

Department of Labor Paves Way for Employers to Classify Workers as “Independent Contractors”

In a move with significant implications for businesses across the country, the United States Department of Labor (“DOL”) is preparing to finalize new rules that would pave the way for many employers to classify some of their workers as independent contractors.

The distinction between employees and independent contractors is an important one: employers are required to pay the minimum wage and overtime pay to their employees under the Fair Labor Standards Act (“FLSA”), and employers who misclassify their workers are potentially on the hook for both treble damages and attorneys’ fees. However, FLSA does not define the word “employee,” sometimes leading to inconsistent rulings from the courts.

In order to clarify who meets the definition of “employee,” on September 25, 2020 the DOL issued proposed regulations to create a uniform standard, focusing on the “economic reality” of whether a worker is in business for himself or herself. This standard would leave less flexibility to courts in deciding whether a worker qualifies as an independent

contractor, potentially making it more difficult for workers to bring misclassification claims. With the expiration of a short thirty-day comment period on October 26, 2020, a final regulation is expected before the end of the year.

The new regulations are unlikely to preempt state law definitions of “employee,” meaning that they would have a limited impact in states like Massachusetts and California that have made it difficult for employers to classify their workers as independent contractors. However (assuming they survive inevitable court challenges) the regulations have the potential to make it easier to businesses to classify workers as independent contractors in the many states without such rules. Businesses that engage workers outside of states with stringent independent contractor laws would be well-advised to keep close tabs on the DOL’s plans going forward.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the proper classification of workers, or employment law issues generally, please contact Michael Brier at (617) 350-6800, or email him at michael.brier@gesmer.com.



Michael Brier