

**ALERTS****Department Of Labor Clarifies “Independent Contractor” Definition**

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On July 15, the U.S. Department of Labor’s (DOL) issued an administrator’s interpretation regarding the application of the Fair Labor Standards Act (FLSA) with respect to the misclassification of workers as independent contractors. The interpretation is significant from a number of standpoints:

- It states the DOL’s unequivocal opinion that “most workers are employees,” under the FLSA.
- It fully embraces the “economic realities” test as the DOL’s preferred approach to determining whether a worker is an employee or a contractor.
- It downplays the significance of an employer’s exertion of control over the tasks performed by the worker.
- It reinforces the DOL’s pattern over the last several years of aggressively examining the classification of workers as contractors.

The “economic realities” test the DOL adopts in the interpretation has been used – in full or in part – by several courts and regulatory agencies for years. The test includes the following factors:

1. The extent to which the work performed is an integral part of the employer’s business;
2. The worker’s opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer

While the DOL’s formal acceptance of the test does not dramatically alter the landscape for how employers should designate employees, it does mean that employers who use contract labor should make sure their designation corresponds to the factors identified in the test. Moreover, throughout the interpretation, the administrator repeatedly de-emphasizes the element of control over how tasks are to be performed. Historically, the issue of control has been regarded as one of the most important factors in assessing whether a contractor actually is an employee. Although not abandoning the issue of control by any means, the fact the Department is downplaying the issue does call into question how control will be regarded in the future and more importantly, whether other factors

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might surpass it in prominence.

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