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DOL Announces Reversal of Employee/Independent Contractor Classification & Joint Employer Guidance

On June 7, 2017, the United States Department of Labor (DOL) reversed its previous guidance issued during the administration of President Barack Obama that broadened the circumstances in which employers could be held liable for misclassification of employees as independent contractors, and as a joint employer with a separate business. New Secretary of Labor Alex Acosta announced that the DOL was withdrawing two letters: (1) a 2015 letter that encouraged scrutiny of employer-independent contractor relationship pursuant to the "economic realities test;" and (2) a separate 2016 letter that interpreted joint employment under the Fair Labor Standards Act (FLSA) with a separate entity as occurring, so long as both employers exercised "indirect" control over the worker. Although the letters were never legally binding, they served as a blueprint for how the DOL enforced federal laws and represented persuasive authority to courts.

Employee/Independent-Contractor Classification Guidance

From July 2015 until June 2017, the DOL's default position was that "most" workers are employees under the FLSA. The DOL also publicly used the "economic realities test" to determine whether work performed for an employer was done by an independent contractor or an employee. The "economic realities test" employed the following six factors: (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.

The net effect of the DOL's use of the "economic realities test" was to greatly diminish the circumstances in which a worker was properly classified as an independent contractor. It is generally believed that the Obama administration employed that standard as a way to combat economic inequality, as the classification of a worker as an employee triggers many benefits for the worker, including minimum wage/overtime compensation, unemployment insurance, and workers' compensation.

Joint Employer Guidance

Relatedly, between January 2016 and July 2017, the DOL adopted the National Labor Relations Board's (NLRB's) decision in Browning-Ferris Industries of California, Inc. v. NLRB, which held that two separate businesses could share legal responsibility over the same employee so long as each exercised "indirect" control over that employee. That is, a company could be treated as an employer even if they did not directly control the employee's terms and conditions of work. In Browning-Ferris, the owner of a waste-disposal site was held to be a joint employer with the company it contracted to provide all of the site's staffing needs.

The DOL's decision to expand joint employer liability proved worrisome for many businesses, especially franchisors and those that relied on staffing companies to provide workers at a particular location. Nevertheless, the decision in Browning-Ferris is separate and remains legally binding upon employers.

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