

Department of Labor Issues Guidance on Misclassification of Employees as Independent Contractors

Employers who rely upon contract workers should be aware of the most recent guidance issued by the U.S. Department of Labor. In short, the DOL considers the definition of “employee” under the Fair Labor Standards Act (“FLSA”) to be broad, and warns that “most workers are employees under the FLSA’s broad definitions.” Workers who are classified as “employees” are entitled to FLSA protection, including federal minimum wage and overtime at the rate of time and one-half their regular rates for every hour of work beyond 40 hours per week.

The DOL considers the misclassification of workers as independent contractors to be a serious national issue depriving workers of overtime pay and other benefits, and makes no secret that it will be ramping up enforcement actions against employers who misclassify their workers. The DOL has targeted employers in the oil and gas industry in wage enforcement actions in the past, and after this guidance, employers should expect that more enforcement actions will occur.

The DOL provides its analysis of the multi-factor “economic realities” test used to determine whether a worker is an employee or an independent contractor under the FLSA. There are a number of factors in the test, but the DOL considers the “ultimate determination” to be whether “the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).”

The DOL’s guidance may make it harder for employers to classify workers as independent contractors. Employers in the industry should review their pay practices for compliance with the FLSA, with special attention to who is considered an “employee”. For starters, the FLSA requires that covered employees be paid at least federal minimum wage and overtime at the rate of time and one-half their regular rates for every hour of work beyond 40 hours per week. All pay received by employees during the workweek must be considered when determining the overtime premium to be paid. Employers that violate the FLSA may be liable to employees for back wages

and liquidated damages. Contact Gordon Arata if you have any questions regarding the DOL's recent guidance or the FLSA.