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# Use of Independent Contractors May Be a High Risk Choice if DOL Gets its Way

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On July 16, 2015, the U.S. Department of Labor (DOL) Wage & Hour Division Administrator issued "Administrator's Interpretation 2015-1" (AI) on the application of the Fair Labor Standards Act (FLSA) for identification of workers who are misclassified as independent contractors. By flatly stating that most workers qualify as employees under the FLSA, this new AI could cause significant misclassification problems for employers, leading to more DOL investigations and enforcement actions and increased private litigation. Already, commentators are disagreeing about whether the AI restates an existing precedent or breaks new ground. It is clear, however, that the AI is a one-sided review of the law. While it remains to be seen how courts will interpret this AI, its very issuance is a strong wake up call for employers who use independent contractors, as undoubtedly more DOL enforcement and private litigation will be on the horizon.

In 2011, the Obama Administration began an initiative to rein in the use of independent contractors. As part of his pledge to improve the wages of working Americans, in March 2014, President Obama signed a memorandum instructing the Secretary of Labor to update the DOL's regulations on who falls under the ambit of the FLSA's overtime requirement. The DOL has taken several significant steps to carry out this mandate, including changing overtime eligibility.

This 15-page Wage & Hour Division interpretation on the independent contractor issue makes the Department's animosity to the use of independent contracts very clear. As indicated above, the AI states the DOL's unequivocal opinion that "most workers are employees." It then relies on the FLSA's definition of "employ" which includes "suffer or permit to work," to assert the broadest possible reach for the FLSA. It goes on to articulate the narrowest possible view of the dividing line between an employee and someone who is running his or her own business, relying on the court cases most favorable to its position. Keep in mind that the new WHD Administrator who signed this AI came to office in 2014 after writing a book on the evils of corporate outsourcing. He has made it clear that he wants to create ripple effects throughout the employer community from the DOL's enforcement efforts against individual companies.

The DOL did not issue this guidance through the usual notice and comment rule-making process. It will not lead to changes in regulations. It is, rather, non-binding guidance articulating DOL's interpretation of the FLSA. However, given the Supreme Court's 2015 decision in *Perez v. Mortgage Bankers Association*, which gave the DOL a green light for such non-binding guidance and then relied upon it to rule in the DOL's favor in an exempt/nonexempt classification case, there is a real risk that courts will, at least to some degree, defer to the AI despite its one-sided nature and lack of opportunity for comment.

Stay tuned for more information and future developments.

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