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# DEPARTMENT OF LABOR (DOL) PUBLISHES NEW INTERPRETATION REGARDING DEFINITION OF INDEPENDENT CONTRACTORS

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## I. DOL's Administrator's New Interpretation Redefines Employees and Independent Contractors.

On Wednesday, July 15, 2015, the Department of Labor ("DOL") expanded the workers who will be considered employees rather than independent contractors. The Administrator of DOL's Wage & Hour Division published "Administrator's Interpretation No. 2015-1" that broadens coverage of the overtime and minimum wage provisions of the Fair Labor Standards Act ("FLSA").

The new interpretation will have the effect of causing more workers to be treated as employees, not just for the FLSA, but for other employment laws as well.

The new standards move away from focusing on the amount of control exercised by the employer over the manner in which the work is performed as a key factor in determining employment status. Instead, the most important factor will be the so-called "economic realities" test.

## II. Under the "Economic Realities" Test, Workers Likely Will Be Considered Employees If They Are Economically Dependent on the Employer.

DOL will now evaluate whether workers are employees covered by the FLSA by examining whether the workers are economically independent and in business for themselves, or whether the work depends upon the employer's business for their livelihood. When making this determination, DOL concedes that the facts of each individual situation must be considered, including factors such as the following:

1 Is the work an integral part of the employer's business? If it is, it is more likely to be employment.

2 Does the worker's managerial skill affect the worker's opportunity to earn a profit or suffer a loss? Managerial skills that DOL will expect independent contractors to exercise include hiring subordinates, investing in equipment or materials, marketing, and making decisions that affect profit or loss beyond working on the particular job being performed at the time.

3 How does the worker's investment compare with the Employer's investment? DOL will expect independent contractors to have made investments in their own business.

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4 Does the work require special skill? If so, DOL will be more likely to regard the situation as an independent contractor.

5 Is the relationship long-term or indefinite? Typical at-will status will weigh in favor of finding that the workers are employees.

6 What is the nature and extent of the employer's control, and does it make the worker economically dependent on the employer? Independent contractors make decisions about meaningful aspects of the work.

7 What the employer and worker call the relationship, i.e. contractor rather than employee, is NOT a factor.

## III. DOL Based Its Interpretation on a Liberal, Expansive View of the FLSA.

DOL justified its new interpretation by contending that it was simply following long-established legal principles and court decisions applying the FLSA. DOL recited that the definition of employment under the FLSA has embodied the concept of whether an employer has "suffered or permitted" a worker to perform services for the business. DOL traced the roots of that definition to child labor laws in the early years of the 20th Century. DOL noted that the concept of who is an employee under those laws is as broad as Congress could define employment.

## IV. Consequences to Employers Based on New Interpretation.

More workers will be classified as employees under the FLSA. This could also affect the classification of workers under common law and under other employment laws.

DOL's interpretation acknowledged that its position regarding which workers are employees under the FLSA is broader than the traditional common law concept of who is an employee. This means that there could be some workers who could be properly regarded as independent contractors under the traditional common law standards, but who DOL now considers to be employees under the FLSA.

As a practical matter, DOL's expansion of criteria for determining employment under the FLSA will lead to the employment treatment of workers for purposes of other statutes or common law. It would be administratively burdensome and virtually impossible to treat a worker as an employee under the FLSA, as DOL would require, while the same worker remains an independent contractor under the common law test or for purposes of other laws, such as workers compensation, unemployment compensation, civil rights laws, I-9s and immigration compliance, employee benefits, IRS, SSA and other applicable tax laws. Workers who are paid overtime or minimum wage as employees under the FLSA will likely be treated as employees for all purposes.

DOL's interpretation pertains to the FLSA, which of course requires minimum wage and overtime compensation for non-exempt employees. There is a greater risk to employers for misclassifying workers who would be non-exempt employees, as reclassifying them will trigger overtime and minimum wage liability. Misclassifying exempt employees should not trigger overtime or minimum wage liability under most circumstances because those workers would not be entitled to overtime or minimum wage payments.

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## V. DOL's New Interpretation Is Not the Last Word on the Subject.

As merely an agency interpretation, the new standards were not published for comment and did not go through the rule-making process. DOL's interpretations do not have the force and effect of law, but many judges will give deference to the agency's views when deciding cases.

DOL's interpretation of the 1930's FLSA is not binding on the Courts. DOL's position can be persuasive to the courts, however. Furthermore, no employer would want to be the test case to litigate whether their workers should be reclassified from independent contractors to employees, but many will be as the cases will work their way through the courts.

One potential remedy would for employers, trade associations, and others to seek Congressional action to clarify the intent of Congress and provide certainty regarding classifications of workers as employee or independent contractors.

## VI. What Can Employers Do To Ensure Compliance and Minimize Risk.

DOL has increased hiring many new DOL investigators and will start auditing companies for compliance with proper and accurate time keeping requirements; ensuring employees have recorded actual start and stop times for work and/or lunch; verifying proper classifications of workers as independent contractors; verifying proper classifications of employees as salaried exempt; salaried non-exempt or hourly; ensuring that employees working piece rate have time cards and are being paid overtime each week in which they work 40 hours or more; that companies are not automatically deducting for lunch, and more. These are some of the items to consider when completing an internal DOL audit.

DOL also is seeking more liquidated damages of double back pay when errors are made and assessing civil monetary penalties when mistakes by companies are discovered. **CONDUCT INTERNAL DOL AUDITS TODAY TO PROTECT YOUR COMPANY!**

All employers should conduct a self-audit and consult with experienced employment lawyers to conduct and provide advice about the self-audit regarding the classification of their workers to ensure that those treated as independent contactors will pass muster under DOL's new interpretation. If there are borderline cases, employers should consider steps to enhance the independent contractor relationship. The most effective and beneficial steps would be to ensure that the workers are truly in business for themselves and are not exclusively engaged in services for the employer and are not economically dependent upon the one employer. Internal DOL audits are necessary to ensure compliance.

*Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD. She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, and wage and hour laws. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.322.4046 or jpace@cavanaghlaw.com*

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