

## DOL is Watching: Are You properly Classifying Employees?

Article By:

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Recently, the **United States Department of Labor (DOL)** issued an Administrator's Interpretation regarding the classification of independent contractors under the **Fair Labor Standards Act (FLSA or Act)**. Much has been written about this "interpretation." In review, the interpretation is best understood as an aspirational view based on an administrative belief that all workers *should* be employees. While DOL's interpretation is supported by case law, in many cases, the supporting law constitutes minority or aberrational positions. Whether DOL's position is ultimately sustained by the courts or not, it is important to understand DOL's enforcement position.

The DOL takes the position that "most workers are employees under the FLSA's broad definitions." This pronouncement strongly signals that the DOL will continue to aggressively pursue misclassification claims. The DOL has entered into memoranda of understanding with at least 25 state enforcement agencies, as well as the IRS, in order to bring enforcement actions regarding alleged misclassifications.

The FLSA's definition of "employ" includes "to suffer or permit to work." This "suffer or permit" concept is interpreted by the DOL to have broad applicability and is declared to be critical to determining whether a worker is an employee and thus entitled to FLSA protection. The Supreme Court has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction recognizing that broad coverage is essential to accomplish the Act's goal.

The Supreme Court and Circuit Court of Appeals have developed a multi-factor "economic realities" test to determine whether a worker is an employee or an independent contractor under the FLSA. The factors typically include: (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer. Each factor is to be examined and analyzed, with no single factor being determinative.

The Administrator's Interpretation analyzes each of the above factors by cherry-picking quotes from courts that have ruled in favor of employee status and ignoring those opinions by courts finding independent contractor status. The Interpretation provides no new guidance for an employer to use in determining independent contractor status; rather, it simply sets forth the DOL's position that only in rare circumstances does it believe a worker is truly an independent contractor.

The Interpretation also goes to great lengths to systematically address the arguments that employers typically raise when defending an independent contractor classifications. The Interpretation specifically notes that control exercised due to nature of the business, regulatory requirements or the desire to ensure that a customer is satisfied still indicates that the worker is an employee. Similarly, the Interpretation notes that a worker's ability to work as much or as little as he/she chooses does not necessarily weigh in favor of independent contractor status. Investing in tools and equipment to operate the independent contractors business may also not be significant, because the tools or equipment "may simply be necessary to perform the specific work for the employer" or the investment, even if for \$35,000, was not "significant" when compared to the employer's investment of "hundreds of thousands of dollars of equipment at each work site" in their business. These positions ignore established case law.

Overall, the Interpretation should be viewed as yet another reminder that worker classifications should be closely scrutinized. The DOL is clearly watching and ready to pursue misclassification claims, which can include claims for backpay and liquidated damages. If misclassification is found, the IRS can also implement penalties for unfiled forms and taxes that were not properly withheld.

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National Law Review, Volume V, Number 259

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