



WORK

Your HR and Employment Law Update

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Most Workers Are Employees, DOL Says



Rick Hepp

Most workers should be classified as employees, and not independent contractors, and be paid minimum wage and overtime pay, the U.S. Department of Labor said in an Administrator's

Interpretation issued July 15. The pronouncement clearly signals the government's intent to step up an already aggressive campaign against employers it believes are trying to skirt wage laws.

The 15-page Interpretation, which is not binding but sets forth the positions the Department of Labor will take when construing the Fair Labor Standards Act's definition of "employ," which is "to suffer or permit to work," is so broad that almost every worker in the United States will be considered an employee. It goes on to warn that agreements labeling workers as independent contractors are "not relevant to the analysis of the worker's status." Rather, it comes down to whether the worker

is economically dependent on the employer or in business for him or herself. This question is to be determined by applying the "economic realities" test, according to the Interpretation.

While the multi-factor "economic realities" test is not new, the Interpretation has put a new gloss on how those factors should be analyzed. For instance, courts have long viewed the degree of control an employer exerts over a worker as a very, if not the most important, factor. No longer. The Interpretation says no one factor—and particularly not the control factor—is determinative. Instead, the emphasis now appears to be on whether the worker is an integral part of the employer's business, the worker's opportunity for profit or loss, the relative investment of the worker compared to the employer and the worker's business and managerial skills.

In other words, the Department of Labor will view a worker as employee unless he or she is running an actual business and the worker has an opportunity to expand the business through proper investment, making astute business

decisions, hiring helpers and recruiting additional clients. This is a high bar and employers who rely on independent contractors should review their business model with their labor and employment counsel to make sure it is consistent with the new Interpretation. The end result is that the recognition of independent contractor status under the Fair Labor Standards Act will be few and far between under this Interpretation.

RICK HEPP is an associate with the firm's Labor & Employment Practice Group. He focuses his practice on counseling clients on independent contractor agreements, non-competition agreements and employment agreements.

Additional Information

For additional information, please contact:

Labor & Employment Practice Group

Maynard A. Buck (216) 363-4694 mbuck@beneschlaw.com

Joseph N. Gross (216) 363-4163 jgross@beneschlaw.com

Rick Hepp (216) 363-4657 rhepp@beneschlaw.com

Peter N. Kirsanow (216) 363-4481 pkirsanow@beneschlaw.com

Christopher J. Lalak (216) 363-4557 clalak@beneschlaw.com

Steven M. Moss (216) 363-4675 smoss@beneschlaw.com

Steven A. Oldham (614) 223-9374 soldham@beneschlaw.com

Lianzhong Pan 86-21-3222-0388 lpan@beneschlaw.com

Richard A. Plewacki (216) 363-4159 rplewacki@beneschlaw.com

Roger L. Schantz (614) 223-9375 rschantz@beneschlaw.com

John F. Stock (614) 223-9345 jstock@beneschlaw.com

Katie Tesner (614) 223-9359 ktesner@beneschlaw.com

Jennifer M. Turk (614) 223-9308 jturk@beneschlaw.com

Mark R. Waterfill (317) 685-6119 mwaterfill@beneschlaw.com

Robert A. Zimmerman (216) 363-4437 rzimmerman@beneschlaw.com

www.beneschlaw.com

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