Use Independent Contractors? DOL Says Almost Everyone Is An Employee Under the FLSA

Labor & Employment Law Update

on July 20, 2015

On July 15, 2015, the U.S. Department of Labor (DOL) issued an Administrator's Interpretation addressing the distinction between employees and independent contractors in the Fair Labor Standards Act (FLSA).

The DOL has aggressively pursued potential misclassifications of employees as independent contractors in recent years. Indicative of that aggressive approach, the interpretation states that most workers are employees under the FLSA. While that statement is walked-back somewhat in other parts of the interpretation, businesses that rely heavily on independent contractors should take this message to heart and reassess whether their independent contractor relationships will truly survive scrutiny by the DOL and other government agencies. The consequences of independent contractor misclassification may be severe and include liability for unpaid taxes, wages, and other damages and costs.

Much of the interpretation covers old ground, but nevertheless there are several interesting insights. Among them is the interpretation's discussion on workers who are able to choose how many hours they work in a day or week, or when and where they perform their work. In short, the interpretation states that such freedom should not weigh heavily in favor of an independent contractor relationship if the workers are not exercising managerial skills in a way that affects the workers' opportunities to realize profits or losses. However, if a worker negotiates the rate at which customers paid for the worker's services, then that would indicate independent contractor status.

The interpretation reiterates that an independent contractor relationship cannot be established by a contract between a business and worker declaring the worker an independent contractor. Instead, the DOL uses a six-factor "economic realities" test in conjunction with the FLSA's "suffer or permit" standard (which is intended to make the FLSA's coverage as broad as possible) to analyze whether a worker is an employee or independent contractor. The interpretation phrases those six factors as:

(A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.

In the end, the question of whether a worker is an employee or independent contractor will generally boil down to whether a worker is truly "in business for him or herself"—and therefore an independent contractor—or whether the worker is "economically dependent on the employer" and an employee. That said, if your business treats workers who are economically dependent on your business as independent contractors, we strongly recommend seeing advice of counsel to determine if changes can be made to ensure a strong defense against litigation or other enforcement actions by the DOL or the independent contractors themselves.