KANE KESSLER, P.C.

1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799
Direct dial (212) 519-5154
jruocco@kanekessler.com

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FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: United States DOL's Wage and Hour Administrator Issues Guidance Regarding the Misclassification of Employees as Independent Contractors

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On July 15, 2015, the Wage and Hour Division of the United States Department of Labor ("DOL") issued Administrator's Interpretation 2015-1 (the "Interpretation"). The Interpretation provides guidance on the Fair Labor Standards Act's ("FLSA's") "Suffer or Permit" standard in an effort to curtail the misclassification of employees as independent contractors. This guidance comes in the wake of several high profile lawsuits concerning the classification of workers as independent contractors by companies such as Uber, Lyft and FedEx. With the issuance of the Interpretation, the DOL is taking the stance that the FLSA's definition of employee is much broader than the definition generally applied by employers. According to the DOL, "most workers are employees under the FLSA's broad definitions."

The Interpretation does not change current law. Rather, the Interpretation seeks to clarify the FLSA's already-promulgated broad definition of the scope of the employment relationship. Under current law, the FLSA defines "employ" as including "to suffer or permit to work."[1] Courts apply (and the FLSA has adopted)[2] a six-factor "economic realities" test when applying this standard, which focuses on whether the worker is "economically dependent on the employer or in business for him or herself." These factors vary by court but generally include:

(i) The extent to which the work performed is an integral part of the employer's business,
(ii) The worker's opportunity for profit or loss depending on his or her managerial skills,
(iii) The extent of the worker's investment relative to the employer's investment,
(iv) Whether the work performed requires special skills or initiatives,
(v) The permanency of the relationship, and

[1] 29 U.S.C. 203(g).

[2] *See* DOL, Fact Sheet 13: Am I an Employee?: Employment Relationship under the Fair Labor Standards Act (FLSA), revised May 2014, http://www.dol.gov/whd/regs/compliance/whdfs13.htm (last visited July 16, 2015).

(vi) The degree of control exercised or retained by the employer.

The Interpretation provides illustrations of each factor to demonstrate that the test is only properly applied when consistent with the FLSA's directive that the employment relationship be broadly construed. No one factor is determinative and the ultimate inquiry is whether the worker is truly in business for him or herself. Indeed, according to the Interpretation, the existence of an agreement labeling a worker as an independent contractor, or an employer's issuance of a 1099-MISC to a worker has no bearing on the analysis.

While the Interpretation does not alter the "economic realities" test, it does offer some key points that enhance the DOL's prior guidance on the issue:

(i) Work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home, or on the home premises of the employer's customers,
(ii) A worker's ability to earn more by making the decision to work additional hours or to take on additional jobs does not relate, by itself, to his or her managerial skills. Likewise, a reduction in earnings does not equate to an opportunity for loss such that the worker is an independent contractor,
(iii) The worker's investment must be significant in relation to an employer's entire business (and not just to an employer's investment in one job) in order to be considered an independent contractor,
(iv) The key is whether the worker makes independent judgments with respect to his or her work, *e.g.*, determines the sequence of work, orders additional materials for the job, and thinks about bidding for the next job,
(v) Marketing and working intermittently for several employers, negotiating rates, and turning down one job for another are indications that the worker is an independent contractor,
(vi) In prior guidance, analysis of this factor depended on who sets work hours and determines how the work is performed, among other things. The Interpretation somewhat rejects this analysis and illustrates that at-home employees very often set their own hours and are subject to very little supervision by employers but may still be employees, not independent contractors.

The Interpretation is not controlling but courts will often utilize guidance issued by the DOL in its decisions interpreting the FLSA. Here, the DOL is sending a clear message that more likely than not, a worker should be classified as an employee rather than an independent contractor based on the FLSA's broad definition of "employee."

Misclassification by employers carries significant risks, including liability for unpaid taxes, interest and penalties on those taxes, unpaid wages and overtime, and penalties and fines for the violation of state and federal wage laws, among other potential liabilities. Therefore, employers should anticipate scrutiny by the DOL and plaintiffs' attorneys. Accordingly, employers should assess and document the six factors listed in the Interpretation against the classification of its workers. In particular, individual contractor agreements should be reviewed. Because the nature of a worker's job may change over time, employers should revisit this assessment periodically to ensure compliance with the law.

This article is provided for information purposes only, and as such is not a part of an attorney-client relationship. No such relationship shall be deemed to exist by virtue of this article. If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael C. Lydakis, or Jaclyn K. Ruocco.