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SPECIAL BULLETIN

THE DEPARTMENT OF LABOR ISSUES NEW INTERPRETIVE GUIDANCE ON INDEPENDENT CONTRACTOR MISCLASSIFICATION

On July 15, 2015, the U.S. Department of Labor issued an "Administrative Interpretation" regarding the classification of workers as either employees or independent contractors under the Fair Labor Standards Act. According to the DOL, the correct classification of workers "has critical implications" and the misclassification of employees as independent contractors "is found in an increasing number of workplaces." The Interpretation sets out the DOL's position on the "economic realities" test—the test utilized by courts to determine if a worker is an employee or independent contractor—and ultimately concludes that "most workers are employees under the FLSA."

The familiar economic realities test includes the following factors: 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss; 3) comparison of the level of investment of the worker and employer; 4) whether the work performed requires special skills and initiative; 5) whether the relationship between the worker and employer is permanent or indefinite; and 6) the degree of control exercised over the worker by the employer.

While the DOL did not re-write the test, the DOL's interpretation of each factor narrows the permissible scope of an independent contractor classification. For example, regarding the third factor—the level of investment of the worker—the DOL analysis considers both the worker's and the business's investments with regard to not only the work performed in the particular job at issue, but also the overall business enterprise. The Interpretation states: "the worker's investment must be significant in nature and magnitude relative to the employer's investment in its overall business to indicate that the worker is an independent businessperson."

Additionally, regarding the fourth factor—whether the work performed requires special skill and initiative—the Interpretation focuses on the workers' "business skills, judgment, and initiative" not the workers' "technical skills." The DOL explained that technical skills of, for example, carpenters or electricians, "are not themselves indicative of any independent or business initiative" but rather are simply skills that are used to perform the work.

The Interpretation is an unmistakable signal that businesses utilizing independent contractors will continue to be a focus of the DOL (and, with this guidance, the DOL provides the plaintiffs' bar another tool in misclassification litigation). Misclassification of independent contractors not only has potential FLSA liability, but also creates exposure under several other laws, such as state and federal tax law, workers' compensation, and unemployment compensation, among others. Businesses seeking to avoid liability for misclassification would do well to reassess their relationships with workers in light of the DOL's stance on this issue and amend their practices accordingly.

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If you have any questions, please call The Kullman Firm attorney with whom you customarily work.

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