

# Insights

## **DOL Withdraws Guidance Document on Independent Contractor/Employee Classification**

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July 12, 2017

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On June 7, 2017, the U.S. Department of Labor (DOL) announced that it was withdrawing an Administrator's Interpretation (Interpretation) issued just two years earlier, on July 15, 2015, which set forth criteria for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Notwithstanding its withdrawal of the Interpretation, the DOL made clear that it would continue its enforcement efforts with respect to the FLSA. The statement issued by the DOL cautioned that the "removal of the [Interpretation] does not change the legal responsibilities of employers under the Fair Labor Standards Act . . . as reflected in the department's long standing regulations and case law."

In the earlier Interpretation, the DOL had taken the position that most workers are employees, applying a broad definition of what constituted an "employee" under the FLSA. Specifically, the DOL had applied what was called the "economic realities test," which entailed an analysis of the following factors:

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- How does the worker's relative investment compare to the employer's investment?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?
- What is the nature and degree of the employer's control?

The DOL's earlier guidance also stated that the agency would closely scrutinize individuals classified as independent contractors and increase its misclassification enforcement efforts.

The DOL's decision to withdraw the Interpretation signals that the Trump administration may be less likely than the prior Obama administration to pursue an aggressive enforcement agenda concerning independent contractor misclassification. It is unknown whether new guidance on classification will be issued. While many employers view the withdrawal of the earlier Interpretation as a positive, the guidance was in fact very similar to the approach



taken by many courts when evaluating employee versus independent contractor status. Further, the risks associated with misclassification still persist, exposing employers to claims for overtime, benefits, taxes, and other forms of monetary relief. Therefore, companies are encouraged to continue to review the status of their workers to be sure they are compliant with the standards applied by courts within their jurisdiction. It is advisable to seek legal counsel on properly structuring these relationships.

For any questions regarding this article and independent contractor/employee status, please contact Tiaundra M. Gordon or Amy J. Adolay.