CLIENT ALERT: U.S. Department of Labor Issues New Formal Guidance on Independent Contractor Classification under the Fair Labor Standards Act

On July 15, 2015, the U.S. Department of Labor issued new formal guidance on independent contractor classification under the Fair Labor Standards Act of 1938 (the "FLSA"). *See Administrator's Interpretation No. 2015-1.* The guidance reflects the Department's priority to sharply reduce the use of independent contractors in the workplaces around the country. The DOL will continue to use its so-called "economic realities test" to determine whether a worker can be characterized as an outside contractor or must be treated as an employee covered by the FLSA. However, the Department's new interpretation is expected to include an increased number of workers within the ambit of federal overtime and minimum wage regulations.

Massachusetts employers should anticipate little practical effect as they are already required to conform to the nation's strictest state independent contractor law. Massachusetts' strict three part test requires a worker to be classified as an employee, unless the worker is free from direction or control, the service is performed outside the usual course of business of the employer, and the worker has an independently established business, trade or occupation that provides a service similar to that provided to the putative employer. M.G.L.ch. 149, § 148B. Nevertheless, the federal labor department's new guidance is expected to affect a large number of businesses that engage contractors outside of Massachusetts.

Drawing on the history of the so-called "suffer or permit" standard for defining employees, the Department has adjusted its longstanding definition of employment that was designed to ensure as broad of a scope of statutory coverage as possible. The nature and degree of the employer's control over a worker's activities is but one factor of the economic realities test, and should not play an oversized role according to the Department. Further, a worker must have meaningful and actual control over the work being performed, with particular consideration given to the fact that technological advances and enhanced monitoring mechanisms may encourage companies to maintain

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stringent control over aspects of the workers' jobs without significant interference with their work activities.

The Department sought equally broad definitions for the remaining factors of the economic realities test: (a) even if the work is just one component of the business and/or is performed by hundreds or thousands of workers, it still may be an integral part of the employer's business; (b) accordingly, it is important not to overlook whether there is an opportunity for loss, and the opportunity for profit must be more than that which is analogous to an employee's ability to take on overtime work or produce more pieces; (c) the worker's investment should be measured beyond tools and equipment necessary to perform the specific work for the employer, and the employer's investment should take into account beyond the funds apportioned to the particular job under evaluation; (d) the proper evaluation is not whether a job requires specialized skill, but rather the extent to which the skills are used in an independent way; and, (e) permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, but where the employment term is defined, courts should evaluate whether the alleged employees worked for the entire operative period of the business.

Companies that have engaged independent contractors should continue to exercise care to ensure that they can overcome the strong presumption of employee status under the new standard set by the labor department. Questions about proper employee classification can be directed to Morgan, Brown & Joy.

The Administrator's Interpretation is available at: http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm

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