Are Your Contractors Actually Employees? DOL Says Probably Yes

Insights
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Last month, the U.S. Department of Labor (USDOL) issued an Administrator's Interpretation aimed at addressing what it characterizes as the "problematic trend" of employers misclassifying workers as independent contractors rather than employees. In issuing this guidance, the USDOL sent a signal that reviewing employers' use of independent contractors will be an enforcement priority. In other words, hospitality businesses: consider yourself warned.

Because hospitality employers regularly use contract workers and often even outsource entire departments, now is the time to review your worker classifications. Particularly vulnerable areas include: housekeeping, valet, night cleaning, security, IT, engineering, spa, golf, and tennis operations.

Nothing New To See Here...
The content of the Interpretation is not new – what is significant is that the guidance was issued at all. The agency explained that this guidance was needed to curtail the perceived "misclassification phenomenon" that leads to violations of the Fair Labor Standards Act (FLSA). The Interpretation clarifies how the legal test for determining whether an individual is an FLSA "employee" can actually help the regulated community classify workers correctly.

The Interpretation enumerates a now-familiar list of dire consequences that would result from misclassification where the FLSA is concerned, including a failure to pay non-exempt employees minimum wage and overtime compensation due for all hours worked in a workweek.

Emphasis On Economic Dependency
Because there is nothing "new" in the Interpretation, it doesn't create a new test for determining whether an individual is an employee or an independent contractor. In fact, even if it did, the test wouldn't be controlling because the Interpretation does not have the force of law. Neither does the Interpretation propose to add to the six factors that courts and the USDOL have used to evaluate the issue.

Instead, the guidance offers some factor-by-factor elaboration on how you should apply each of the six factors, and offers illustrative examples to explain the law in plain language. Not surprisingly, the USDOL's guidance sets the bar high for determining that a worker is an independent contractor,

and expressly concludes that "most workers are employees under the FLSA." The basic premise has not changed, essentially boiled down to these inquiries:

- Is the worker in business for himself? If yes, he is probably an independent contractor.
- Is the worker economically dependent on the employer? If yes, he is probably an employee.

How Should Hospitality Employers Respond?
In light of this renewed emphasis on misclassification, you should consider the following recommendations:

Be proactive. Hospitality employers should compile a list of all individuals being treated as contractors (those to whom you issue an IRS form 1099); for each of them, you should review the working relationship and evaluate the risk.

Let's use the spa as an example. If you have a contract massage therapist (or two or three), look at your history with the individual. How long has she been performing services for the hotel? How often does she service your guests? Does she regularly show up on the spa schedule? Does she attend employee meetings and training sessions? Does the massage therapist provide her own equipment and products?

Depending on the answers to these questions, in some situations, your contract massage therapist may actually be a part-time or on-call employee and not an independent contractor.

Review your outsourced services. Another area you should consider is your outsourced services, such as maintenance, housekeeping, and valet. We suggest you closely examine the realities of these third-party relationships and compare them against the USDOL's economic realities test as emphasized in the guidance.

Modify contracts as appropriate. If you decide to continue the contractor relationship with your outside vendors, consider modifying your written agreements to add more protection. You should consider including indemnification language and other provisions to shield your company from liability in the event the government determines the contractor's workers are actually your employees.

Consider the risks. Finally, you should remember that misclassification of workers as contractors may present a number of potential pitfalls and expensive consequences, even outside the USDOL arena. These include failure to withhold taxes, failure to include workers on medical benefit plans under the Affordable Care Act, failure to pay unemployment compensation insurance, failure to complete I-9 forms, failure to pay workers' compensation insurance, and failure to provide FMLA leave, to name just a few.

The Bottom Line
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It has been a longstanding USDOL priority to crack down on misclassification in the independent-contractor arena. Against that background, neither the publication of this Administrator's Interpretation nor the views it expresses should come as a surprise. And while courts are not required to adopt USDOL's position, they might well come to embrace what the Interpretation has to say, leading this guidance to essentially carry the force of law.

In other words, hospitality businesses: consider yourself warned.

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