COMPLIANCE BULLETIN

DOL Revises Guidance on Employee Classification

HIGHLIGHTS

- The DOL has continued to update its guidance on employee classification, returning to more traditional interpretations.
- Employers are still required to properly classify workers.
- These updates may provide employers with more flexibility when classifying their workers for federal labor law purposes.

IMPORTANT DATES

March 2018
The DOL made several updates to its guidance regarding employee classification under the FLSA.

June 2017
These updates follow the DOL's withdrawal of administrative interpretations on the same topics.

OVERVIEW

The Department of Labor (DOL) recently updated the following guidance regarding employee classification under the Fair Labor Standards Act (FLSA):

- ✓ Three chapters in the Wage and Hour Division's (WHD) Field Operations Handbook were removed, and instead, indicate that revisions will be coming soon. These chapters explained how to interpret the employer-employee relationship, including issues related to joint employment and independent contractor misclassification.
- ✓ A fact sheet from May 2014 interpreting the term "employment relationship" was withdrawn and replaced with a 2008 version. Notably, the 2008 fact sheet omits guidance that was included in the 2014 fact sheet indicating that "most workers are employees."

ACTION STEPS

These updates follow the DOL's withdrawal of two administrative interpretations on employee classification last year. According to the DOL, these changes are being made to reflect established administration policy.

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Employee Classification

Employee classification has a direct impact on employee eligibility for benefits, legal protections (such as minimum wage and overtime rights) and taxation. In general, employment laws, labor laws and related tax requirements do not apply to independent contractors. For this reason, employee misclassification is a concern for the DOL.

Several tests exist to determine whether an employee is an independent contractor. The most common tests include the common law or agency test, the economic realities test, the hybrid test and the IRS test.

Traditionally, the DOL has favored using the **economic realities test**, which looks at whether an employee is economically dependent on the employer or is in business for him or herself. Generally, under the economic realities test, the more an individual depends financially on an employer, the more likely it is that the individual should be categorized as an employee. According to the DOL, if the worker is economically dependent on the employer, he or she should be protected by employment laws.

Economic Realities Test

The May 2014 fact sheet provided the DOL's interpretation of how the economic realities test should be applied by employers in their worker classification efforts. Notably, this fact sheet provided that "workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees."

This updated guidance indicates that the DOL no longer advises that "most workers are employees."

This guidance indicated that the DOL believed that most workers will be considered employees covered by the FLSA under the economic realities test. The withdrawn administrative interpretation and parts of the removed Field Operations Handbook chapters reiterated and clarified this DOL interpretation.

Updated Guidance

The DOL's recent updates to its employee classification guidance indicates that it no longer advises that "most workers are employees." However, these updates do not abolish the economic realities test nor the DOL's preference of this test for employee classification purposes.

Like the 2014 guidance, the 2008 fact sheet includes the following factors to consider under the economic realities test:

- ✓ The extent to which the work is an integral part of the business;
- ✓ The permanency of the working relationship;
- ✓ The amount of the worker's investment in facilities and equipment;
- ✓ The nature and degree of control by the employer;

- The worker's opportunities for profit and loss;
- The amount of initiative, judgment or foresight in open market competition with others required for the worker's success; and
- The degree of independent business organization and operation.

By updating its employee classification guidance, the DOL is returning to more reliance on existing judicial interpretations of the law's requirements, rather than providing its own interpretations on how employers should follow the law. This may provide more flexibility for employers in applying the economic realities test when classifying their workers.

Joint Employment

Joint employment occurs when an employee works for two or more related employers. When joint employment exists, all joint employers are jointly and severally liable for compliance with applicable laws. Additionally, in joint employment situations, an employee's hours worked for all of the joint employers during the workweek are aggregated and considered one employment. As a result, that employee's overtime compensation depends on whether his or her aggregate hours of work exceed the limits set by federal law.

The withdrawn administrative interpretation and parts of the removed Field Operations Handbook chapters established a broader interpretation of joint employment. This guidance allowed the DOL to establish the existence of joint employment in situations where an employer only has **indirect control** over another employer's workplace.

The DOL's recent updates indicate that it is returning to a more traditional interpretation, where joint employment can only be established when an employer has **direct control** over another employer's workplace. This change will limit the number of situations where the DOL may hold employers liable for federal labor law violations committed by affiliated entities.

However, employers should also note that the National Labor Relations Board's (NLRB) definition of joint employment is unaffected by this DOL action. Therefore, it is possible that the NLRB may find an employer liable for certain violations while the DOL may determine that no joint employment situation actually exists.