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Client Alert

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Department of Labor Promises Harsher Enforcement Regarding Independent Contractors

In a recent press release regarding two California cases involving the misclassification of drivers, United States Department of Labor (DOL) Wage and Hour Division Administrator Dr. David Weil stressed that his agency is taking seriously the issue of employers misclassifying workers to gain a competitive advantage:

> "We are attacking this problem head on through education and outreach as evidenced by our recent guidance to the employer community," Weil said. "But make no mistake. We are also engaged in a nationwide, data-driven strategic enforcement initiative across all industries to ensure that workers are correctly classified and properly paid, and that those employers who are playing by the rules aren't operating at a competitive disadvantage to those who aren't."

The press release follows Administrator Weil's July 2015 Administrator's Interpretation regarding the classification of workers as independent contractors versus employees under the Fair Labor Standards Act (FLSA). Focusing on the breadth of the FLSA's definition of the term "employ," Administrator Weil emphasized in that Interpretation that "most workers" are employees under this definition, not independent contractors.

The FLSA broadly defines "employ" as "to suffer or permit work." As described by Administrator Weil in his recent Administrator's Interpretation, this standard was specifically designed to ensure expansive coverage of workers and "clearly covers more workers as employees." Accordingly, he asserts, the breadth of "suffer or permit to work" standard should guide the analysis of whether a worker is classified as an employee or independent contractor.

To determine whether a worker should be classified as an employee or independent contractor under the FLSA, the Supreme Court and Circuit Courts of Appeals have developed a multi-factor test referred to as the "economic realities" test. The key inquiry under this test is whether, as a matter of economic reality, the worker is economically dependent on the employer, making the worker an employee, or in business for him or herself, making the worker an independent contractor. The factors typically analyzed under the "economic realities" test include:

(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.

Employment Law

Osborn Maledon's Employment Law team is here to help. For more information, please contact:

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Noting that no single factor should control, Administrator Weil explained in his recent guidance that "the economic realities of the relationship, and not the label an employer gives it, are determinative." The Administrator's Interpretation discusses each of the factors listed above in detail, providing examples of how the DOL would analyze each.

With the issuance of the Administrator's Interpretation declaring that "most" workers will qualify as employees under the FLSA, and the statements made Wage and Hour Division's recent press release regarding worker misclassification, employers can safely assume that the DOL will continue to take a hard look at any workers classified as independent contractors. Our recent experience in representing numerous clients involved in DOL investigations has shown that worker misclassification has been a top priority for the DOL for some time now. The Department's most recent statements regarding harsher enforcement in this area are consistent with the approach we have seen the Wage and Hour Division take here in Arizona.

The classification of a worker as an employee as opposed to an independent contractor impacts a worker's entitlement to workplace protections such as minimum wage, overtime, unemployment insurance, and worker's compensation. Misclassification of an employee as an independent contractor can expose an employer to potential liability in all of these areas, and can also bring potential tax liability. Employers should therefore carefully examine any worker currently classified as an independent contractor.

If you have questions about worker classification issues, the Osborn Maledon Employment Law team can help.

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