JULY 17, 2015

DOL SAYS "MOST WORKERS ARE EMPLOYEES," NOT INDEPENDENT CONTRACTORS

On July 15, 2015, the U. S. Department of Labor ("DOL") issued a Wage and Hour Division Administrator's Interpretation that reasserts the broad definition of employee such that employers will rarely find that the individuals who work for them can be classified as independent contractors. This interpretation, although not having the effect of law, does indicate the DOL's enforcement position in addressing the misclassification of workers. The interpretation only directly affects employee status under the Fair Labor Standards Act of 1938 ("FLSA"). In other words, employees who are not exempt under the FLSA are entitled to minimum wage and overtime pay. This interpretation coupled with DOL's recently proposed doubling of the salary threshold for exempt status indicates that many more individuals will be considered to be employees eligible for minimum wage and overtime protection. The interpretation does not have a direct impact on employee status under other federal employment laws or for income tax purposes. Those laws were not drafted with the same broad definition of employ as found in the FLSA. See our previous discussions of those laws here and here.

DO YOU SUFFER OR PERMIT EMPLOYEES TO WORK?

Very early in the 20th century, before the passage of the FLSA in 1938, the abuses of child labor were a national scandal. Employers were using third parties to provide the child labor and argued that these children were not their employees. State and federal laws were enacted to protect children and were drafted so broadly that any one "suffering or permitting" work of an individual was deemed an employer. This definition was much broader than the generally applied common law control test and was intentionally carried over to the FLSA by congress as a way to protect the most workers.

WHAT ARE THE ECONOMIC REALITIES?

Courts use the economic realities test to determine whether the worker is either *economically dependent on the employer* or *in business for him or herself*. According to the DOL, under this broad definition of employ, "*most workers are employees under the FLSA*."While most misclassified employees are labeled independent contractors, the DOL reports an increasing number of instances where employees are labeled something else, such as "owners," "partners" or "members of a limited liability company." In these instances, the determination of whether the workers are in fact FLSA-covered employees is also made by applying an economic realities analysis.The courts look at six factors in determining whether a worker is an employee or an independent contractor. None of the factors is controlling and all are weighed together:

1. The extent to which the work performed is an **integral part** of the employer's business;
2. The worker's **opportunity for profit or loss** depending on his or her **managerial skill**;
3. The extent of the **relative investments** of the employer and the worker;
4. Whether the work performed requires **special skills and initiative**;
5. The **permanency** of the relationship; and
6. The **degree of control** exercised or retained by the employer.

Using these factors, if the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself, economically independent from the employer, then the worker is an independent contractor. Labels and contractual language are not determinative of a worker's status. Significantly, even if a worker is determined to be an employee, the law does not allow the worker to waive employee status.The DOL goes into detail about each of the factors, providing past judicial holdings to support its interpretation and offering some examples to help in the practical application of the definition in several instances. Here is a summary of the key takeaways:

- *Integral part of employer's business*

If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer. Work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home

or on the premises of the employer's customers.

- *Opportunity for profit or loss dependent on managerial skill*

In considering whether a worker has an opportunity for profit or loss, the focus is whether the worker's managerial skill can affect his or her profit and loss. Simply working more or fewer hours to increase or decrease personal income is not the same as using managerial skill that affects profit and loss risk.

- *Worker's relative investment*

The worker should make some investment and therefore undertake at least some risk for a loss in order for there to be an indication that he or she is an independent business. For example, a worker who simply provides his or her preferred cleaning supplies will not be an independent contractor when the cleaning company provides insurance, transportation and equipment and gives the worker a Form 1099-MISC. The worker's investment in cleaning supplies does little to further a business beyond that particular job.

- *Special skill and initiative*

A worker's business skills, judgment and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. For example, just being a highly skilled carpenter working for the same company will not make the worker an independent contractor. However, that same skilled carpenter could be an independent contractor if he or she provides a specialized service for a variety of area construction companies, such as fabricating custom cabinets may be demonstrating the skill and initiative if the carpenter markets the services, determines when to order materials and the quantity of materials to order and determines which orders to fill.

- *Permanent or indefinite relationship*

Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. Most workers are engaged on a permanent or indefinite basis as in the indefinite employment-at-will relationship. The key is whether the lack of permanence or indefiniteness is due to operational characteristics of the industry or the worker's own business initiative. For example, agency nurses are part of a transient workforce that that reflects the nature of their profession and not their success in marketing their skills independently.

- *Employer control*

The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. For example, a nurse registry trains its nurses and sends a weekly listing of potential clients. The nurse is required to adhere to a certain wage range, inform the registry before contacting any client and to inform if the nurse is hired by the client. The nurse is not allowed to provide care during any weekend hours and is required to contact the registry if a scheduled shift will be missed. This nurse would be an employee because the registry exercises significant control. On the other hand, where a nurse is free to call on as many or as few clients as the nurse desires and negotiates the nurse's own wage rates with the client, this would indicate an independent contractor relationship because of the lack of significant control by the registry.

HEADS-UP FOR EMPLOYERS – MISCLASSIFICATION IS THE TARGET

The Wage and Hour Division is working with the IRS and 23 states to combat employee misclassification and to ensure that workers get the wages, benefits and protections to which they are entitled. In some cases, the DOL is cooperating with the Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs and the Office of the Solicitor.The DOL's focus on misclassification of workers is sure to lead to more enforcement actions. Employers should carefully review all independent contractor arrangements to ensure compliance in light of this new and very broad interpretation.Reference: Administrator's Interpretation No. 2015-1, July 15, 2015.If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.