

Are Your "Independent Contractors" Entitled to Overtime?

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The United States Department of Labor recently proclaimed that "most workers are employees under the FLSA." On July 15, 2015, the DOL issued new guidance concerning the standard for determining whether an employee has been misclassified as independent contractor under the Fair Labor Standards Act's ("FLSA"). The FLSA, which was originally enacted 1938, is a federal law that requires employers to pay all covered employees overtime for all hours worked in excess of 40 hours per week. Under the law, an individual is considered to be an "employee" of a person or entity that "suffer[s] or permit[s]" him or her to work. Although the FLSA's broad definition of the term "employ" has been around for over 75 years, courts have interpreted the standard in a variety of ways.

The DOL's new guidance, entitled "Administrator's Interpretation No. 2015-1," makes it clear that the agency intends to interpret that definition in the broadest way possible. To that end, the agency has concluded that the liberal "economic realities test" should be used to determine whether a worker is an employee or an independent contractor under the FLSA. This test focuses on whether the worker is economically dependent on an employer or in business for him or herself. If the worker is economically dependent on the employer, then he or she is deemed to be an employee who is potentially eligible for the protections of the FLSA. Based on this expansive interpretation, the DOL has boldly asserted that "most workers are employees under the FLSA."

The DOL's economic realities test contains six factors:

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

The DOL has explained that each factor in the test must be "examined and analyzed in relation to one another, and no single factor is determinative." The agency has also emphasized that the "control" factor should not be given undue weight. Finally, the DOL has stated that: "[t]he application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers."

Companies that engage workers on a contract basis should carefully review the DOL's recent guidance. Employers who fail to do so could be liable for back overtime wages, liquidated damages and attorneys' fees under the FLSA.