You May Have More Employees Than You Think (Part II)

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Following on last week's post about a Sixth Circuit case counting certain volunteers as employees for purposes of determining whether an employer has the requisite number of employees to be covered by the FMLA, recent guidance from the EEOC cautions employers that individuals designated as "partners" or other owner-type positions may in fact be employees for purposes of determining eligibility under the Age Discrimination in Employment Act (ADEA). These two involve different laws and different groups of potential employees, but share the important takeaway for employers – who are your employees under various employment statutes may include a variety of individuals you do not designate as such.

Here, the EEOC issued an "informal discussion letter" responding to an inquiry from one or more accounting firms about the status of firm partners. The inquiry was made because of rumors that the EEOC is considering litigation against accounting firms, an important aspect of which would be asserting that many accounting firm "partners" are in fact employees. The EEOC understandably did not comment on ongoing investigations or planned litigation, but did issue the following guidance:

> There is no legal presumption that an individual who holds the title of "partner" is never an employee. This determination depends on the actual working relationship between the individual and the partnership. The relevant question is whether the individual acts independently and participates in managing the organization (not an employee), or whether the individual is subject to the organization's control (an employee). The EEOC has identified six non-exhaustive factors relevant to making this determination:
>
> - Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
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> - Whether and, if so, to what extent the organization supervises the individual's work;
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> - Whether the individual reports to someone higher in the organization;
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> - Whether and, if so, to what extent the individual is able to influence the organization;
>
> - Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
>
> - Whether the individual shares in the profits, losses, and liabilities of the organization.

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The substance of this guidance is not surprising and is consistent with judicial guidance on the subject, but the fact that the EEOC has issued the letter should serve as a caution to professional service firms and other employers not counting certain individuals as employees because they are partners or have some other owner-type status to review these situations with counsel. Of course, all employers should review the proper status of individuals performing work but not classified as employees, whether volunteers, partners, independent contractors, or otherwise, to assess the correctness of current classifications.