

USDOL Issues Guidance Regarding Misclassification of Employees as Independent Contractors

On July 15, the U.S. Department of Labor's Wage and Hour Division (WHD) issued [Administrator's Interpretation No. 2015-1](#), which provides guidance regarding the misclassification of employees as independent contractors. According to the WHD Administrator's Interpretation, "most workers are employees" under the Fair Labor Standards Act (FLSA).

The Administrator's Interpretation notes that the FLSA's definition of "employee" is extremely broad and basic ("any individual employed by an employer") and that to "employ" includes to "suffer or permit to work." The WHD explains that this definition was intentionally designed to create "as broad of a scope of statutory coverage as possible."

In interpreting this broad definition, the WHD rejects the common law "control" test in favor of an "economic realities" test to determine employee or independent contractor status. The economic realities test focuses on whether a worker is economically dependent on an employer (which would indicate an employment relationship) or in business for herself or himself, (which would indicate an independent contractor relationship). The WHD evaluates the following six factors in making this determination, with no one factor being dispositive:

1. The extent to which the work performed is an integral part of the employer's business.
2. Whether the worker's opportunity for profit or loss depends on his or her managerial skill.
3. The extent of the worker's investment compared to that of the employer.
4. Whether the work performed requires special business skills, judgment, and initiative.
5. Whether the relationship is permanent or indefinite.
6. The degree of control exercised by the employer over the worker.

According to the WHD, these factors should be evaluated in light of the broad definition of "employee" under the FLSA and the principle that the FLSA should be liberally construed to provide expansive coverage for workers.

Misclassifying employees as independent contractors can result in a number of potentially expensive consequences, such as liability for minimum wage and overtime violations, unemployment insurance contributions, workers' compensation coverage, and unpaid employment taxes. Therefore, organizations that have independent contractor relationships should examine those relationships closely to make sure that they do not cross the line into an employment relationship. It is also worth noting that, although written agreements with independent contractors can be helpful, they are not dispositive in establishing an independent contractor relationship.

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Editor's Note: Our thanks to Luke O'Brien, one of Bond's Summer Law Clerks, who helped prepare this article.

