



## DOL – Misclassification of Employees

Is that worker an employee  
or an independent  
contractor???

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## Employee or contractor???

United States Department of Labor issued Administrator's Interpretation No. 2015-1 on July 15, 2015.

- Relates to employees misclassified as contractors
- DOL believes that many employees are misclassified
- Has entered into agreements with the state and IRS for increased enforcement

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## Employee or contractor???

Why does DOL/IRS/State care?

- Workers don't receive workplace protections like workers compensation, overtime, minimum wage
- Lower tax revenues for government
- Uneven playing field for those who comply
- Compliance issues – child support, immigration, tax filing

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## Employee or contractor???

Why does DOL/IRS/State care?

- Failure to provide health insurance or unemployment benefits creates a societal burden

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## Employee or contractor???

Interpretation provides a much broader scope of employment than previous interpretations.

Definitions:

- Employ = to suffer or permit to work
- Economic Realities Test = if, as a matter of economic reality, the individual is dependent on the entity

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## Employee or Contractor???

“...overarching principle that the FLSA should be liberally construed to provide broad coverage for workers, as evidenced by the Act’s defining ‘employ’ as ‘to suffer or permit to work.’”

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## Employee or Contractor???

An entity “suffers or permits” an individual to work if, as a matter of economic reality, the individual is dependent on the entity.

Must apply the economic realities test to the relationship.

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## Employee or Contractor???

Economic realities test:

1. The extent that the work is integral to the employer’s business
2. The opportunity for profit or loss based on the worker’s **MANAGERIAL** skills
3. The investments of the employer and worker relative to each other

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## Employee or Contractor???

### Economic Realities Test

4. The permanency of the relationship
5. The degree of control exercised or retained by the employer
6. Whether the work requires special skills and initiative

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## Employee or Contractor???

“Ultimately, in considering economic dependence, the court focuses on whether an individual is ‘in business for himself’ or is ‘dependent upon finding employment in the business of others.’”

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## Employee or Contractor???

If it walks like a duck, quacks like a duck – then it is a duck. A label of independent contractor doesn't make it so!

Employees **CANNOT** waive employee status if they are an employee. Signed independent contractor agreements won't matter if the economic reality points to employee.

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## Employee or Contractor???

Is the Work an Integral Part of the Employer's Business?

- Employees perform the primary work of the employer – receptionist vs. software designer
- Work is integral even if it is just one component of the business
- Doesn't matter where the work is performed

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## Employee or Contractor???

Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?

- Ability to work more hours or do more work has nothing to do with managerial skills
- Technical skills are not managerial skills
- Decisions to hire, purchase materials and equipment, advertise, rent space and manage time tables demonstrate managerial skills.

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## Employee or Contractor???

How Does the Worker's Relative Investment Compare to the Employer's Investment?

- The worker should have significant investment in equipment, supplies, and tools relative to what the employer provides
- Worker is dependent on the employer if the employer has the higher investment

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## Employee or Contractor???

Does the Work Performed Require Special Skill and Initiative?

- A worker's business skills, judgment and initiative, not his technical skills, will aid in determining if he is economically dependent
- Must operate as an independent business separate and apart from employer and make all decisions relative to that business

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## Employee or Contractor???

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

- Positions that are permanent or indefinite suggest the worker is an employee
- A worker who is truly in business for himself will avoid permanent or indefinite positions
- If not permanent or indefinite, look at the reasons why. Seasonal, part-time or a business decision by a contractor?

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## Employee or Contractor???

What is the Nature and Degree of the Employer's Control?

- The worker must control meaningful aspects of the work as is in an independent business
- Must be actual control, not theoretical
- Employers don't need to be looking over the worker's shoulder to have control
- Cannot base decision on control alone

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## Employee or Contractor???

Conclusion of U.S. Department of Labor Administrator David Weil in Interpretation No. 2015-1:

“In sum, most workers are employees under the FLSA's broad definitions.”

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## Employee or Contractor???

IRS has established the Three-Factor Test to determine whether a worker is an employee:

- Behavioral Control – whether the employer controls what is done and how it is done
- Financial Control – basis on which individual paid (hourly or project), eligibility for expense reimbursements, worker's investment in tools

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## Employee or Contractor???

IRS has established the Three-Factor Test to determine whether a worker is an employee:

- Relationship Control – whether worker is provided benefits of any sort or is hired for indefinite duration

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## Employee or Contractor???

Church and ministry workers to review:

Childcare workers

Substitute teachers/receptionists

Pastors

Custodians/janitors

Musicians/worship leaders

Event helpers

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## Employee or Contractor???

Childcare workers are most certainly under the control of the church due to risk management issues that should be considered in hiring childcare workers.

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## Employee or Contractor???

Clergy who are employees under the control of a church or ministry must be issued a W-2 form for services, not a 1099 form.

Being self-employed for FICA purposes does not change the fact that they are an employee reportable on a W-2 form.

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## Employee or Contractor???

See DOL handout in the back of the booklet.

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