On July 15, 2015, the U.S. Department of Labor (DOL) issued guidance on determining whether a worker is an independent contractor in the form of an "Administrator's Interpretation." Describing independent contractor misclassification as resulting in an "uneven playing field for employers" and as a "means to cut costs and avoid compliance with labor laws" for other employers, it is no surprise that the DOL's Administrator's Interpretation No. 2015-1 adopts perhaps the most expansive definition of "employee" possible. Specifically, the DOL outlines that the economic realities test governs the determination of independent contractor status.

This is not a new position taken by the DOL, but it is the first time that the DOL has repackaged its analysis in the form of an Administrator's Interpretation. This is also the first Administrator's Interpretation issued by David Weil, who became the DOL's Wage and Hour Division Administrator on May 5, 2014 and is an outspoken critic of independent contractor agreements, franchising agreements, outsourcing and other business arrangements that he contends create a "fissured workplace."

The economic realities test is guided by six separate factors, including whether:

1. the work performed is an integral part of the employer's business;
2. the worker's managerial skill affects the worker's opportunity for profit or loss;
3. the worker is retained on a permanent or indefinite basis;
4. the worker's investment is relatively minor as compared to the employer's investment;
5. the worker exercises business skills, judgment, and initiative in the work performed; and
6. the worker has control over meaningful aspects of the work performed.

While all of these factors must be considered when making this determination and the Interpretation discusses each one in detail, the DOL finds some of these factors more compelling than others, including, for example, whether the contractor is performing work that is integral to the business. The DOL's ultimate inquiry is whether the worker is "economically dependent on the employer or truly in business for him or herself." This is the standard that the DOL often has referenced in its court filings in recent years.

Importantly, while the DOL promotes this economic realities test, it repeatedly emphasizes that this determination, overall, must be guided by the expansive "suffer or permit to work" standard governing coverage under the Fair Labor Standards Act.
Generally, as the DOL explicitly recognizes in the interpretation, the “suffer or permit to work” standard ensures the broadest scope of statutory coverage possible.

Employers using independent contractors for construction, housekeeping, in-home care, and trucking services in particular should be especially cautioned, as the Labor Department has recognized those industries as common culprits of misclassification.

Importantly, the DOL’s use of the economic realities test is not limited to determining coverage under the FLSA. The DOL also applies this analysis in determining employment or independent contractor status under the Migrant and Seasonal Agricultural Worker Protection Act and the Family and Medical Leave Act.

This interpretation comes on the heels of several formal information-sharing agreements between the DOL and various states (including Wisconsin, Florida, and Alabama), as well as the Internal Revenue Service, whereby the agencies agree to share information on misclassification. It also follows the DOL’s September 15, 2014 award of $102 million to 19 different states to implement and improve misclassification detection and enforcement in unemployment insurance programs.

While the extent of deference afforded to this interpretation by federal courts remains to be seen, there is no doubt that independent contractor relationships are under fire, and now is the time to closely review any independent contractor relationships you may have. This scrutiny must necessarily include review and revision of any applicable independent contractor agreements and, more importantly, actual practice with contractors, which would be the overriding consideration in audits or litigation. If the factors weigh against independent contractor status, employers should take appropriate steps such as enhancing the independent contractor model, arbitration agreements with class action waivers, or reclassification. The potential liability associated with a misclassification finding is too significant not to.