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Department of Labor Guidance Seeks Expanded "Employee" Classification of Workers

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The DOL acknowledged that no one factor is determinative of whether a worker is an employee or an independent contractor. The DOL noted that the outcome of the assessment must be determined "by a qualitative rather than a quantitative analysis" and that the "application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers." The DOL repeatedly emphasized that the focus of the economic realities test is whether a worker is "economically dependent" on the employer or in business for him or herself. "The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself." In addition to citing case law throughout the interpretation, the DOL's guidance provided hypothetical examples of the analysis as applied to carpenters, providers of cleaning services, a print editor and providers of nursing care.

The issue of misclassification of employees as independent contractors has received media attention following the publication of the California Labor Commissioner's conclusion that drivers for Uber Technologies, Inc. are employees under California law. The commissioner's analysis was analogous to the DOL's application of the economic realities test: "Defendants are involved in every aspect of the operation[:] Defendants vet prospective drivers, who . . . cannot use Defendants' application unless they pass Defendants' background and DMV checks[;] Defendants control the tools the drivers use [by requiring that] drivers must register their cars with Defendants, and none of their cars can be more than ten years old[;] Defendants monitor [drivers'] approval ratings and terminate their access to the application if the rating falls below a specific level[;] [the drivers] work [does] not entail any 'managerial'

skills that could affect profit or loss[;] [drivers have] no investment in the business [aside from their car; and] Defendants provide[] the iPhone application, which [is] essential to the work."

This is the fifth administrator interpretation issued by the DOL since 2010 when the agency ceased issuing opinion letters. Administrator interpretations are entitled to Skidmore deference, provided that the interpretation of the issue has not changed over time, in which instance, the level of deference is uncertain. This is a lower level of deference than the level accorded legislative regulations, which have the force and effect of law. The new administrator interpretation provides insight into the DOL's approach to enforcing the FLSA's minimum wage and overtime provisions. Akin Gump continues to monitor the application of the economic realities test and is available to assist you and your business with any issue that may arise related to the classification of your workers.

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