Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

A Trifecta of Wage and Hour Developments: A Mixed Bag for Employers

Given three critical recent developments in the area of wage and hour law, employers are well-advised to examine their wage and hour practices to ensure compliance and stay tuned for updates. An employer's violation of wage and hour law, even if inadvertent, can be extremely costly.

Misclassification of Workers as Independent Contractors

The U.S. Department of Labor ("DOL") issued an Interpretation on July 15, 2015 addressing the frequent misclassification of workers as independent contractors. *See Administrator's Interpretation 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (the "Interpretation"). While not a departure from the DOL's prior position, the Interpretation concludes that "most workers are employees under the Fair Labor Standards Act's ("FLSA") broad definitions."

Specifically, the Interpretation does not alter the multi-factor "economic realities" test that most courts currently apply in determining whether a worker is an independent contractor, which focuses on whether the worker is economically dependent on the employer's business or in business for him or herself. The Interpretation advises that each factor of the economic realities test must be applied consistently with the broad definition of

Aug
2015

"employ" set forth in the FLSA. The definition of employ under the FLSA is "suffer or permit to work" by the employer.

The economic realities test generally includes the following factors:

» **The extent to which work performed is an integral part of the employer's business –** The DOL stated that if the work performed by a worker is integral to the business, it is more likely that the worker is economically dependent on the employer. Work can be integral to the business even if it is performed away from the employer's premises, at the worker's home, or on the premises of the employer's premises.

» **The worker's opportunity for profit or loss depending on his or her managerial skill –** The DOL stated that the focus is whether the worker's managerial skill can affect his or her opportunity for profit or loss, contrasted with working more hours which does little to separate an employee from an independent contractor.

» **The extent of the relative investments of the employer and the worker –** The DOL stated that the worker should make some investment in order to indicate that he or she is in an independent business, such as furthering the business' opportunity to expand, reduce its cost structure, or extend the reach of the business' market. On the other hand, investing in tools and equipment is not necessarily a business investment indicative of independent contractor status.

» **Whether the work performed requires special skills and initiative –** The DOL stated that a worker's business skills, judgment and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent.

» **The permanency of the relationship –** The DOL stated that a worker who is truly in business for him or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness.

» **The degree of control exercised or retained by the employer –** The DOL stated that the worker must control the meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her business. The DOL emphasized that this control factor should not be given undue weight.

The Interpretation emphasized that no single factor is determinative and that the goal is to determine whether the worker is economically dependent on the employer (and thus

its employee) or whether the worker is truly in business for him or herself (and thus an independent contractor).

Given the DOL's conclusion that most workers are in fact "employees," employers who engage independent contractors should re-evaluate those relationships and conduct an in depth factual analysis of the applicable factors. It is important to note that the existence of a written independent contractor agreement is not dispositive of such status, but merely should be viewed as evidence of the parties' intent to establish such a relationship. It is also important to note that the definitions of employee may vary under state law as well, and the applicable tests are likewise evolving under state law.

The Second Circuit Rejects the DOL Test for Determining Status as an Unpaid Intern

The DOL has long espoused a 6-factor test to determine proper status as an unpaid intern. The United States Court of Appeals for the Second Circuit, which includes New York, called the DOL's test "too rigid" and adopted a more flexible "primary beneficiary" test in two decisions decided under the FLSA and the New York Labor Law. *Glatt et al. v. Fox Searchlight Pictures, Inc. et al*., Nos. 13-4478-cv and 13-4481-cv (2d Cir. 2015) and *Wang et al. v. The Hearst Corp*., No. 13-4480-cv (2d Cir. 2015)(summary order).

The DOL's test, set forth in informal guidance, lists the following six criteria for determining when an internship may be unpaid:

- The internship is similar to the training that would be given in an educational environment;
- The internship experience is for the intern's benefit;
- The intern does not displace regular employees but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the intern's activities;
- The intern is not entitled to a job when the internship ends; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Instead of requiring that all six factors be present to establish that the intern is not an employee, the district court balanced the factors and determined that the these

individuals were misclassified as unpaid interns. On appeal, Fox Searchlight urged the court to adopt a more nuanced "primary beneficiary test" under which there is no employment relationship created if the intangible benefits the intern receives are greater than the intern's contribution to the employer's operation. The court of appeals agreed with Fox Searchlight, adopting a more flexible test which focuses on what the intern receives in exchange for his or her work. The court set forth a non-exhaustive list of factors to consider, including:

- The extent to which the intern and employer clearly understand that there is no expectation of compensation;
- The extent to which the internship provides training similar to that which would be given in an educational environment;
- The extent to which the internship is tied to the intern's formal education program;
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
- The extent to which the intern's work complements, rather than displaces, the work of paid employees; and
- The extent to which the intern and the employer understand that the internship is without entitlement to a paid job at the conclusion.

Accordingly, employers within the Second Circuit, including New York, now have more flexibility in determining whether an intern is correctly deemed to be unpaid, which is timely given the summer season.

DOL Proposed Rule to Amend Overtime Regulations Would Significantly Narrow the "White Collar Exemptions"

In a third critical wage and hour development this month, which is not yet in effect, the DOL proposed a rule which would greatly increase the number of employees eligible to receive overtime under the FLSA. The proposed changes would more than double the minimum salary threshold which is currently required in order to satisfy the DOL's white collar exemptions.

Specifically, under current federal law, the FLSA provides an exemption from the overtime requirements for employees who are paid on salary basis and earn a certain weekly minimum salary, provided they meet one of the applicable "duties" tests, which include the executive, administrative, professional, outside sales and computer employee exemptions. There is also an exemption for highly compensated employees who earn at least $100,000 per year.

The current weekly minimum salary is $455 per week under federal law, equivalent to $23,660 per year. It is important to note that this weekly minimum salary is higher under certain state laws, including New York. The proposed rule would increase the minimum salary to $970 per week, or $50,440 per year and the highly compensated employee threshold to $122,000 annually. The DOL estimates that as many as 5 million new employees would be eligible for overtime under the new rule.

At this time, the DOL has invited interested parties to submit written comments to the proposal over the next two months. This is certain to be a hotly contested area. We will continue to update you on developments, which will affect all employers.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor; Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Jill Turner Lever, Esq.
Client Alert Author; Of Counsel, Employment and Labor Practice Group
jlever@sillscummis.com | (973) 643-5691