Employment Misclassifications: A Warning to Employers

The U.S. Department of Labor Wage and Hour Division ("WHD") issued official guidance on how to determine whether a worker is an employee or an independent contractor under the federal Fair Labor Standards Act ("FLSA"). The WHD is the federal agency that administers and enforces the FLSA. A six-factor economic realities test is used to make this determination, including whether:

- the work performed is an integral part of the employer's business;
- the worker's managerial skill affects the worker's opportunity for profit or loss;
- the worker is retained on a permanent or indefinite basis;
- the worker's investment is relatively minor as compared to the employer's investment;
- the worker exercises business skills, judgment, and initiative in the work performed; and
- the worker has control over meaningful aspects of the work performed.

Although each of these factors must be considered when making a classification determination, the guidance indicates that some factors are more weighty than others, including the "integral to the business" prong of the test. The guidance also combines the economic realities test with the WHD's broad interpretation of employment, which includes persons who businesses "suffer or permit to work." As indicated in the guidance, economic dependence indicates that the worker is suffered or permitted to work, and therefore, the worker is likely to be seen as an employee rather than an independent contractor. The WHD concluded that, in fact, "most workers are employees under the FLSA's broad definitions."

Ultimately, companies that use independent contractors should reexamine their relationships and employment practices with workers to determine whether they are appropriately classified. Of course, the WHD's guidance only addresses worker classification under the FLSA. Different from the FLSA test, the multi-factor Borello economic realities test commonly used under California's labor laws emphasizes the right to control rather than the economic dependence between the worker and the alleged employer. Business owners must be aware that different tests are used under other state and federal laws to determine whether workers have been misclassified, and the outcome may not be the same.

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DID YOU KNOW...

An employee may not be able to prove age discrimination under the federal Age Discrimination in Employment Act if the only evidence of discrimination is an age difference of less than ten years.

*France v. Johnson (9th Cir. 2015) 795 F.3d 1170, 1174 (age difference of 10 years or more is presumptively substantial while a lesser age difference is presumptively insubstantial)

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