



Expect USDOL Independent-Contractor "Clarification" This Summer

Insights

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Employment Law360 recently reported U.S. Wage and Hour Division Administrator David Weil's announcement that he will soon release an Administrator Interpretation stating "a very clear set of criteria" delineating the agency's view of who is and is not a "legitimate independent contractor" under the federal Fair Labor Standards Act.

Dr. Weil was also quoted as observing that the necessary evaluation is "not a mechanical process, but it's a holistic process of assessment." This has unquestionably been the case historically speaking, and one may therefore fairly question whether and to what extent the forthcoming publication will appreciably clarify determinations about independent-contractorship.

Vague Factors, Ambiguous Criteria

The typical FLSA-related analysis focuses upon whether as a matter of "economic reality" a putative independent contractor is dependent upon the alleged employer for his or her livelihood. The Division has applied six general factors, which might be paraphrased as asking:

- Are the individual's services an integral part of the alleged employer's activities?
- Does the individual have a comparatively substantial investment in facilities or equipment?
- Does the individual have an opportunity for profit and an exposure to loss in a business sense?
- Does the individual exercise a businessperson's initiative, judgment, or foresight?
- Is the relationship permanent or indefinite, rather than for a determinable time?
- What nature and degree of control does the alleged employer retain with respect to the relationship and the work to be performed?

These criteria might at first appear to be explicit and specific, but actually evaluating them can often be a difficult and uncertain undertaking. Even the Wage and Hour Division tends to look at a number of sub-considerations, many of which are themselves of indefinite and elusive meaning and relevance.

The Bottom Line

One may at least hope that the U.S. Labor Department's elaboration will indeed represent an improvement over the current state of affairs. In many situations, whether there is truly and reliably

an independent-contractorship might be an "eye of the beholder" proposition involving some beholders who threaten to impose substantial liability and penalties.

The Administrator Interpretation will no doubt emerge amidst much media fanfare. If your organization's operational model includes an "independent contractor" contingent, perhaps it would be wise to start re-evaluating matters before that day arrives.