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Employee versus Independent Contractor? New DOL Guidance Suggests that Most Workers are Employees

August 1, 2015

In the wake of recent lawsuits and administrative proceedings against Lyft, Uber and other similar companies for misclassifying employees as independent contractors, the U.S. Department of Labor ("DOL") has provided new guidance in an attempt to clear up some of the confusion. The guidance, "Administrator's Interpretation," emphasizes the DOL's inclusive definition of "employee" and makes it clear that the proper test is whether the individual is really in business for himself or is economically dependent on an employer.

The DOL's interpretation explains that in order to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act ("FLSA"), courts use the "economic realities" test. Under this test, the inquiry is whether a worker is economically dependent on the employer, thereby making the worker an employee, versus whether the worker is truly in business for him or herself and thus, an independent contractor. Interestingly, the Supreme Court and Circuit Courts of Appeals have developed a multi-factor "economic realities" test to determine the economic independence of a worker.[1] The factors typically include:

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 depending on his or her managerial skill;
3. the extent of the relative investments of the employer and the worker;
4. whether the work performed requires special skills and initiative;
5. the permanency of the relationship; and
6. the degree of control exercised or retained by the employer.

In applying the "economic realities" test, no one factor is determinative and "each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself…or is economically dependent on the employer." Additionally, the interpretation further explains that "the economic realities of the relationship, not the label an employer give it are determinative. Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor … is not relevant to the analysis of the worker's status."

Ultimately, the "Administrator's Interpretation" concludes by stating that when applying the "economic realities" test, most workers are employees under FLSA's broad definitions. As a result, employers will likely find it difficult to defend independent contractor classifications. This issue is particularly noteworthy because if employers are

required to now classify workers as employees, instead of independent contractors, it will likely increase costs. In other words, by labeling workers as independent contractors rather than employees, employers are not required to afford workplace benefits, such as minimum wage, overtime compensation, unemployment insurance, health costs, and workers' compensation.

While the Administrator's Interpretation does not have an implementation date, employers who utilize independent contractors should carefully review the DOL's guidelines or seek immediate advice from counsel to determine whether they truly meet the restricted definition of independent contractors.

If you or your institution has any questions or concerns regarding employment related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

Thank you to Lauren Dwarika, a law clerk at Cullen and Dykman, for her assistance with this blog post.

[1] *See*, *e.g.*, *Tony and Susan Alamo Found v. Sec'y of Labor*, 471 U.S. 290,301 (1985).