

DOL Replaces Guidance on Employee Classification

Background

In 2014, the US Department of Labor (DOL) issued guidance on how to determine whether an “employment” or “independent contractor” relationship exists for purposes of the federal Fair Labor Standards Act (FLSA). The guidance stated, among other things, "Applying the FLSA's definition [of "employ"], workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees." Effective immediately, the DOL has withdrawn this guidance and **replaced** it with its earlier guidance from 2008.

2008 guidance once again effective

The 2008 guidance does not contain the statement that "most workers are employees," making it somewhat less restrictive for employers than the 2014 guidance. However, the 2008 guidance does include the same "economic realities" test contained in the 2014 guidance. That “economic realities” test focuses on whether the worker is economically dependent on the employer or truly in business for him or herself, and determines employee status by considering the following factors:

- ✓ The extent to which the work is an integral part of the employer’s business;
- ✓ The permanency of the working relationship;
- ✓ The amount of the worker's investment in facilities and equipment;
- ✓ The nature and degree of control by the employer;
- ✓ The worker's opportunities for profit and loss;
- ✓ The amount of initiative, judgment, or foresight in open market competition with others required for the worker’s success; and
- ✓ The degree to which the worker is an independent business organization and independent operation.

Many states still presume employment relationship

While this updated guidance by the DOL may provide more flexibility for employers in applying the economic realities test when classifying their workers, employers need to keep in mind that many states have a strict independent contractor test. Massachusetts, for example, presumes employment relationship *unless* the employer can expressly prove that the worker passes the state’s strict independent contractor test, in which the biggest challenge is to prove that “the service is performed outside the usual course of the business of the employer.” In Massachusetts, most people who work or provide services are considered employees under the law. This means that they have rights to minimum wage, overtime, and other protections. Employers who misclassify employees as independent contractors may face criminal enforcement or civil penalties.

Avoid the “Misclassification Trap”

Employee classification has a direct impact on an employee’s eligibility for benefits, legal protections (such as minimum wage and overtime rights), and taxation. In general, employment laws, labor laws, and related tax requirements do not apply to independent contractors. For this reason, employee misclassification is a concern for both federal and state agencies. Several tests exist to determine whether an employee is an independent contractor, but there is not one standard test to determine classification.



Misclassification consequences are big — paying back-taxes with interest, large fines, and even class-action lawsuits — and Massachusetts automatically applies triple damages.

Advice to Employers

If your business uses independent contractors, we strongly recommend that you conduct a self-audit to ensure all your employees are classified correctly. Businesses need to examine their independent contractor relationships, understand the risks involved, and consider taking appropriate steps to reclassify relationships for individuals they determine do indeed fall under an employment relationship. While using independent contractors can cut down on your costs — such as employment taxes, overhead, and employee benefits — the practice is not legal in all circumstances. Organizations that don't understand the difference between employees and independent contractors run the risk of finding themselves in some seriously hot water.

This content is provided with the understanding that HR Knowledge is not rendering legal advice. While every effort is made to provide current information, the law changes regularly and laws may vary depending on the state or municipality. The material is made available for informational purposes only and is not a substitute for legal advice or your professional judgment. You should review applicable laws in your jurisdiction and consult experienced counsel for legal advice. If you have any questions regarding this content, please contact HR Knowledge at 508.339.1300 or [email us](#).