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Independent Contractor or Employee? The DOL Weights In.

Legal Alert

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The U.S. Department of Labor is offering its two cents on the big dollar distinction between employees and independent contractors, and it is saying, "most workers are employees under the FLSA's broad definitions." This new advice is consistent with DOL's continuing campaign to "crack down" on what it deems misclassification of employees as independent contractors and is important because determining whether an individual is an independent contractor or an employee is one of the most vexing issues employers face, in large part because getting wrong can be so costly.

The DOL's position is set forth in Administrator's Interpretation No. 2015-1, released on July 15, 2015, and issued by David Weil, Administrator of the Department of Labor's Wage and Hour Division (WHD). The snappy title of the Interpretation is "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." While the Interpretation does not overtly change DOL policy and is not per se binding on employers or the courts, employers should evaluate their classifications based on this guidance and see how they measure up.

Although this Interpretation is not controlling on the courts, our Supreme Court has recognized that Administrator's Interpretations reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance. Employers also should keep in mind that, while the Interpretation is limited to the independent contractor classification under the FLSA, other federal and state statutes and regulations also govern the classification of employees in relation to taxes, workers compensation coverage, unemployment insurance, and other issues. Employers obviously need to consider all applicable laws, regulations and guidance when determining whether to classify a worker as an independent contractor, but, in light of this Interpretation should:

- Evaluate job descriptions and duties to determine whether they are likely to be deemed "integral to the business";
- Analyze whether the work independent contractors are performing goes beyond the scope of their stated duties and could be considered integral; and
- Assess whether workers currently treated as employees may be considered independent contractors due to the non-integral nature of their work. For more information on the proposed changes to overtime rules, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to Adam Gersh's blog, or follow him on Twitter @AdamGersh.

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