

# THE LAW OFFICES OF ALEX W. CRAIGIE

*Employment law, made simple.*

## **August 28, 2015 Employment Law Bulletin**

### **US Department of Labor Issues Guidance That Most Workers Are *Employees*, Not Independent Contractors**

On July 15, 2015, the United States Department of Labor (DOL) issued a guidance memorandum (Administrator's Interpretation No. 2015-1) clarifying whether workers can properly be characterized as Independent Contractors, rather than employees. This Bulletin explains this development and its implications for employers who treat any workers as Independent Contractors.

#### **What is The DOL and Why is This Important?**

The DOL is the federal agency charged with enforcing laws and regulations enacted to protect employees. The DOL's Administrator periodically issues "guidance" memoranda interpreting a law or regulation. While these memoranda are neither law nor legally binding, they are frequently cited and given weight by courts when interpreting law in a particular case. They may also be considered in the legislative process, as federal and state laws are enacted which directly impact employers.

This guidance is also important because it provides clarity and may help employers avoid misclassifying workers as Independent Contractors. Employers who misclassify risk a costly claim or civil lawsuit by the worker claiming she did not receive overtime or rest and meal periods as a result of the misclassification.

#### **The "Economic Realities" Test**

Determination whether an employer can properly treat a worker as an Independent Contractor has long required application of the "economic realities" test. This test asks the following questions about a worker classified as an Independent Contractor:

- Is the work performed by the individual an "integral part of the employer's business"?
- Does the individual's "managerial skill" affect his or her opportunity for profit or loss?
- How does the worker's investment compare with that of the company?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the company permanent or indefinite?
- What is the nature and degree of the employer's control?

## What Does the DOL Guidance Add?

The DOL guidance memorandum adopts the economic realities test. But the agency makes clear that the test must be applied in the context of the definition, from the federal Fair Labor Standards Act (FLSA), of "employ," as "suffer or to permit to work." An individual who is "*economically dependent* on an employer is suffered or permitted to work by the employer," and thus cannot be properly classified as an Independent Contractor (emphasis added).

In other words, only a worker who is financially *independent* of the employer can properly be classified as an Independent Contractor. In one telling sentence, the memorandum says that "Only carpenters, construction workers, electricians, and other workers who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors."

The guidance also clarifies that work away from the employer's premises does not necessarily support Independent Contractor classification, since that work can still be integral to the employer's business.

## What Should Employers Do?

The issuance of this guidance is an excellent reminder for employers to work with their employment law counsel to evaluate whether they are properly classifying any worker who is treated as an Independent Contractor.

**The Law Offices of Alex W. Craigie** helps Central and Southern California employers prevent, address and resolve employment disputes in a logical and cost-effective manner. Reach us at (323) 652-9451, (805) 845-1752 or at [Alex@CraigieLawfirm.com](mailto:Alex@CraigieLawfirm.com).

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