



## DOL Issues Guidance on Classification of Independent Contractors

The Department of Labor (DOL) has issued an [“Administrator’s Interpretation”](#) to assist employers in determining if a worker is an employee or an independent contractor. The DOL has determined that many employers are incorrectly classifying employees as independent contractors, which can harm the worker and open the employer up to various liabilities. Unfortunately, there is not a clear-cut checklist or rule in determining a worker’s status. Employers who are unsure about its categorization of workers should consult their legal counsel to review the factors provided by the DOL and its application to a specific situation or worker.

The distinction between employee and independent contractor is important, as employees are entitled to workplace protections such as minimum wage, overtime, and workers compensation. Furthermore, under the Patient Protection and Affordable Care Act (ACA) employees are entitled to health benefits if they work for an applicable large employer and work more than 30 hours a week. The ACA regulations specifically state that independent contractors are not considered a common-law employee for purposes of providing health benefits. Because of the difference in protections offered to employees versus independent contractors, employers must be careful to ensure they do not misclassify an individual. The DOL has found that many employers are also incorrectly labeling someone as an “owner,” “partner,” or “member of a limited liability company” rather than properly determining if they are an “independent contractor” in order to avoid having to determine the worker’s status. The DOL was clear that this is inappropriate, and all workers should have their title and classification properly determined.

The DOL’s guidance rests on the fact that when determining employee versus independent contractor, courts use a “multi-factorial ‘economic realities’ test,” which focuses on an individual’s economic dependence on an employer or business.

The DOL advised that the economic realities test should be applied in view of the Fair Labor Standards Act’s (FSLA) broad scope of employment and the “suffer or permit” standard; and that the economic realities factor guides the determination on whether the worker is truly an independent business or is an economically-dependent employee. The DOL provides a variety of factors that should be weighed to answer these questions. The factors should be considered indicators of the broader concept of economic dependence and should not be used as a checklist.

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The DOL's "suffer or permit" standard broadens the scope of employment relationships that are covered by the FLSA and, at its core, finds that an individual is an employee if the individual is economically dependent on the employing entity. The courts look to the economic realities of the relationship, rather than the label the employer gives it. An economically-dependent worker is considered an employee. Someone who is in the business for him or herself is an independent contractor.

The factors an employer should consider when determining if an individual is an independent contractor or an employee are:

- Is the work an integral part of the employer's business? If the work is integral, it is more likely that the worker is economically dependent on the employer. Example: a carpenter is integral to a residential construction company that frames residential homes, whereas a software developer creating software that tracks bids and material orders for the company is not.
- Does the worker's managerial skill affect the worker's opportunity for profit or loss? A worker who is in business for him or herself faces the possibility of making a profit or experiencing loss. A worker's decisions relating to hiring, firing, material purchasing, advertising, or managing timetables may reflect managerial skills that will affect his or her opportunity for profit or loss. However, the ability to work more hours and earn more money is not considered an indicator of an employee or independent contractor.
- How does the worker's relative investment compare to the employer's investment? Independent contractors should make an investment and undertake some risk of loss. Investments by workers should not be considered in isolation, and should be looked at as relative to the employer's investments. A cleaning service worker who provides cleaning products in comparison to the employer's provision of a work vehicle, advertising, and equipment is not comparable, and supports the fact that the worker is an employee. Conversely, a worker that provides cleaning services that receives referrals, purchases a vehicle for their job that is not suitable for personal use, and rents space to store the vehicle and cleaning materials is comparable to the level of investment of the local cleaning company for which he or she sometimes works. This pattern would support the fact that the worker is an independent contractor.
- Does the work performed require special skills and initiative? A worker's business skills, judgment and initiative (rather than his or her technical skills) will help determine whether or not a worker is economically independent. A highly-skilled carpenter providing services to a construction firm, but who does not determine the work he is doing, the sequence of the work, and does not worry about bidding on the next job, would be an employee. A highly-skilled carpenter who provides a specialized service for a variety of builders to make custom, hand-crafted cabinets that are made to order could be demonstrative of the skill and initiative of an independent contractor if the carpenter markets his services, orders his own materials, and determines which orders to fill.
- Is the relationship between the worker and employer permanent or indefinite? Permanency suggests an employer-employee relationship, although lack of permanence does not always mean an individual is an independent contractor. The reason for the lack of permanence should be reviewed to decide if the reason is because the individual is running an independent business. An editor working for a publishing house who edits manuscripts provided by the employer, and done according to the publishing house's specifications, would be indicative of an employee relationship. An editor who works for the publisher intermittently, who markets his or her services to multiple publishing houses, and negotiates rates for each job, sometimes turning a job down, is a lack of permanence that is indicative of an independent contractor.

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- What is the nature and degree of the employer’s control? The worker must control meaningful aspects of the work performed in order for the worker to be an independent contractor. Lack of control over workers who telecommute or work from home is less indicative of an independent contractor relationship. The DOL was clear that the “control” factor should not be considered the most important or telling aspect when determining a relationship between a worker and employer. A registered nurse who provides care to nursing homes listed with a Named Nurse Registry (NNR), who undergoes training from the NNR, who adheres to the NNR’s wage range and rules, and who must notify the NNR if she is hired by a client, would indicate an employer-employee relationship. A registered nurse who is listed with a registry and may pick and choose among any potential clients, and work for as many clients as she wishes, and who negotiates her own rate with clients, would be representative of an independent contractor.

7/30/2015

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