Insight

IN-DEPTH DISCUSSION

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How Broad is Broad? New DOL Guidance Determines "Most Workers Are Employees"

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In a move that is expected to have far-reaching consequences for employers, the U.S. Department of Labor issued new guidance on the classification of independent contractors as employees under the Fair Labor Standards Act (FLSA). Dr. David Weil, the DOL Wage and Hour Administrator, issued a July 15, 2015 Administrative Interpretation (the "Interpretation") warning employers that the definition of "employ" is very broad under the FLSA.[1] The guidance reads as an argument, complete with references to favorable federal court decisions, which will likely be used to support future DOL enforcement actions.

Dr. Weil begins his Interpretation by stating:

> [m]isclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations. When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation.

A Presumption of Employment

Under the statute's definition of employment, the DOL would find that most workers qualify as employees, not independent contractors. Dr. Weil asserts the statute defines "employ" broadly as including "to suffer or permit to work," which covers more workers as employees. The legal test is whether the worker is economically dependent on the employer or in business for him or herself. "In light of the broad statutory definition of employ, a worker who is economically dependent on an employer is suffered or permitted to work by the employer."

Dr. Weil directs the DOL to be guided by this broad statutory definition when determining whether a worker is an employee or an independent contractor. The employer's title for the employees is irrelevant in making the determination. Similarly, a 1099 form issued by the employer shows only that the employer does not view the worker as an employee.

1 *See* Administrator's Interpretation No. 2015-1, United States Department of Labor (July 15, 2015), available at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm.

The DOL applies six economic realities factors when determining the classification of a worker. Dr. Weil cautions that all the factors must be considered in each case, and no one factor is determinative. According to Dr. Weil, those factors include: whether the worker's work is an integral part of the employer's business, whether the worker has an opportunity for profit or loss, the nature of the worker's investment in the company (investment in tools and equipment is "probably" not enough), a worker's use of business skills and initiative as opposed to technical skills, the permanence or indefiniteness of the relationship, and, finally, the nature and degree of the employer's control.

Dr. Weil asserts that the factor of control would not be determinative. He rejects the common-law control test, which analyzes whether a worker is an employee based on the employer's control over the worker, because the "suffer or permit" standard broadens the scope of employment relationships covered by the FLSA. He notes also that "technological advances and enhanced monitoring mechanisms" allow companies to engage workers without exercising traditional control over their duties and that the control factor should not play an "oversized role" in the analysis of whether a worker is an employee or an independent contractor.

By stating that "most workers are employees under the FLSA's broad definitions," the guidance may be viewed as creating a presumption of employment for workers. The new DOL expansion of the employment relationship means that employers must review all their relationships with independent contractors carefully because the DOL will treat most workers as employees.

We anticipate that this approach to the classification of workers as employees will quickly be used by the DOL in enforcement actions. If and when such enforcement actions are challenged in court, the DOL is expected to use this guidance to support its increasingly broad definition of employee under the FLSA.

Another Example of Sub-Regulatory Guidance v. Rulemaking

Dr. Weil is instituting these changes through an interpretive bulletin rather than going through the official rulemaking process. This avoids the notice-and-comment procedures that normally apply to rulemaking. As noted by the U.S. Supreme Court in *Perez v. Mortgage Bankers Association*,[2] not all rules enacted by an administrative agency must be issued through the notice-and-comment process. The Administrative Procedures Act (APA) notice-and-comment requirement applies only to "substantive rules," not to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.

Unfortunately, the APA does not define substantive or interpretive rules. In *Perez*, the Supreme Court acknowledged the debate over the definition of what is a substantive or interpretive rule, but refused to clarify the issue, stating that it would not "wade into" the debate.

The drawback to this process for agencies is that interpretive guidance is not given full *Chevron*-style[3] deference.[4] On the other hand, the interpretive "sub-regulatory" process is faster and less transparent as it allows a rule to be issued without any notice or providing stakeholders an opportunity to weigh in. Moreover, while the agency is not entitled to full deference for interpretive rules, some courts give more *Chevron*-like deference to interpretive rules like the Interpretation.[5] Thus, we expect courts will likely defer to the DOL's Interpretation, even though the DOL did not use the substantive rulemaking process.

Will the Interpretation Be Challenged?

The Supreme Court's refusal to define what constitutes an agency's substantive or interpretive rule in *Perez* has left the door open for such a challenge to the Interpretation. Specifically, it can be argued that the Interpretation is not an interpretive rule exempt from the APA's notice-and-comment procedures, but rather is a substantive rule that should have been issued through the APA's formal notice-and-comment process.

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2 575 U.S. ___ (2015).

3 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference requires that courts defer to reasonable interpretations of the statutes they are charged with administering when the plain language of the statute is not otherwise clear, or the statute is reasonably susceptible to more than one interpretation.

4 *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

5 *See, e.g., National Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997).

Whether the Interpretation was enacted without the proper notice-and-comment period, or was a valid interpretive rule, will depend upon the DOL's intent in issuing the Interpretation.[6] Proving the intent was to issue informally a substantive rule, however, may be difficult. In fact, some federal courts have determined that similar Administrator's Interpretations are interpretive rules and therefore need not comply with the APA's notice-and-comment requirements.[7]

Employers have been feeling the heat from a number of recent Administration initiatives and proposals. This DOL administrative interpretation comes only a few weeks after its proposed rule to expand FLSA overtime provisions to millions of employees by substantially increasing the salary requirements for the "white collar" exemption from overtime. At the same time, the National Labor Relations Board's Office of the General Counsel is attempting to expand the joint-employer standard to unrelated businesses through complaints it has filed against a franchisor for alleged unfair labor practices of its franchisees, and in its brief in the pending *Browning-Ferris* case, in which the Board is poised to adopt a much looser standard for determining whether a business is considered a joint employer with another entity for liability purposes under the National Labor Relations Act. The bottom line is that businesses are facing a time of unprecedented uncertainty as the government continues to change the definition of both who is an employer and who is an employee.

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6 *See, e.g., Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

7 *See, e.g., Lewis v. Huntington Nat. Bank*, 838 F. Supp. 2d 703 (holding a 2010 interpretation regarding the application of the administrative exemption mortgage loan officers was not a substantive rule that required a notice-and-comment period).