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EMPLOYMENT LAWSCENE ALERT: DOL MEMO STATES THAT MOST WORKERS ARE EMPLOYEES UNDER THE FLSA

Today, July 15, 2015, the U.S. Department of Labor (DOL) issued a memo regarding the classification of workers as either employees or independent contractors, which stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL noted that the FLSA has an expansive definition of employment and that workers who are misclassified may miss out on many protections that they should be given, including minimum wage, overtime, unemployment compensation, and workers' compensation.

Under the FLSA, a worker is an independent contractor if he is genuinely in business for himself; if a worker is economically dependent on the employer, however, the worker is an employee. To determine if the worker is economically dependent on the employer, the DOL looks at the six-factor economic realities test, which must be applied consistently with the broad scope of the FLSA. These factors are 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. None of the six-factors is determinative; instead, the DOL states that they are indicators of the broader concept of economic dependence, which is the ultimate determination. Importantly, neither an employee's job title or an agreement between the worker and the employer factor into the analysis of whether a worker is an employee or an independent contractor. It is the reality of the working relationship that is determinative of an individual's employee or independent contractor status.

The DOL's conclusion is that most workers are employees under the FLSA and are thus entitled to all of the protections afforded employees. Therefore, employers need to be proactive and regularly revisit and reassess their use and classification of independent contractors to avoid liability for misclassification. If an individual is being treated like an employee, he or she needs to be classified as an employee. Employers who do otherwise are likely to find themselves facing litigation.