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Employee Or Independent Contractor? US Department Of Labor Provides New Guidance

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"[M]ost workers are employees under the [Fair Labor Standards Act's] broad definitions."

The debate over classification of workers as employees versus independent contractors has yet another chapter. Last month, it was the ***California Labor Commissioner*** who sent ripples across the rideshare industry by telling Uber Technologies, Inc. that its drivers are employees, not independent contractors. This month, the United States Department of Labor decided it was time to throw its hat in the ring and weigh in on the matter by way of a fifteen page Administrator's Interpretation issued by Dr. David Weil.

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The ***Fair Labor Standards Act*** ("FLSA") defines employees, rather unhelpfully, as "any individual[s] employed by an employer." The FLSA's definition of "employer" is similarly unilluminating: "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." To "employ" under the FLSA is "to suffer or permit to work."

If you're confused as to whether a worker is an employee or independent contractor based on these definitions, you're not alone.

The Department of Labor's new interpretation explains that an "economic realities" test should be utilized to determine worker classification. Under this test, the key inquiry is whether a worker is economically dependent on the employer, thereby making the worker an employee, versus whether the worker is truly in business for him or herself and thus, an independent contractor. Determining the economic independence of a worker should occur on a case-by-case basis, using a multi-factor test that has been developed by a series of federal court decisions. Factors that should be customarily examined include:

(i) the extent to which the work performed is an integral part of the employer's business;

(ii) the worker's opportunity for profit or loss depending on his or her managerial skill;

(iii) the extent of the relative investments of the employer and the worker;

(iv) whether the work performed requires special skills and initiative;

(v) the permanency of the relationship; and

(vi) the degree of control exercised or retained by the employer.

No one factor is determinative and "each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself... or is economically dependent on the employer." The interpretation emphasizes the FLSA definitions were deliberately designed to provide a broad scope of statutory coverage and the "Act's intended expansive coverage for workers must be considered when applying the economic realities factors." The interpretation also explains "the economic realities of the relationship and not the label an employer give it are determinative. Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor... is not relevant to the analysis of the worker's

status."

The correct classification of workers matters both for workers and employers alike. A worker's classification affects entitlement to legal protections such as overtime pay and minimum wage, amongst other protections under the Act. This DOL interpretation comes only two weeks after the DOL unveiled its proposed rule that is anticipated to result in approximately 5 million currently exempt workers shifting classification to non-exempt workers, thereby becoming entitled to minimum wage and overtime protection under the FLSA.

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