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Attorneys React To DOL Misclassification Guidance

Law360, New York (July 15, 2015, 9:18 PM ET) -- On Wednesday, the U.S. Department of Labor issued guidance on how to determine whether a worker is an independent contractor or an employee under the Fair Labor Standards Act. The misclassification guidance says most workers qualify as "employees" under the FLSA's expansive definitions. Here, attorneys tell Law360 why the guidance is significant.

Richard Alfred, Seyfarth Shaw LLP
"The Administrator's Interpretation does not announce a new test for employee, as opposed to independent contractor, status. Rather, it grafts the multifactor 'economic realities' test that courts commonly use onto an extremely expansive reading of the FLSA's 'suffer or permit to work' definition of 'employ.' In so doing, the administrator's analysis and examples further the Wage and Hour Division's recent efforts to investigate the use of independent contractors. Combined, WHD's efforts indicate a significant hostility towards the use of independent contractors. The result that the administrator seeks is to severely restrict the use of independent contractors and to require businesses to reclassify those workers as employees subject to the minimum wage and overtime requirements of the FLSA as well as to other federal and state laws applicable to the employment relationship. Ultimately, the AI is consistent with the DOL's stated intent to aggressively challenge independent contractor classifications. The guidance now makes it likely that DOL investigations and enforcement actions and private litigation contesting the classification of such workers will intensify."

Tawny Alvarez, Verrill Dana LLP
"[The] Administrative Interpretation serves as the DOL's interpretation of the standard used to interpret whether an individual is properly categorized as an independent contractor. The Interpretation is neither a rule, nor a policy statement, but instead sets forth the DOL's broad interpretation of what 'suffer or permit to work' under the FLSA means. The interpretation provides that when using the 'economic reality test' to determine whether an individual is an employee, the ultimate question under the FLSA is 'whether the worker is economically dependent on the employer or truly in business for him or herself.'"

William H. Andrews, GrayRobinson PA
"If the DOL prediction is true that most independent contractors should be considered employees, it will have a dramatic effect on employers who utilize independent contractors, found to be employees, including compliance with the FLSA (record keeping, child labor, minimum wage and overtime), unemployment compensation and workers' compensation considerations, tax withholding and Social Security payments, inclusion in a company's group health insurance plan, and contributions to an ERISA-covered retirement plan. If the FLSA's broader definition of employees is adopted by other governmental agencies, it could mean that these workers are also covered by the various employment discrimination laws and FMLA. Also for employers who have unions, they may be covered under the employers' collective bargaining agreement."

Rodney L. Bean, Steptoe & Johnson PLLC
"I don't see this guidance as the death knell for independent contractor status as we have known it, because I think it died a while ago. This is just the official pronouncement. When President Obama appointed a professor who had just written a book about the evils of corporate outsourcing of work to lead

the Wage and Hour Division, it was pretty clear that we were all going to have to learn a new framework. We've been advising employers for a long time that what they've traditionally considered an 'independent contractor' might no longer qualify. It is clear now that, as the DOL sees it, almost nobody will qualify."

Robert Boonin, Dykema Gossett PLLC
"It's no secret that the DOL is skeptical of independent contractors. ... These new guidelines reflect the DOL's overall scheme to administratively expand the FLSA's coverage. Many contractors are legitimately independent, and many insist on being classified as contractors. If employers were to treat some contractors as employees, employers would structure their pay so that they'd be exempt. Now, employers and contractors alike worry that the DOL will presume contractors are misclassified and thereby unduly trigger disputes or organizational changes despite business needs and legal rights."

Jeremy M. Brenner, Armstrong Teasdale LLP
"Taken together, the two recent DOL actions make the DOL's true intentions abundantly clear: to sweep more American workers under the umbrella of the FLSA, and in turn, have more of those covered employees earning overtime compensation (or significantly higher salaries)."

Mark E. Brossman, Schulte Roth & Zabel LLP
"The legal standards for determining if a worker is an employee or independent contractor have existed for decades. The law has always favored treating most workers as employees — albeit temporary, part-time or seasonal. If the employer tells a worker when to work and what to do, most likely they are an employee. A true independent contractor is the person you hire to paint your house: You don't know when they will show up, when they will finish, and they bring their own paintbrushes and supplies. The DOL's new guidance just highlights the simple fact that it is very difficult to be a true independent contractor."

David Buchsbaum, Fisher & Phillips LLP
"DOL's Administrator's Interpretation on independent contractors is significant because it clearly signals the agency's position that 'most workers are employees under the FLSA.' DOL interprets each of the six factors analyzed by courts in a way designed to minimize the prospects for a finding that a worker is an independent contractor. As a result, in the context of an agency investigation, employers are going to be hard-pressed to show that a worker is an independent contractor in all but the most clear-cut situations. Moreover, courts might well embrace DOL's views in FLSA lawsuits."

Koray Bulut, Greenberg Traurig LLP
"If there were a statutory basis for invoking the 'economic realities' test to determine whether a worker is an independent contractor or an employee covered by the FLSA and FMLA, the administrator would not have needed fifteen single-spaced pages to justify his conclusion. It appears that the DOL, emboldened by its Supreme Court victory in Perez v. Mortgage Bankers Association, has engaged in the rulemaking under the guise of 'interpretative guidance' without meeting the notice-and-comment requirements of the Administrative Procedure Act. Because such interpretations are afforded deference by the courts, this skirting of rulemaking requirements raises exactly the concern expressed by the concurring opinions in Perez and is likely to be challenged."

Keith Covington, Bradley Arant Boult Cummings LLP
"The DOL's guidance makes clear that, in determining whether an employer's workers have been properly classified as employees or independent contractors for purposes of the Fair Labor Standards Act, the DOL will apply an expansive 'economic realities' test in which the relevant inquiry is whether the workers are economically dependent on the employer or truly in business for themselves. By specifically noting that this 'economic realities' test provides a 'broader scope of employment' than the common law 'control' test and by rejecting a more mechanical approach that gives 'undue weight' to any one test factor, the DOL has reaffirmed its intention to pursue an aggressive agenda on the issue of worker misclassification and has signaled — not so subtly — that employers need to rethink whether their workers are being classified correctly."

Paul DeCamp, Jackson Lewis PC
"Honestly, this Administrator's Interpretation is just silly. It simply restates what a bunch of cases already say, cobbling together choice quotes from courts that ruled in favor of the workers, while ignoring the many decisions that reject misclassification claims. Except for a few minor overstatements, the guidance makes no contribution to the legal framework. It says nothing that wasn't already perfectly clear from the case law, and it provides no help to workers or businesses in figuring out whether in any actual, specific situation a worker is an employee or an independent contractor, at least in any nonobvious case."

Susan Eisenberg, Akerman LLP
"The Department of Labor emphasized that the analysis of whether a worker is an employee or independent contractor must be guided by the overarching principle that the scope of employment is extraordinarily broad under the FLSA. The significance here is that the DOL will lean more towards finding that independent contractors are misclassified. The DOL also confirms that the 'economic realities' test is the proper test under the FLSA, however, courts have often merged this analysis into the 'degree of control' test used by other agencies including the IRS. The overall significance is that the DOL has teased out the requirements of the economic realities test in such a manner as to make it very difficult to properly classify workers as independent contractors. The DOL's position that the factors of the test should be applied in an outcome determinative manner leaves businesses with great uncertainty and open to increased litigation and enforcement initiatives with inconsistent results. Employers are well advised to review the status of all independent contractors under this more restrictive analysis."

Steve Ensor, Alston & Bird LLP
"The interpretation makes clear that the DOL will consider six factors in assessing a worker's status. No single factor is dispositive of the issue and each one should be considered in determining 'whether the worker is economically dependent on the employer or truly is in business for him or herself.' There are a number of these factors over which a company has very little control, while there are other factors over which companies have a lot of control."

Kirsten Eriksson, Miles & Stockbridge PC
"The DOL's Administrator Interpretation letter is the latest weapon in the DOL's efforts to 'crack down' on misclassification of employees as independent contractors. The letter is significant not for its substance, but more for what it may signify. The letter merely recites the position the DOL has taken for years that the 'economic realities' test used under the FLSA is broader than the common law standard (used, for example, by the IRS) and is meant to encompass most workers. This is only the fifth Administrator Interpretation in the past five years, and may therefore signal increased activity from the DOL."

Adam Forman, Miller Canfield Paddock & Stone PLC
"The staffing industry certainly should consider the guidance, because it is an industry particularly susceptible to 'joint employer' obligations, not just under the FLSA, but other workplace statutes as well. As the DOL points out, consequences of a misclassification determination include employer liability for minimum wage, overtime compensation, employment withholding taxes, unemployment insurance and workers' compensation. In addition, however, a misclassification determination could lead to other significant 'joint employer' consequences, including an obligation to provide health insurance coverage under the ACA and exposure to liability under statutes such as Title VII, ADEA, ADA and FMLA."

Kurt Franklin, Hanson Bridgett LLP
"Unfortunately, companies sometimes receive bad information on misclassification risk from temporary agencies, professional employer organizations and others. The basic question is whether the worker is 'really' in business for him or herself? Similarly, is the worker really an 'owner,' 'partner' or 'member of a limited liability company?' The DOL, IRS and state workforce agencies have been interested in misclassification for some time, as have the plaintiff-side employment bar. The courts tend to take a broad definition of employee. Last month in California, a California Department of Labor administrative law judge came down hard on the 'gig economy' with Uber drivers, finding them to be employees. And while not new, the employer misclassification is a multifaceted problem. If an employer 'misses' in this area, it's

a domino of bad consequences, ranging from failure to withhold taxes, failing to complete employer-mandated immigration forms, failure to pay workers compensation and other benefits, failures related to unemployment insurance, failing to count workers toward leave head counts, failing to pay overtime, failing to provide meal and rest breaks, failing to insure them for losses for work completed at the company's behest, failing to reimburse for business expenses, etc. The relationship between the worker and business should be regularly monitored for potential material changes. The basics haven't changed: How much freedom does the worker have over how to complete the project? Is the work integral to the business? Is the worker permitted to have other clients, and does he or she have other clients? Is there opportunity for profit or loss? Does the work require managerial skill? Does the worker have necessary business licenses and insurance? Does the worker have unique and special skills? What is the permanency of the relationship? Does the worker bring his or her own tools and equipment to complete the job? Does the worker set his or her own schedule?"

Rachel Geman, Lieff Cabraser Heimann & Bernstein LLP
"The Administrator's Interpretation is an important reminder that the law and regulators expect that workers will be classified as employees. Too often this is reversed, with many employers and industries starting from the presumption that they have as few acknowledged employees as possible — even for workers who earn relatively little. That is not the law. Consistent with its purpose, much of the interpretation clarifies existing law, but in so doing it provides guidance to address many of the common employer defenses, such as work location, the meaning of 'opportunity for loss,' worker investments, and — notably — the relevance of the 'control' factor. This is welcome language from the Department of Labor on this hugely important issue of the use and misuse of the independent contractor designation. It is also consistent with recent decisions involving Uber and other companies showing that employers who misclassify workers face steep consequences."

Keith Gutstein, Kaufman Dolowich & Voluck
"The Administrator's Interpretation issued by the Department of Labor emphasizes that the economic realities test is to be used when determining whether a worker is an employee or an independent contractor. According to the interpretation, the Supreme Court and circuit courts of appeals have applied the multifactor test when presented with this issue. While the test discussed in the interpretation is not new, the conclusion, which states that under the FLSA, 'most workers are employees,' is what is most glaring. It is this conclusion that will likely have the biggest impact on current and future Department of Labor investigations."

Jennifer G. Hall, Baker Donelson Bearman Caldwell & Berkowitz PC
"The DOL will bring cases with the goal of having courts recognize the Administrator's Interpretation as controlling law. As such, we will see additional DOL investigations and enforcement actions. Couple that with the recent proposed rulemaking to expand overtime, and it is clear that the agency intends to have workers classified as employees, eligible for both minimum wage and overtime protections. Accordingly, it is imperative that employers are correctly classifying employees, correctly paying employees, and correctly maintaining timekeeping and payroll records. Now is the time for employers to right the ship — engage legal counsel to conduct FLSA audits and take corrective action as needed."

James R. Hammerschmidt, Paley Rothman
"The substance of the DOL's memorandum is nothing new. The most significant aspect of the DOL guidance is the fact of its issuance. I view the timing of the issuance of the DOL's guidance immediately on the heels of the DOL's issuance of the proposed changes to the FLSA overtime rules just two weeks ago to be a clear and coordinated message to the nation's employers that its enforcement objective is to sweep as many workers as possible under the umbrella of the FLSA. President Obama provided the DOL with a clear mandate, and the agency is flexing its muscle; it's putting employers on notice that it is coming after them because it believes 'most workers are employees under the FLSA's broad definition.' Employers that use an independent contractor business model must examine those relationships very closely or risk significant liability."

Kevin Hishta, Ogletree Deakins Nash Smoak & Stewart PC
"This guidance comes as no surprise. Independent contractor misclassification has been an enforcement priority of the current administration, and the DOL has adopted perhaps the most expansive definition of 'employee' possible. Any company utilizing independent contractors is well advised to have the relationship closely examined and weigh the pros and cons of maintaining the relationship very carefully. This guidance will receive a tremendous amount of publicity, and legal challenges will undoubtedly increase substantially along with potential liabilities."

Carrie Hoffman, Gardere Wynne Sewell LLP
"The DOL's Administrator Interpretation 2015-1 follows President Obama's pronouncement in 2011 that the IRS would add personnel to audit the issue of misclassification of workers and therefore the loss of tax revenue associated with that classification. The Department of Labor's interpretation synthesizes the already-existing law into a guidebook for contractors and plaintiffs attorneys alike — that an individual is an employee when they are economically dependent on the entity. Not surprisingly, the department's view is that most workers are employees rather than contractors. The implication is far-reaching — both under the Fair Labor Standards Act (requiring minimum wage and overtime), the Affordable Care Act (requiring medical benefits), and the Internal Revenue Code (requiring tax withholdings). Employers should be examining their use of contractors to avoid these potential pitfalls as this Interpretation signals an increase in audits and a likely increase in misclassification litigation."

Eric Holshouser, Buchanan Ingersoll & Rooney PC
"The DOL's July 15 guidance raises a red flag for employers who use independent contractors. Employers should re-evaluate using independent contractors, particularly where the purported independent contractors provide the core service(s) the employer provides; the worker's investment in equipment, offices and personnel is far less than the employer's investment; the worker's revenue permanently or indefinitely comes from one employer; the asserted independent contractor's functions involve little or no managerial activities, like purchasing, bidding, advertising or hiring and managing his/her own employees; and/or the worker's functions do not require any specialized skills or initiative, or the employer closely prescribed how the work is done."

Annette Idalski, Chamberlain Hrdlicka
"The DOL, and in particular, its wage and hour investigators, are not always correct in their analysis of independent contractor status, as we saw in the district court decision in Gate Guard Services v. Thomas Perez and by the Fifth Circuit's affirmation earlier this month. While employers should be mindful of the DOL's guidance, companies should be prepared to challenge the agency and to take an offensive approach to investigations. We have learned over the last five years that while the DOL's primary initiative is to crack down on misclassifications, it has not properly trained investigators to correctly conduct those investigations, gather relevant facts and properly analyze the findings."

Linda Inscoe, Latham & Watkins LLP
"DOL's interpretation was not published following a formal rulemaking process. Therefore, while it may be instructional in considering issues of worker classification, it is nonbinding. The most interesting and novel aspect of the Interpretation is DOL's de-emphasis of some elements of the long-standing economic realities test. DOL de-emphasizes the importance of worker control and technical skills, and suggests that the only time an independent contractor classification is valid is when a worker is economically independent of the employer. That sets a high bar for the classification and, if followed by courts, could limit it to workers who run their own businesses."

John Jansonius, Jackson Walker LLP
"Two aspects of Administrator's Interpretation No. 2015-1 that stand out are increased subjectivity and relativity. The DOL's application of the economic realities test as described in the new interpretive guidance views the worker's investment in a business relative to the company engaging the worker's services. Thus, even a significant investment by the worker in tools, equipment or other capital necessary to perform the work may not weigh in favor of independent contractor status if that investment is minor in

comparison to the investment of the principal necessary for performance of the work. As to the worker's skill and ability as an indicator of independent contractor status, the DOL guidance removes emphasis from performance of the work and places the emphasis on opportunity for profit or loss. Managerial skill relevant to business success appears weighted ahead of technical skill needed to perform the work. The DOL's approach as set out in Interpretation No. 2015-1 puts emphasis on the business judgment and initiative of the worker to determine whether she is genuinely in business for herself. All in all, the guidance from the DOL still leaves a great deal of balancing and subjectivity to analysis of independent contractor status."

Michelle Johnson, Nelson Mullins Riley & Scarborough LLP
"The interpretation does not break new ground with respect to the 'economic realities' test, which has been in effect for many years. One significant question, however, is whether this test will be applied to workers other than traditional 'independent contractors' — such as workers who are designated as owners, partners or members of a limited liability company. In a footnote, the administrator indicates that these titles will not immunize an employer from liability if the economic realities indicate an employment relationship."

Mark D. Katz, Ulmer & Berne LLP
"While the wage and hour administrator's interpretation memo sheds light on the criteria to determine employee v. independent contractor status under the FLSA, employers nonetheless are left with misclassification dilemmas. This is due to the numerous tests under employment, labor and tax laws which can result in inconsistent conclusions. For example, under the federal discrimination laws and ERISA, a common law right to control test is applied, while the IRS utilizes a different right to control test for federal tax determinations. For union organizing issues, the NLRB has a different focus on the relevant factors from that applied by the Department of Labor for wage and hour purposes. Since the FLSA's 'economic realities' test is the broadest test for finding an employment relationship, the safest approach is to follow the FLSA analysis for all purposes. This will enable employers to classify their employees in a consistent manner and be assured that they are not misclassifying their workers as independent contractors."

Michael S. Katzen, Goldberg Segalla
"One of the more striking aspects of the interpretation seems to be the way in which it systematically attacks arguments frequently made by employers when defending independent contractor classifications. For example, the interpretation indicates that a worker's ability to work as much or as little as he/she chooses does not necessarily weigh in favor of independent contractor status. Neither does investing in tools and equipment. The administrator further indicates that control exercised over a worker due to regulatory requirements is still control at the end of the day and indicative of an employment relationship. The interpretation essentially reads like a preemptive strike against potential employer defenses to be used in future misclassification actions before the Department of Labor's Wage and Hour Division."

Deborah Kelly, Dickstein Shapiro LLP
"The DOL's new guidance makes it harder for employers to classify their workers as independent contractors (thereby avoiding FICA, withholding, benefits, etc.) rather than employees, and is likely to spark a new wave of litigation by contractors who allege they've been misclassified. Under the DOL's new guidance, an employee is a worker who is 'economically dependent' on the employer, while an independent contractor 'is really in business for himself or herself' — a standard that is more strict than most courts have applied. Many employers work with contractors who do not fit this definition, so those employers will be an even more inviting target for the plaintiffs' bar."

Jonathan Keselenko, Foley Hoag LLP
"This Administrator's Interpretation is not surprising given the signals the agency has sent about the so-called 'underground economy.' It also doesn't break much new ground. But it should cause employers to realize once again that DOL has set a high bar for establishing that an individual is an independent contractor. Employers need to know that DOL will give no weight to the classification that they and the

worker agree on and will take an independent analysis as to whether an individual is 'economically dependent' on the employer. Coupled with the proposed 'white collar' regulations, employers may need to rethink how they pay and classify individuals."

Adam KohSweeney, O'Melveny & Myers LLP
"The DOL guidance is not a regulation made pursuant to notice and comment rulemaking and only reflects the DOL's enforcement stance. For the most part, the guidance merely collects existing cases and argues for the broadest possible reading of them — in many respects, it is not dissimilar to amicus briefs that the DOL has been known to file. The DOL's attempts to de-emphasize the 'control' test, and emphasize the integral part of the employer's business test, are likely to be a focal point of future litigation."

Todd Lebowitz, BakerHostetler
"The memo provides a script for plaintiffs' lawyers for how to argue misclassification in an FLSA collective action. It cherry-picks the case law that supports the DOL's agenda of ending independent contractor relationships, ignoring the decisions that go the other way. It is true that it is getting harder and harder to support an independent contractor relationship, but the memo tries to stack the deck against companies who may be acting properly."

Scott Liner, Liner LLP
"The DOL regulations are not expected to be finalized and take effect until January 2016 at the earliest. Nonetheless, California employers can consider taking some of the following steps in anticipation of the expected changes: Employers may consider whether it is more feasible to increase wages of those employees currently covered under the applicable exemptions or to change the employees' status to nonexempt. If employees are converted to nonexempt status, employers must ensure that they follow all requirements for nonexempt employees, including tracking of hours, overtime wages are calculated correctly, and ensuring meal and rest periods are provided and taken. Employers may also consider reducing employees' hours to avoid increased overtime costs and/or the hiring of additional workers at lower wages. Employers should also consider auditing the exemption status of all positions, to ensure that employees are currently classified correctly and/or will be at the time the new regulations are finalized."

Patrick Madden, K&L Gates LLP
"The U.S. Department of Labor's Administrative Interpretation 2015-1, issued July 15, 2015, attempts to provide guidance on how to identify 'employees who are misclassified as independent contractors;' however, this is not an objective analysis of the law that provides meaningful guidance for businesses. Although the department discusses the economic realities factors that should be used to determine whether an individual is an employee or independent contractor, that discussion is relatively one-sided and pro-employee, and the department then explains that each factor should be ignored if the factor interferes with the talismanic concepts of worker rights and economic independence. The interpretation thus highlights the department's commitment to fomenting litigation rather than assisting with compliance. The greatest disappointment with Administrative Interpretation 2015-1 is that it resorts to platitudes ('most workers are employees under the FLSA's broad definitions') and fails to directly discuss the most difficult contractor issue: Whose employees are they? The department provides no guidance as to whether workers admittedly employed by Company X can bring claims as employees of other companies to which Company X provides services and also provides no guidance as to the appropriate legal test for conducting such an analysis."

Audrey Mross, Munck Wilson Mandala
"If earlier DOL and IRS partnerships with states, along with recent state laws to combat misclassification, did not get your attention, this should. While the Administrator's Interpretation does not have the force of law, it is the latest in a series of federal and state indicators that employers should enter into independent contractor relationships very carefully. Decades of lax enforcement are yielding to a new reality and, in some places and industries, a legal presumption of employee status. This AI furthers that trend by

concluding that 'most workers are employees under the FLSA' and giving contrasting examples of employee v. contractor scenarios to support that conclusion."

Frank Neuner, Spencer Fane Britt & Browne
"The importance of the DOL's guidance is less about what it says and more about what it signifies. The economic realities test is not new. The DOL already had a fact sheet employing this standard. Rather, the DOL's decision to issue this administrator's interpretation — with its pronouncement that 'most workers are employees under the FLSA' — serves as a stark reminder that misclassification is an enforcement priority for this agency. It also brings more attention to this issue within the workforce. If they haven't already, employers should carefully review their independent contractor relationships."

Jeffrey H. Newhouse, Hirschler Fleischer
"Wage and Hour Division's position that most workers are employees signals the federal government's continued intention to aggressively challenge businesses' classification of workers as independent contractors — even if that requires WHD to announce an overly expansive version of the FLSA's 'economic realities' test. One byproduct of WHD's attempt to transform more independent contractors into employees is almost certain: There will be an increase in private wage and hour litigation as plaintiffs try to capitalize on this new version of the 'economic realities' test."

Cheryl D. Orr, Drinker Biddle & Reath LLP
"The DOL guidance set forth in Administrator's Interpretation No. 2015-1 is significant because it affirmatively and unequivocally takes the position that 'most workers are employees under the FLSA's broad definitions' and takes 15 pages to explicitly define why. The opinion is detailed and cites repeatedly to case law favorable to interpretations that favor a misclassification ruling. While the Supreme Court has taken the position that interpretative rules do not carry the 'force and effect of law,' we can be assured that the DOL and the plaintiffs' bar will rely on this guidance as they continue to step up their enforcement efforts and test independent contractor classifications. While the 'economic realities test' is not new, the emphasis on all of the factors having equal weight, as opposed to the 'control' factor having more can be considered a definitive shift. Practitioners on both the employer and employee sides will need to continue the complicated multilayered analyses of the classification as well as tease out the differences between federal and state interpretations. California, for example, also relies on the 'economic realities test' but the DLSE takes the position that 'in applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed.' Additionally, the emphasis of the DOL on the broad interpretation of 'employment and the "suffer or permit" standard' leaves little doubt that all companies presently using independent contractors should carefully (re)assess their practices to see if they, indeed, are properly classified."

Chris Parlo, Morgan Lewis & Bockius LLP
"Despite the ever-changing and new 'employment' models that exist in 2015, the DOL seeks to apply definitions created over 70 years ago to capture every individual as an employee. Instead of developing guidelines reflecting the diverse arrangements and flexibility that workers today seek, the DOL focuses singularly on the source of the worker's income. That completely ignores that truly independent workers may choose to provide their services to one company before providing services elsewhere. The DOL also seeks to relegate to 'insignificance' important concepts that define independence — such as whether the worker controls his or her own hours, has little or no supervision and decides what tools and equipment to buy or not buy. This 'interpretationi will clearly result in numerous challenges, including as to whether this one-sided pronouncement should be given any deference."

Mark Payne, Rutan & Tucker LLP
"Our firm has been dealing for some time with California efforts to criminalize misclassification, and this Department of Labor interpretation serves to reinforce the risks that exist, at both the state and federal level. Probably everything a company should know in assessing this risk is stated in the DOL's conclusion: 'Most workers are employees under the FLSA's broad definitions.' There is rarely a one-size-

fits-all answer to most questions, and the DOL acknowledges some narrow flexibility, but this interpretation comes pretty close to telling companies, large and small, how the DOL (working with the IRS and some states) will likely classify workers."

Jessica Perry, Orrick Herrington & Sutcliffe LLP
"The DOL guidance doesn't address the real issue — the worker classification scheme is woefully outdated. New Deal-era protections like Social Security, unemployment insurance, and wage-and-hour laws were developed to protect people from the 'hardships of existence' and 'inequality of bargaining power' over working conditions. The modern on-demand/sharing economy business model allows anyone to set up shop for themselves and earn money in a flexible way — which reflects core characteristics of independent contractors and an economic system fundamentally different than that of decades past. While the world has evolved dramatically in recent years, the antiquated classification scheme has not evolved with it."

John P. Quirke, McCarter & English LLP
"This guidance broke no real new ground, yet it speaks volumes. The DOL has put the business community on notice that the default standard will be that workers are employees until the company presents an ironclad case to the contrary. As a practical matter, classification will turn largely on whether the worker has an identifiable, functional business and actively manages operations. Absent that, the person will almost inevitably be considered an employee. As a management-side employment lawyer, I'd advise companies seeking to utilize contractors to ask workers first if they are state-registered as a business. If not, they should probably move on or hire the person as an employee."

Richard Rainey, Womble Carlyle Sandridge & Rice PLLC
"The significance of the Administrator's Interpretation is that it sends a strong signal to the wage and hour investigators at the Department of Labor to aggressively seek out cases where employees have been misclassified as independent contractors and to err on the side of finding employee status. This will also encourage regulators, both state and federal, outside the U.S. Department of Labor to take a similarly aggressive stance. Employers need to be more confident than ever in their classification decisions particularly if they extensively utilize contractors."

Ruth Rauls, Saul Ewing LLP
"The DOL's FLSA misclassification memo makes clear that the agency defines 'employees' broadly. This memo, coupled with the recently released proposed rules increasing the minimum salary threshold for FLSA white collar exemptions, demonstrates the DOL is taking aim at employers' efforts to cut labor costs. This is especially true in the construction, cleaning services and health care industries which the agency highlighted in examples throughout the memo. While the DOL remained focused on the 'economic realities' test, it emphasized that employer control is not determinative. Instead, the agency's primary inquiry is the 'suffer or permit to work' definition in the statute."

Jason E. Reisman, Blank Rome LLP
"If anyone lost focus seeing the DOL's new proposed exemption rules, make no mistake — the DOL is vigorously pursuing misclassification issues. Describing a nationwide epidemic, the DOL claims employers misclassify to skirt the law and cheat their competitors, denying workers a host of benefits and shorting the government of taxes. This guidance is a 'casting call' for more misclassification complaints. It provides a malleable, incredibly broad standard to determine 'employee' status, which preserves DOL discretion in applying it. Under the FLSA, 'employ' means 'to suffer or permit to work.' Once again, however, this effort creates another vehicle whereby employers may suffer for permitting someone to work."

Robert L. Rickman, Kane Russell Coleman & Logan
"The DOL has always taken an expansive view of the term 'employee' and who qualifies for FLSA protection, so this recent interpretation is not a drastic change from its historical position. At the end of the day, it still comes down to how much control and economic independence exists between the individual

and the entity. And while it may create more issues with DOL audits, courts are not obligated to adhere to the DOL's interpretation. Notably, the Second Circuit recently rejected a six-factor test promulgated by the DOL in a closely watched case involving the distinction between unpaid interns and employees."

Ricki Roer, Wilson Elser Moskowitz Edelman & Dicker LLP
"The definition of employment under the FLSA has long been recognized as the broadest of all statutory definitions. The growing trend to utilize an economic realities test or totality of circumstances test not only confirms the de facto elimination of the independent contractor label in all but the most limited circumstances but also poses a direct threat to the now ubiquitous subcontracting, outsourcing and staffing models increasingly being used by corporations throughout the country. While certainly there are some clear misclassifications which the DOL properly seeks to address, the WHD guidance is evidence of an ever-more apparent trend to have our employers fill in the gaps of the diminishing safety net provided by the public sector."

Matthew C. Scarfone, Colodny Fass
"Considering the Department of Labor's guidance on the classification of workers in conjunction with its recent proposal to essentially double the 'salary basis test,' it seems the department's goal is to broaden the scope of the FLSA immensely."

Matthew T. Scully, Burr & Forman LLP
"The opening in the Department of Labor's 'interpretative' rule says it all: 'Most workers are employees under the FLSA.' While the DOL has repackaged various 'independent contractor' factors, the real takeaway is that workers are now more likely to be classified as 'employees.' The rule does not have the 'force and effect of law,' but it is the agency's position and courts are generally deferential. Employers that ignore the rule do so at their own peril. What should an employer do? Audit independent contractor positions. Misclassification actions can be costly and time consuming."

Leslie Selig Byrd, Bracewell & Giuliani LLP
"To place today's guidance in perspective, the DOL has targeted independent contractor/misclassification issues for a number of years. In December 2011, the DOL published its one-page DOL Misclassification Initiative on its website describing misclassification issues as one of the 'most serious problems facing affected workers.' The DOL administrator's guidance issued today is a 16-page summary of the current case law, analyzing in detail each of the six factors in the routinely applied economic realities test, and providing practical examples of each factor. While the guidance is just that — a summary of existing law — and not a change in the statute, regulations or the DOL's position or interpretation of the law, certainly the DOL's issuance of such a detailed guidance is a signal to employers of the likelihood of an even greater enforcement effort on the part of the DOL. The DOL and courts have long utilized the six-factor economic realities test in interpreting the FLSA, and have long emphasized that no one factor is determinative. The guidance offers nothing new in this respect. However The DOL administrator's final comment in this guidance is illustrative of the administration's emphasis on the importance of proper classification. Administrator Weil concludes that the correct classification is important 'particularly when misclassification occurs in industries employing low wage workers.' Less than two weeks after the DOL's notice of proposed rulemaking proposing to more than double the exempt salary threshold, the DOL's guidance is yet another demonstration of this administration's focus and priorities, and the DOL's reinvigorated emphasis on enforcement."

Adam Sencenbaugh, Haynes and Boone LLP
"Technological innovation allows companies to exert ever greater control over their workers while simultaneously giving them the flexibility traditionally associated with independent contractors. Especially when these workers perform the integral tasks of the business, the DOL believes they are likely employees but often misclassified as independent contractors. Today's guidance signals that the department intends to fight misclassification by looking past superficial freedoms to focus on whether the worker is really in business for themselves."

Mark A. Shank, Gruber Hurst Elrod Johansen Hail Shank LLP
"In its new guidance on what constitutes an independent contractor, the Wage and Hour Division is placing a renewed focus and emphasis on the issue of employee misclassification. It's increasingly clear that the stakes are high, and a company can no longer take a 'business as usual' stance in establishing an independent contractor relationship. Businesses need to study the guidance and make certain that any service provider meets the definition of an independent business, and be sure that the relationship is properly documented and monitored. Failure to do so creates great risk, particularly in this environment of heightened scrutiny."

Lara Shortz, Michelman & Robinson LLP
"The DOL's latest crackdown on the digital economy has gone too far. The agency's memo providing new guidance on the FLSA states that 'most workers are employees under the FLSA's broad definitions.' Essentially, the DOL is saying that independent contractors are a rare category of workers and cannot include individuals who are an integral part of an employer's business. Though directed toward companies like Uber, these new guidelines have the ability to necessitate costly restructuring to the detriment of many industry sectors, including hospitality and construction, that have successfully relied heavily on the independent contractor model for decades."

Peter D. Stergios, McCarter & English LLP
"Companies and their counsel, particularly in New York, should beware of blindly following DOL's guidance as to what factors necessarily determine independent contractor status. The Second Circuit, in a recent case of first impression, Eric Glatt et aux v. Fox Searchlight Pictures, rejected DOL's rigid six-pronged test to determine intern status, finding that the issue turns more on who is the primary beneficiary of the relationship. Hence, DOL's administrative determination as to contractor status, which relied on six 'economic reality' factors, may also be subject to similar criticism, and until it is fully litigated, it should be analyzed carefully as a guide, not a command."

Brett A. Strand, Hinshaw & Culberston LLP
"The new guidance is significant not because of what it says, but rather because of what it represents: DOL's aggressive new approach to misclassification cases. In other words, there is nothing doctrinally groundbreaking here — no new tests, rules or standards. Instead, what we have is a full-throated endorsement of the most aggressive possible application of current law, no doubt in response to Uber and its ilk. (The guidance reminds readers no less than fifteen times of the FLSA's 'very broad' definition of 'employee.') The lesson for employers is to review (and re-review) all employee classifications decisions now, before DOL comes knocking."

Mark D. Temple, Reed Smith LLP
"The DOL is trying to turn up the heat on employers and whether their classification of individuals as independent contractors instead of employees is lawful. Part of this push is undoubtedly caused by governmental pressure to collect more taxes. The DOL will be closely examining whether an individual is economically dependent on a company in the determination of whether that person is truly an independent contractor or an employee, proclaiming that most workers are employees, as opposed to independent contractors. This guidance is likely to fuel the fire of many employees and employee-side lawyers on the lookout for wage-hour violations committed by employers. It may be a good time for companies to have their wage-hour practices and job classifications analyzed for full legal compliance."

Michael D. Thompson, Epstein Becker Green
"The FLSA is often criticized as outdated, Depression-era legislation. The DOL is trying to define how the statute should be applied to the modern workplace with regard to issues such as flexible work arrangements and relationships of finite duration, among others. From the DOL's perspective, contractors have independently established businesses with several sources of income that can bargain with companies as equals. The more a relationship looks like that, the more likely it is that the DOL will find an independent contractor relationship. Accordingly, employers should evaluate the extent to which they are relying on criteria that was minimized by the administrator as justification for classifying workers as

independent contractors, as opposed to looking to the economic independence of those workers."

Teresa R. Tracy, Freeman Freeman & Smiley
"This interpretation is likely to trigger a host of individual, class and representative actions by workers — not only those who are intentionally misclassified by employers seeking to reduce labor costs, but also by workers who were initially pleased with the advantages of independent contractor status but who have become disenchanted with the vagaries of being in business for oneself. Employers should take a close look at workers who are classified as independent contractors and balance the risk of continuing that classification with the possibility of expensive litigation and related back pay, tax and other payroll-driven obligations, penalties and attorneys' fees."

Xinying Valerian, Sanford Heisler Kimpel LLP
"The DOL's new guidance is significant in two main ways. One, it provides more clarity on the meaning of the long-established 'economic realities' test for determining whether a worker is an independent contractor or employee. The DOL has clarified that in its view, 'economic dependence' is the touchstone question. Two, the DOL's interpretive guidance makes it much easier to apply the well-established FLSA standards to newer work arrangements enabled by technology. We're seeing cases like the Uber misclassification case in California challenge the technology-enabled 'independent contractor' arrangements. We should be seeing more of these cases under the FLSA."

Eric J. Wallach, DLA Piper
"Given the DOL's recent positions in enforcement actions, as amicus, and elsewhere, the expansive reach of FLSA coverage set forth in Administrator Weil's interpretation is unsurprising. The unfortunate impact of this guidance will be to discourage employers from engaging independent contractors to provide services in appropriate circumstances, and eviscerate the rights of those individuals who are in business for themselves and wish to maintain their independence. We note, however, that DOL guidance does not have the force of case law, and it will ultimately be for the courts to decide these classification issues."

Steven J. Whitehead, Taylor English Duma LLP
"The Department of Labor's guidance regarding the proper classification of workers as independent contractors combines the FLSA's 'suffer and permit' definition of the word 'employ' with the 'economic realities test' used by courts to evaluate employment status. The guidance is heavily reliant on self-serving case-law analysis and barely mentions the existence of contrary law. The administrator's guidance does not have the same force as would a regulation that has gone through the comment process (like the proposed rules changing the overtime exemptions) but the DOL's interpretation of the FLSA is likely to be given some level of deference by courts. This announcement, coming on the heels of the DOL's proposed rules altering the test for determining overtime exemption, makes it clear that DOL will be more active and aggressive in investigating worker misclassification claims. Employers should closely evaluate the status of every individual who is performing work for the company and ensure that those employees are properly classified."

Bradford J. Williams, Holland & Hart LLP
"The Administrator's Interpretation will likely be ill-received by courts. The Wage and Hour Division enjoys no particular competence in interpreting case law — as opposed to ambiguous statutes, or the DOL's own regulations — so the division's purported distillation of nationwide standards under the 'economic realities' test will be entitled to deference only — at most — to the extent it persuades. However, the division's cherry-picking of favorable cases construing particular factors, and its effective attempt to read the 'control' factor out of the test altogether, will likely discourage courts more than it persuades. Indeed, the division's invocation of dubious policy rationales to explain how certain factors should be construed — e.g., that individuals who are 'truly' in business for themselves will automatically eschew indefinite relationships with particular putative employers — is more the stuff of unpersuasive social scientific speculation than reasoned administrative rulemaking."

Richard S. Zackin, Gibbons PC
“The guidance makes clear that, when deciding whether someone has been misclassified as an independent contractor, the overriding issue for the DOL will be whether the individual is in business for himself. Individuals who exercise managerial initiative that affects their profit or loss in an ongoing business and who make a significant investment in that business will likely be considered independent contractors. However, if the work performed is integral to the employer’s business, most likely the DOL will find an employer-employee relationship. Although the employer’s 'control of the work' remains a factor to consider, the guidance appears to downplay its importance.”

Rachel Ziolkowski Ullrich, Ford & Harrison LLP
“With its latest guidance, the DOL has placed 'economics' front and center in the independent contractor versus employee debate. Employers must look at their independent contractors and ask whether, considering the economic realities test, these workers are truly in business for themselves or are they economically dependent on the employer’s business? Given the DOL’s sweeping statement that 'most workers are employees under the FLSA’s broad definition,' the economic reality for many employers may be that their independent contractors will now be considered their employees.”

Joshua Zuckerberg, Pryor Cashman LLP
"This guidance is consistent with the DOL’s long-held view that employers generally misclassify employees as independent contractors in an effort to avoid paying taxes, overtime, and extending other statutory protections. Moreover, the DOL has consistently argued that a true independent contractor is one who controls his/her own schedule, tools, and the means by which the job is accomplished, taking very little instruction from the client. Many employers still wrongly believe that they can simply agree with an individual to classify the relationship as an independent contractor relationship, and that will make it so. The DOL’s guidance here is a reminder that such an agreement will not be honored by the agency, nor by the courts. I don’t see this so much as a new development, as much as a reminder of the DOL’s abiding commitment to an expansive definition of employee, which extends statutory protections to as many individuals as possible. Employers who ignore this reminder do so at their peril."

--Editing by Mark Lebetkin.