Regulatory Update:

Analysis of DOL’s Wage and House Division (WHD) Administrator’s Interpretation No. 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

Overview

The Wage and Hour Division will consider most workers as employees under the Fair Labor Standards Act (FLSA). The economic realities test factors will be used to determine if a worker is an employee or an independent contractor. These factors must be considered together and no one factor should be over-emphasized. No one factor is determinative of whether a worker is an employee or independent contractor. The Interpretation looks at the 6 most common factors applied by federal courts. To be considered an independent contractor –

- The worker’s work should not be an integral part of the employer’s business.
- The worker should be in business for him or herself with evidence of using managerial skills relative to exposure to profit or loss and development of future work.
- The worker’s relative investment in his or her business should be comparable to that of the employer, demonstrating that the worker is exposed to a risk of loss.
- The worker’s business skills, judgment, and initiative, not his or her technical skills, will be used to determine if the worker is economically independent – it will be assumed that an independent contractor will use his or her skills in some independent way, such as demonstrating business initiative.
- Permanence or indefiniteness in the worker-employer relationship suggests that the worker is an employee – it will be assumed an independent contractor will seek independence from a single employer.
- The nature and degree of oversight of the employer will be considered – it will be assumed that an independent contractor will control meaningful aspects of the work performed.

I. Economic realities test determines status –

DOL reiterates the “economic realities” test that courts have developed to determine whether a worker is an employee or an independent contractor under the FLSA. This seems to be based on a broad interpretation of the FLSA’s “suffer or permit to work” language in the definition of “employ”.

The Interpretation cites federal case law as a source to validate its assertions. This analysis does not attempt to challenge the reliance on these cases. For example, the Interpretation cites a 1996 case for

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1 Hereafter “Interpretation”.
2 Interpretation, page 7, see Footnote 6.
the assertion that “An entity suffers or permits an individual to work if, as a matter of economic reality, the individual is dependent upon the entity.”

II. **Several things important to note**

The Interpretation seems to assume most workers will be employees, not independent contractors: “The distinction between workers who are economically dependent on employers and the narrower subset of workers who are truly independent businesspersons must not be eclipsed by a mechanical application of the economic realities test.”

The Interpretation warns that “the economic realities of the relationship, and not the label an employer gives it, are determinative”. Citing case law –

“Thus an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not determinative of the economic realities of the working relationship and is not relevant to the analysis of the worker’s status.”

“Economic realities, not contractual labels, determine employment status for remedial purposes of the FLSA.”

The Interpretation reviews the multi-factor economic realities test, emphasizing that “In undertaking this analysis, each factor is examined and analyzed in relation to one another, and no single factor is determinative.” Likewise: “The factors should not be applied as a checklist, but rather the outcome must be determined by a qualitative rather than quantitative analysis.”

III. **The 6 factors of the economic realities test**

1. The extent to which the work performed is an integral part of the employer’s business
2. The worker’s opportunity for profit or loss depending on his or her managerial skill
3. The extent of the relative investments of the employer and worker
4. Whether the work performed requires special skills and initiative
5. The permanency of the relationship
6. The degree of control exercised or retained by the employer

1. **Is the Work an Integral Part of the Employers Business?**

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3 Id. at page 2, citing Antenor v. D & S Farms.
4 Id. at page 5.
5 Ibid.
6 Ibid., citing Scantland v. Jeffrey Knight, Inc.
7 Interpretation, page 5, citing Real v. Driscoll Strawberry Association.
8 Id. at page 4.
9 Ibid.
10 Ibid. The Interpretation notes that courts may use additional factors or may describe each factor differently. See Interpretation footnote 4 on page 4.
11 Id. at page 6.
“If the work performed by a worker is integral to the employer’s business, it is more likely that the worker is economically dependent on the employer.”\textsuperscript{12}

“A true independent contractor’s work, on the other hand, is unlikely to be integral to the employer’s business.”\textsuperscript{13}

The Interpretation concludes: “Work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds of thousands of other workers.”\textsuperscript{14}

- For a construction company that frames residential homes, carpenters are integral to the employer’s business because the company is in the business of framing houses and carpentry is an integral part of providing that service.\textsuperscript{15}
- For the same construction company, a software developer who creates software to help the company track bids, schedule projects and crews, and track orders, is not performing work that is integral to the construction company’s business.\textsuperscript{16}

2. \textbf{Does the Worker’s Managerial Skill Affect the Worker’s Opportunity for Profit or Loss?}\textsuperscript{17}

“The worker’s managerial skill will often affect opportunity for profit or loss beyond the current job, such as by leading to additional business from other parties or by reducing the opportunity for future work.”\textsuperscript{18}

“On the other hand, the worker’s ability to work more hours and the amount of work available from the employer have nothing to do with the worker’s managerial skill and do little to separate employees from independent contractors – both of whom are likely to earn more if they work more and if there is more work available.”\textsuperscript{19}

“Consistent with determining whether the worker is in business for him or herself, it is important not to overlook whether there is an opportunity for loss, as a worker truly in business for him or herself faces the possibility of experiencing a loss.”\textsuperscript{20}

The Interpretation concludes: “In sum, in order to inform the determination of whether the worker is in business for him or herself, this factor should not focus on the worker’s ability to work more hours, but rather on whether the worker exercises managerial skills and whether those skills affect the worker’s opportunity for both profit and loss.”\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{12} Ibid., citing \textit{Rutherford Food Corp. v. McComb}.
\item \textsuperscript{13} Ibid.
\item \textsuperscript{14} Id. at page 6.
\item \textsuperscript{15} Id. at page 7.
\item \textsuperscript{16} Ibid.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} Ibid, citing \textit{Scantland}.
\item \textsuperscript{20} Id. at page 8, citing \textit{Dole v. Snell}.
\item \textsuperscript{21} Id. at page 8.
\end{itemize}
A worker performs cleaning services for corporate clients. He performs assignments only as determined by a cleaning company. He does not independently schedule assignments, solicit additional work from other clients, advertise his services, or endeavor to reduce costs. He regularly agrees to work additional hours at any time in order to earn more. This worker does not exercise meaningful managerial skill that affects his profit or loss, and this scenario suggests an employment relationship.22

Where the worker produces advertising, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new client, this shows an exercise of managerial skills that affects his opportunity for profit and loss. This scenario suggests an independent contractor relationship.23

3. How Does the Worker’s Relative Investment Compare to the Employer’s Investment?24

“The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent business.”25

“Even if the worker has made an investment, it should not be considered in isolation; it is the relative investments that matter... comparing the worker’s investment to the employer’s investment helps determine whether the worker is an independent business.”26

“For example, investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor.”27

The Interpretation concludes: “Moreover, an analysis that compares the worker’s investment to the employer’s investment – but only to the employer’s investment in the particular job performed by the worker – likewise disregards the ultimate determination by examining only a piece of the employer’s business for the comparison.”28

A worker provides cleaning services for a cleaning company and is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies. In this example, the relative investment of the worker as compared to the employer is suggestive of an employment relationship.29

A worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to

22 Ibid.
23 Id. at page 9.
24 Ibid.
25 Ibid.
26 Ibid.
27 Id. at page 9, citing Snell.
28 Id. at page 10.
29 Ibid.
travel to various worksites. The worker rents her own space to store the vehicle and materials. She also advertises and markets her services and hires a helper for large jobs. She regularly purchases and uses her own materials and equipment. In this example, the worker’s level of investments is similar to the investments of the local cleaning company for whom she sometimes works, suggestive of an independent contractor relationship.  

4. Does the Work Performed Require Special Skill and Initiative?

“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 fact that workers are skilled is not itself indicative of independent contractor status.”

“Even specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical and used to perform the work.”

“For skills to be indicative of independent contractor status, they should be used in some independent way, such as demonstrating business initiative.”

- A highly skilled carpenter provides carpentry services for a construction firm. The carpenter does not make any independent judgments at the job site beyond the work he is doing for the job. He does not determine the sequence of work, order additional materials, or think about bidding the next job. Instead, he is told what work to perform where. In this scenario, such skills are not exercised in an independent manner. The carpenter is not demonstrating the skill and initiative of an independent contractor.

- A highly skilled carpenter who provides a specialized service for a variety of construction companies (for example, custom cabinetry) may be demonstrating the skill and initiative of an independent contractor if the contractor markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

5. Is the Relationship between the Worker and the Employer Permanent or Indefinite?

“Permanence or indefiniteness in the worker’s relationship with the employer suggests that the worker is an employee. After all, a worker who is truly in business for him or herself will eschew a permanent or

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30 Ibid.
31 Ibid.
32 Ibid.
33 Id. at page 10, citing Brock v. Superior Care, Inc.
34 Id. at page 10.
35 Id. at page 11, citing Superior Care.
36 Id. at page 11.
37 Ibid.
38 Id. at page 11.
indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness.” 39

“Even if the working relationship lasts weeks or months instead of years, there is likely some permanence or indefiniteness to it as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer.” 40

“However, a lack of permanence or indefiniteness does automatically suggest an independent contractor relationship... neither working for other employers nor not relying on the employer as his or her primary source of income transform the worker into the employer’s independent contractor.” 41

“The key is whether the lack of permanence or indefiniteness is due to operational characteristics intrinsic to the industry or the worker’s own initiative... A worker’s lack of a permanent or indefinite relationship with an employer is indicative of independent contractor status if it results from the worker’s own independent business initiative.” 42

➢ An editor has worked for an established publishing house for several years. Her edits are completed in accordance with the publishing house’s specifications, using its software. She only edits books provided by the publishing house. This scenario indicates a permanence to the relationship that is indicative of an employment relationship. 43

➢ An editor has worked intermittently with fifteen different publishing houses over the past several years. She markets her services to numerous publishing houses. She negotiates rates for each editing job and turns down work for any reason, including because she is too busy with other editing jobs. This lack of permanence with one publishing house is indicative of an independent contractor relationship. 44

6. **What is the Nature and Degree of the Employer’s Control?** 45

“The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business.” 46

“And the worker’s control over meaningful aspects of the work must be more than theoretical – the worker must actually exercise it.” 47

“Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied. However,

39 Id. at pages 11, 12.
40 Id. at page 12, citing Donovan v. Dial America Mktg.
41 Id. at page 12, citing Superior Care.
42 Ibid.
43 Id. at pages 12, 13.
44 Id. at page 13.
45 Ibid.
46 Ibid., citing Scantland.
47 Id. at page 13, citing Snell.
control exercised over a worker, even for any or all of those reasons, still indicates that the worker is an employee.”

“The economic reality test requires us to examine the nature and degree of the alleged employer’s control, not why the alleged employer exercised such control.”

- A registered nurse who provides skilled nursing care in nursing homes is listed with ABC nursing registry in order to be matched with clients. ABC interviewed the nurse prior to her joining the registry, and also required the nurse to undergo a multi-day training by the registry. ABC sends the nurse a listing each week with potential clients and requires the nurse to fill out a form prior to contacting the clients. ABC also requires the nurse to conform to a certain wage range and the nurse may not work on the weekends. The nurse must inform ABC if she is hired by a client and must contact ABC if she will miss any scheduled work. In this scenario, the degree of control exercised by the registry is indicative of an employment relationship.

- A registered nurse who provides skilled nursing homes care in nursing homes is listed with XYZ registry in order to be matched with clients. XYZ sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as she wishes and to work for as many or as few as she wishes. The nurse also negotiates her own wage and schedule with the client. In this scenario, the degree of control exercised by the registry is not indicative of an employment relationship.

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48 Id. at pages 13, 14.
49 Id. at page 14, citing Scantland.
50 Id. at page 14.
51 Id. at pages 14, 15.