



The DOL Announces Guidance on Wage and Hour Misclassification – Employees vs Independent Contractors

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The Department of Labor recently released [new guidance](#) (Administrator's Interpretation No. 2015-1) on how it will decide whether a worker is properly classified as an employee or an independent contractor. Although the factors discussed in the Administrator's Interpretation are not new, the DOL's broad reading of the term "employee" under the Fair Labor Standards Act and the heightened focus on the "economic realities" of the business relationship between the worker and the purported employer indicate that wage and hour misclassification will be an enforcement priority for the DOL going forward. Specifically, the DOL states that "misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States" and that "most workers are employees under the FLSA's broad definitions." The DOL's renewed focus on wage and hour misclassification is likely due to the public's growing concerns about income inequality and the increasing popularity of distributed business models. A recent New York Times article, [Growth in the 'Gig Economy' Fuels Work Force Anxieties](#), aptly sums up the political and psychological forces driving the DOL's regulatory behavior: "Along with other changes, like declining unionization and advancing globalization, the increasingly arm's length nature of employment helps explain why incomes have stagnated and why most Americans remain deeply anxious about their economic prospects six years after the Great Recession ended. . . . Even if the economy continues to improve, the lingering malaise will almost certainly be the central issue in next year's presidential election."

The economic realities test consists of a number of factors which are listed below. But, at bottom, the goal of the analysis is "to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus an independent contractor)."

- **Is the worker an integral part of the employer's business?** The more integral, the more likely the worker is an employee.
- **Does the worker's managerial skill affect the worker's opportunity for profit or loss?** If the workers performance or management ability has little impact on how much money they make then it is evidence that they are actually an employee.
- **How does the worker's investment compare to the employer's investment?** The higher the ratio between employer's investment in the worker's productivity and the worker's investment in his or her own productivity, the more likely the worker is an employee.
- **Does the worker routinely exercise business judgment and initiative?** If the worker is not responsible for marketing and selling his or her services then it is evidence that they are actually an employee.
- **Is the relationship between worker and employer indefinite? If so, what are the reasons for the indefiniteness of the relationship?** If the relationship is fairly permanent and consistent then it is evidence that the worker is an employee. Even if the relationship is indefinite, the DOL will carefully review why that is the case. For example, if the reason for the indefiniteness is the seasonal nature of the work (e.g. fruit picking) then indefiniteness is not a persuasive indication of independent contractor status.
- **What is the nature and degree of the employer's control?** The more control an employer has over how the worker performs their job, the more likely it is that the worker will be considered an employee for FLSA purposes.

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As a take away, employers should carefully review their independent contract relationships in light of this new guidance and ensure that they are in compliance. Given that the DOL believes that most workers are employees, auditors and investigators will go out of their way to find that workers who fall into the grey-zone between employee and independent contractor should be classified as employees. This will be particularly true “when misclassification occurs in industries employing low wage workers.”

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