Patterson Belknap Webb & Tyler LLP

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With the Flick of a Pen, U.S. Department of Labor Announces that Most Workers Are Employees

On July 15, 2015, the Wage and Hour Division of the United States Department of Labor ("DOL") issued guidance on employee and independent contractor classification under the Fair Labor Standards Act ("FLSA"). Stating that the key consideration in classification decisions is whether the worker is economically dependent on a business, the DOL emphasized its view that most workers are employees under the FLSA. Although it remains to be seen how far courts will go in accepting the DOL's interpretation, employers should be aware that the DOL will apply a very broad definition of "employee" when investigating a company's practices.

The guidance opens by noting that worker misclassification is a growing issue and an area of significant concern to the DOL. Independent contractors, unlike employees, are not protected by a number of employment laws, including guarantees of minimum wage, overtime compensation, unemployment insurance, and workers' compensation, nor are they eligible to receive a variety of other employee benefits such as medical insurance and retirement plan participation.

Under the FLSA, the definition of "employ" is to "suffer or permit to work." The DOL states that this "very broad definition of employment" covers both work that the employer directs and work that it permits to take place. In applying the "suffer or permit" standard to determine whether a worker is an employee or an independent contractor, federal courts generally use some version of an "economic realities" test. The underlying purpose of this test is to determine whether a worker is economically dependent on an employer or is legitimately in business for herself. The guidance details the factors the DOL believes should be considered in making this determination.

Those factors are:

- **Is the work an integral part of the employer's business?** (The more integral the work is, the more likely the worker is an employee.)
- **Does the worker's managerial skill affect the worker's opportunity for profit or loss?** (If it does not, the worker is more likely to be an employee.)
- **How does the worker's relative investment compare to the employer's investment?** (A lower investment by the worker makes it more likely that the worker is an employee.)
- **Does the work performed require special skill and initiative?** (If not, the worker is more likely to be an employee.)
- **Is the relationship between the worker and the employer permanent or indefinite?** (A permanent or indefinite relationship suggests an employment relationship.)
- **What is the nature and degree of the employer's control?** (The more control exercised by the employer, the more likely the worker is to be an employee.)

The guidance emphasizes that while the level of control over a worker is relevant, it should not be treated as more important than the other factors; instead, the goal is to consider all of the factors together to determine whether the worker economically relies on the business. The DOL notes that "each factor should be considered in light of

the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee)." Employers should also keep in mind that courts routinely consider other factors based on the circumstances of the specific working relationship (*e.g.*, did the contractor have his or her own desk in the employer's office, or did he or she have an employer-provided e-mail account or business cards) and will likely continue to do so following this guidance.

The guidance includes hypotheticals in an effort to help employers apply each factor. For example, regarding the first factor ("Is the work an integral part of the employer's business?"), the guidance notes that for a construction company that frames residential homes, carpenters are integral to the employer's business because carpentry is an integral part of providing the service of framing homes. A carpenter at such a company is likely an employee. Alternatively, a construction company that frames homes may engage a software developer to create software that helps the company track its bids, schedule projects and crews, and track material orders. Since these services are not an integral part of the company's business, the software company and its workers are likely independent contractors with respect to the construction company.

It is important to note that the factors described in the guidance do not reflect a change in the law or in the DOL's view of worker classification. Prior DOL guidance and court decisions have long applied these and similar factors. But in its guidance, the DOL goes out of its way to stress its view that most workers should be treated as employees and indicates that this will be an area of focus for the agency going forward.

As a result, employers should take this opportunity to ensure that workers are properly classified. As a starting point, employers should review long-standing relationships with independent contractors, as the duration of the relationship itself can suggest employment. Similarly, independent contractor relationships with individuals (as opposed to companies) should be reviewed, as they are particularly likely to be situations in which misclassification has occurred.

New York employers should also continue to consider guidance from the New York State Department of Labor. The State DOL agrees that multiple factors should be applied to determine a worker's proper classification. But the factors it considers are different, and focus on how much supervision, direction, and control an employer has over a worker. They also include the manner of compensation (employees are typically paid a salary or by the hour; independent contractors are typically paid by the job). And the State DOL highlights the importance of independent contractors actually offering their services to the public. For this reason, it is important to ask those you are planning to hire as contractors whether they have an independent business and have other customers; if they do not, as a matter of economic reality, they likely depend on your business and should be classified as employees. New York employers should apply both the federal and state tests when making classification determinations; if the worker would be classified as an employee under either test, you should treat him or her as an employee.

Lisa E. Cleary	**212-336-2159**	**lecleary@pbwt.com**
Catherine A. Williams	**212-336-2207**	**cawilliams@pbwt.com**
Helen P. O'Reilly	**212-336-2739**	**horeilly@pbwt.com**
Adam E. Pinto	**212-336-2156**	**apinto@pbwt.com**
Sam A. Yospe	**212-336-2471**	**syospe@pbwt.com**