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The Department of Labor Says Most Workers Are Employees, Not Independent Contractors

The U.S. Department of Labor (“DOL”) has issued an Administrator’s Interpretation letter on the topic of misclassification of employees as independent contractors. Their conclusion is that “most workers are employees under the FLSA’s broad definitions.” The DOL sets out several factors that it will examine when determining whether a worker is an employee or an independent contractor. Although the DOL has often placed a great deal of importance on the degree of control and direction that an employer has over the means and methods by which work is done, the new guidance states that the control factor “should not be given undue weight.” Rather, the focus is on whether, as a matter of economic reality, the worker is dependent on the employer or not.

To determine whether or not a worker is economically dependent on an employer the following questions will be examined:

- A. Is the work performed an integral part of the employer’s business?
- B. Does the worker’s managerial skill affect the worker’s opportunity for profit or loss, including making decisions about hiring helpers, advertising, recruiting clients, etc.?
- C. How does the workers’ relative investment compare to the employer’s investment; that is, is the investment significant in nature and magnitude relative to an employer’s investment in its overall business?
- D. Does the work performed require special business skills, judgment and initiative?
- E. Is the relationship between the worker and the employer permanent or indefinite; that is, is the worker engaged on a single project for an employer, continuously, or repeatedly?



F. What is the nature and degree of the employer's control?

The DOL's ultimate goal is to determine whether "it is economically realistic to view the relationship as one of employment or not."

This guidance points toward a much more active compliance enforcement. It also suggests that any particular investigation or audit by the DOL regarding any possible misclassification likely will result in finding that the worker at issue is an employee and not an independent contractor. Any employer using independent contractors needs to reexamine and reassess the way these workers are classified.

Questions or Assistance:

If you have questions regarding either of these changes, please contact Gary Starr at gstarr@goodwin.com or (860) 251-5501 or Henry Zaccardi at (860) 251-5737 or hzaccardi@goodwin.com.

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