Labor and Employment Alert: DOL Declares That Most Workers are Employees, Not Independent Contractors

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Update: DOL Withdraws Guidance

Since this *Labor and Employment Alert* was published there has been a development. On June 7, 2017, DOL announced that it will withdraw "recent guidance on independent contractors and joint employers." To learn more read this Labor and Employment Alert.

Original Alert:

Today, the U.S. Department of Labor (DOL) issued an Administrator's Interpretation discussing the misclassification of employees as independent contractors. In this guidance, the DOL takes the position that "most workers are employees under the FLSA's broad definitions." "The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the [FLSA's] intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor."

Courts typically apply a multi-factor test in analyzing whether a worker has been misclassified: (1) the extent to which the work performed is integral to the employer's business; (2) the worker's opportunity for profit or loss depending on the worker's managerial skill; (3) the relative investments of the worker and employer; (4) whether the work requires special skills; (5) the permanency of the relationship between the worker and the employer; and (6) the degree of control the employer exercises over the worker. The DOL's guidance states that none of these factors alone is determinative, but rather, "[t]he application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers." The "ultimate inquiry" in evaluating these factors, according to the DOL, is "whether the worker is economically dependent on the employer [and, hence, an employee] or truly in business for him or herself [and, hence, an independent contractor]."

The DOL states that misclassification of employees as independent contractors is “increasing” and that it has received “numerous complaints” from workers alleging misclassification. As such, this guidance is part of a years-long enforcement effort by the DOL to prevent, detect, and remedy misclassification through its Misclassification Initiative. Through that initiative, the DOL and 22 states (Alabama, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Rhode Island, Texas, Utah, Washington, and Wisconsin) agreed to share information and coordinate enforcement efforts to curb misclassification.

While the Administrator’s Interpretation does not have the force of law, it sets forth the DOL’s general interpretation of the law and the agency’s enforcement position. This means employers can expect to see the DOL use its expansive view of misclassification in aggressively enforcing the FLSA. Contact your Vorys lawyer for questions about the proper classification of your workers.