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

On July 15, 2015, the Department of Labor’s Wage and Hour Division (WHD) issued an interpretation of how to determine if a worker is an employee or an independent contractor in relationship to the employer.

WHD assumes most workers are employees under the Fair Labor Standards Act (FLSA). Because of ambiguities and vagueness in the statutory definition of this employment relationship, federal courts have fashioned a test for determining the status of a worker under the FLSA. The WHD Interpretation provides an analysis of the courts’ economic realities test and the application of factors that the WHD will be used to determine if a worker is an employee or an independent contractor.

It is important to note that 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.**

In general, a worker is an employee if he or she is economically dependent on the employer. A worker is an independent contractor if he or she is in business for him or herself. The 6 factors below are intended to help determine the worker status. Just because one factor suggests an employment relationship or an independent contractor relationship does not mean the relationship should be characterized as such. WHD will look at the totality of the circumstances to determine the worker-employer relationship.

**Six Factors of the Economic Realities Test**

The Interpretation looks at the 6 most common factors applied by federal courts. *The bulleted items below are taken from the Interpretation, including the examples given*. To be considered an independent contractor —

1. **The worker’s work should not be an integral part of the employer’s business.**
   - Workers are more likely to be employees rather than independent contractors if they perform the primary job of the employer.
   - Work can be considered integral to a business even if the work is just one component of the business.
   - For a construction company that frames residential homes, WHD would consider carpenters integral to the employer’s business because carpentry is an integral part of the business of framing houses.
Where the same construction company contracts with a software vendor to develop software to manage its bids, work flow, or material orders, the software vendor would be considered an independent contractor because the work of the software vendor.

2. 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.
   - This factor focuses on whether the worker exercises managerial skills and whether those skills affect the worker’s opportunity for both profit and loss.
   - The worker’s ability to work more hours or the amount of work available from the employer has nothing to do with the worker’s managerial skills.

   A worker who provides cleaning services for a cleaning company 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, supplies for the worker, and invests in advertising and finding clients, while the worker may occasionally bring her own preferred cleaning supplies. This scenario suggests an employment relationship.

   A worker who 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, is exercising managerial skills suggestive of an independent contractor.

3. 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.
   - Investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor.
   - The comparison of the investments of the worker and employer should not be limited to a particular job; instead, the relative investments of the worker in his or her business should be compared to that of the employer in its business.

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   For the same worker and company: Where the worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites, rents space to store the vehicle and materials, advertises and markets her services, hires help for large jobs, and regularly purchases and uses her own materials and equipment, this suggests an independent contractor relationship.

4. 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.
• 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. 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. 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.
• Even if the working relationship lasts weeks or months instead of years, there can be a 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.
• 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.
• 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.
  ➢ 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.
  ➢ 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.

6. 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.
• The worker’s control over meaningful aspects of the work must be more than theoretical – the worker must actually exercise it.
• 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, control exercised over a worker, even for any or all of these reasons, still indicates that the worker is an employee.

➢ 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.