DOL Cracks Down On Definition Of Independent Contractors

July 15, 2015 | | Fair Labor Standards Act,Labor And Employment

Hannesson Murphy
Partner

According to the Department of Labor (DOL), most workers are "employees," not independent contractors. After years of watching more contract workers fall outside the categories of "employees," this morning, the DOL issued an Administrator's Interpretation regarding the alleged "misclassification" of workers as independent contractors, and broadly includes most workers as employees. The DOL's guidance responds to the skyrocketing usage of contract labor in the wake of increased government regulation, including the Affordable Care Act. Bucking this trend, agencies like the DOL have increased regulatory action to clampdown on worker misclassification. Today's Interpretation continues the trend.

The DOL Administrator outlines the current law regarding classification, and articulates – in no uncertain terms – the department's position that "most workers are employees under the FLSA's broad definitions." The DOL relies on the FLSA's broad definition of the term "employ" as being "to suffer or permit to work" and fully embraces the "economic realities test," which has regularly been adopted by courts as the most applicable to determining whether an individual is a contractor. The economic realities test applies a multi-factor approach, including: (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. Many courts and other federal agencies have used similar tests. For example, the IRS applies three broad categories:

- Behavioral: Does the company control or have the right to control how the worker does his job?
- Financial: Are the business aspects of the worker's job controlled by the company (i.e. how the worker is paid, whether expenses are reimbursed, who provides tools / supplies, etc.)?
- Type of Relationship: Are there written contracts or employee type benefits (*i.e.* pension plan, insurance, vacation pay, etc.); will the relationship continue; and is the work performed a key aspect of the business?

Although no one factor ever has been determinative in assessing whether a worker is a contractor – the right to control how the work is performed

RELATED PRACTICE AREAS

Labor and Employment
Wage and Hour

RELATED TOPICS

Department of Labor (DOL)
Independent Contractor

historically has been regarded as the most important. And, notably, today's Interpretation pointedly downplays the significance of the employer's ability to control the performance of the work. It is difficult to predict whether the Administrator's comments indicate an overall erosion of the "control" factor, or whether the DOL merely intends to promote other factors.

Regardless, employers who rely on contract labor should review this latest Interpretation and make sure they understand the Administrator's economic realities approach. Of course, this latest development is consistent with the current trend to improve the wages and benefits of more workers. For employers that rely on independent contractors, misclassifying workers creates multiple liabilities, and thus, it is important to evaluate this issue with their human resource staff and legal counsel at the beginning of the employment relationship.

Analyzing the issue down the road is too late, and getting the question wrong could spell trouble, not only from a liability standpoint with respect to the misclassified employee, but also from government agencies like the DOL.