



Department of Labor issues guidance on the misclassification of independent contractors

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In response to what the Department of Labor (DOL) says is the increased misclassification of employees as independent contractors, it has issued an interpretation of how the Fair Labor Standards Act's (FLSA) definition of "employ" guides the determination of whether a worker is an employee or an independent contractor.

The DOL says that, when viewed with the expansive definition of "employ" under the FLSA, most workers are employees under the "economic realities" test. The ultimate question is whether the worker is economically dependent on the employer or in business for himself or herself.

The DOL looked at each factor under the economic realities test and provided the following guidance:

Factor 1: Is the work an integral part of the employer's business?

According to the DOL, the policy behind the FLSA was to bring within the scope of employment those workers integrated into an employer's business. Thus, when a worker performs work that is integral to the business of the employer, it is more likely the worker is an employee. "Integral" work could include work that is performed by thousands of other employees, or it could include work that relates to only one component of the employer's business.

Factor 2: Do the employee's managerial skills affect his or her opportunity for profit or loss?

A worker who is truly in business for himself or herself and, therefore, an independent contractor, faces the possibility to not only make a profit but also to experience a loss. A worker who lacks the managerial skill to affect his or her own opportunity for profit or loss is likely an employee, according to the DOL. Managerial skills include, for example, a worker's decision "to hire others, purchase materials and equipment, advertise, rent space, and manage timetables," but not necessarily

the ability to decide to work more hours.

Factor 3: How does the employee's relative investment compare to the employer's investment?

A true independent contractor typically makes investments that support the business as a business beyond any particular job. When a worker makes only minor investments in the business — relative to the investment of the employer — he or she likely is an employee. That is because, according to the DOL, a relatively minor investment suggests the worker may be economically dependent on the employer.

Factor 4: Does the work performed require special skill and initiative?

Under this factor, the focus should be on the worker's business skills, judgment and initiative, not his or her technical skills. Where the worker does not exercise business skills, judgment or initiative, it is less likely the worker is economically independent, even though he or she may be performing highly technical skills.

Factor 5: Is the relationship between the worker and employer permanent or indefinite?

A permanent or indefinite relationship between the worker and the employer indicates that the worker is an employee. However, the lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship. The key is whether the lack of permanence or indefiniteness results from the worker's own independent business initiative.

Factor 6: What is the nature and degree of the employer's control?

Finally, the DOL looks to whether the employer controls meaningful aspects of the work performed, such that it is possible to view the worker as a person conducting his or her own business. If the employer exercises meaningful control over the worker's job, then the worker likely is an employee. However, the DOL cautions that the "control" factor should not play an oversized role in the independent contractor analysis and stresses that the FLSA rejected the common law control test for determining employment. Instead, the DOL urges employers to analyze this factor along with the other factors to determine whether the worker is truly economically dependent.

More than providing new information, the interpretation indicates that the DOL is paying particular attention to whether employers are properly classifying their workers. Employers should take this opportunity to review their independent contractor agreements using the DOL guidance and scrutinize whether those workers are truly economically independent.