

Worker Classification Audit Assistance

The Wage and Hours Division (WHD) of the Department of Labor (DOL) determines a worker's status as either contractor or employee using the "economic reality" test.

If the worker depends on your business financially – as a matter of economic reality – then that worker is classified as an employee. The determination of status as a contractor requires that the worker have the economic independence to control his/her own financial success. But this can be a very subjective determination.

The DOL may consider several factors during a review:

- The company's control over the worker
 - The worker's opportunity for profit and loss
 - Who provides the equipment and supplies used
 - If the service the worker provides requires special or unique skills
 - How permanent the work relationship is
 - If the service is integral to the company's business activities (typically employee), or supplemental (typically contractor)
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A business can argue that a worker should be an independent contractor based on three common safe harbors (when applicable):

1. Failure of a federal agency to challenge a classification as independent contractor in a prior audit
2. Judicial precedent
3. Standard industry practice to treat such workers as contractors (difficult to prove unless government policy or legislation provides such a definition)

What can you do if you have an audit pending?

1. Talk to an attorney who specializes in labor law (laws vary by state)
2. Never let an attorney tell you to just “let it go”
3. Use the ALC Forum to ask for advice or help, especially from other businesses in your state
4. Reach out to the JNCL-NCLIS, they might have useful information
5. Review all of your documentation and paperwork to be sure it is organized and you know where everything is

All year long, you can mitigate the risks from an audit.

1. Learn state and federal requirements for proper classification
2. Keep your records organized
3. Encourage contractors to get a business license
4. Keep copies of any materials a contractor uses to market himself/herself as a business
5. Don't create invoices on behalf of your contractors, they should generate their own
6. Speak with other companies in your state who have been audited to learn which criteria your state is using to decide employment status (The ALC Forum is great for this)

Good luck. And keep the ALC Board informed of your situation! We can't help you if we don't know about it. The Board – and the entire association – are here to help you.