysis of the FLSA concludes that the test for whether a worker is an "employee" or an "independent contractor" depends upon whether the worker is "economically dependent" on the business. The FLSA defines employment as "to suffer or permit to work". 29 U.S.C § 203(g). The Department concludes that "the application of the economic realities factors must be consistent with the broad 'suffer or permit to work' standard of the FLSA."

The Department advises that, in determining whether a worker is an employee or independent contractor, all of the factors of the economic realities test must be weighed, and no one factor given more weight than another, including the "control" factor that many courts previously principally relied upon. In considering the factors, the Department maintains that the goal is 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)."

The factors to be considered 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 upon his or her managerial skill (not technical skill at performing the job functions);
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency or indefiniteness of the relationship; and
- The degree of control exercised or retained by the employer.

The memorandum explains each of these factors and provides examples of how, in the Department's view, they should be analyzed.

The Department also specifically states that the economic dependence test is determinative, not whether the company and worker have entered into an agreement by which the worker agrees that he or she is an independent contractor or whether the worker has accepted and filed an IRS Form 1099 to record the pay received.

Through this Administrator's Interpretation, the U.S. Department of Labor has announced that it will continue to aggressively review worker classifications and share the results of its findings with the Internal Revenue Service and the numerous state law enforcement and regulatory agencies with which the Department has entered into information sharing agreements.

In light of the foregoing, businesses must continue to be mindful of how they classify their workers to remain in compliance with the law and to stave off potential investigations, audits, and civil litigation.

The Department of Labor's Administrator's Interpretation No. 2015-1 may be accessed via: http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

CONTACT

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