U.S. Department of Labor Issues Administrator's Interpretation on Independent Contractors

Written by Jonathan A. Keselenko

July 16, 2015

As promised earlier this summer, on July 15, 2015, the U.S. Department of Labor's Wage and Hour Division (WHD) issued an "Administrator's Interpretation" (AI) regarding when individuals are misclassified as independent contractors under the Fair Labor Standards Act (FLSA). The AI sends a signal to employers that the WHD has set a demanding standard for establishing when an individual is properly classified as an independent contractor and indicates that the agency views the issue as an enforcement priority. The AI states that, in the view of the WHD, "most workers are employees under the FLSA's broad definitions."

As background, unlike the regulations, AIs are not subject to the rulemaking process such as that which is now underway for the proposed amendments to the white collar overtime rules (**click here** for our previous alert). Rather, the AI provides the WHD's view of the law, and that view is very unfriendly to those attempting to classify workers as independent contractors. In media interviews this week, the WHD's Administrator David Weil stated that the AI was designed to give employer's "fair notice" that they will run into the agency's crosshairs if they misclassify individuals.

According to the AI, in order to determine whether an individual is an employee or independent contractor, the "economic realities" need to be examined to determine the true relationship. This test is to determine "whether an individual is economically dependent on the [putative] employer (and thus an employee) or is really in business for him or herself (and thus is an independent contractor)."

The AI uses a six-factor test commonly used by courts in determining status under the FLSA. The factors are (1) whether the work performed is integral to the employer's business; (2) whether the worker has an opportunity for profit and loss based on his/her skills; (3) the relative investments of the employer and the worker; (4) whether the work requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. The AI emphasizes that no one factor is determinative.

While the factors discussed above are not new, the WHD's application of them is more expansive than ever articulated by the federal government. In weighing the factors in the AI, the WHD clearly puts its thumb on the scale in favor of employee status. For example, in discussing the "control" factor – which many have viewed as the most indicative factor in determining status – the AI emphasizes that "it should not play an oversized role in the analysis" and states that an employer's "lack of control over workers is not particularly telling if the workers work from home or offsite." It also states that "workers' control over the hours when they work is not indicative of independent contractor status."

Importantly, the AI states it will give no weight to the parties' understanding or agreement concerning the relationship. The AI states that "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."

Notably, the FLSA is only one of many laws governing worker classification. Many states, including Massachusetts, have set a high bar for establishing that an individual is an independent contractor. Given these trends, we expect to see litigation and enforcement action to increase.

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