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**EMPLOYEES VS. INDEPENDENT CONTRACTORS;  
U.S. DEPARTMENT OF LABOR REAFFIRMS THAT THE ECONOMIC  
REALITIES TEST IS THE APPROPRIATE TEST TO USE IN MISCLASSIFICATION CASES  
BY: CHRISTINA HARRIS SCHWINN, ESQ.**

Several years ago, the U.S. Department of Labor (“DOL”) announced its misclassification initiative. In particular, the DOL is concerned about instances where workers are misclassified as independent contractors. On July 15, 2015, the DOL issued its first Administrator’s Interpretation No. 2015-1 of the year on this issue. The Administrator’s Interpretation reaffirms the DOL’s interpretation of the law and opines that the appropriate test to use when conducting the analysis of whether a worker should be classified as an employee or independent contractor is the economic realities/economic dependence test. This test has six 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 upon 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.

No one factor is determinative. All six factors have to be analyzed independently to determine whether the worker is economically dependent upon the business.

The balance of this article will discuss the economic realities test in general terms. This article is intended to be an overview only of the Administrator’s Interpretation No. 2015-01.

***1) The extent to which the work performed is an integral part of the employer’s business.***

When analyzing this factor determine whether the duties being performed by the worker were previously performed by an employee. If the duties being performed by the worker were previously performed by an employee, it is more than likely that the worker is an employee and not an independent contractor.

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**2) *The worker's opportunity for profit or loss depending upon his or her managerial skill.***

This factor determines whether the worker has an opportunity to use managerial skills the worker has developed over the years to increase the worker's opportunity to earn a profit. The opportunity to earn a profit should not be confused with a worker's ability to work overtime and earn time and a half. Rather, the inquiry goes to the heart of whether the worker is operating an independent business where the worker can make decisions about accepting contracts and rejecting contracts and has control over pricing issues.

**3) *The extent of the relative investments of the employer and the worker.***

When analyzing this factor it is not enough to conclude that the employee has made an investment of the worker's own. Rather, the relative weight of the investments made by each party needs to be evaluated. For example, if the employee invested in a truck that cost him \$30,000 to perform services for a business that has invested hundreds of thousands of dollars in equipment, the investments are not close to being equal. As such, the DOL would likely give very little weight to this factor when the relative investments are substantially unequal.

**4) *Whether the work performed requires special skills and initiative.***

When analyzing this factor, it is important to understand that the issue is not whether the worker has technical skills. Rather, the issue is whether the specialized skills that the worker has will lead to economic independence from the business. For example, a highly skilled construction worker who provides his own tools to perform work for a construction firm would not be considered an independent contractor. However, if this same highly skilled construction worker provided services to multiple construction firms, it is more likely that the individual would be considered an independent contractor.

**5) *Is the relationship between the worker and the employer permanent or indefinite?***

This factor takes into account the seasonality of certain businesses. If a worker is retained to perform services for a business on a temporary basis because it is seasonal work, that does not mean that the person is an independent contractor simply because the season may be of a duration of three to four months. Rather, the goal is to determine whether the lack of permanence or indefiniteness is the result of the worker's own decision or initiative.

**6) *What is the nature and degree of the employer's control?***

The control analysis has changed over the years as businesses have outsourced and allowed employees (telecommuters) to work from home. While the employer may not exercise day to day control over an employee who is working from home, it is important to understand that that is not the test. In order for a worker to be an independent contractor and not an employee, the worker must have meaningful control over the work that the worker performs for the business owner. A telecommuter does not have meaningful control over the work that the telecommuter performs. While the telecommuter may determine the hours that the telecommuter works, the telecommuter is not in a position to determine what work he or she will perform. Of the six factors, the control factor is generally given the least weight when analyzing whether a worker should be classified as an employee or as an independent contractor.

## *Summary*

Make no mistake about the fact that the DOL believes that most workers are employees and not independent contractors. The DOL continues to push its misclassification initiative because workers who are misclassified as independent contractors are deprived of certain benefits, including workers' compensation coverage in the event of an injury, unemployment compensation, the employer's contribution for Social Security, Medicare, employee benefits to include health insurance and paid time off benefits.

While it may be financially attractive to treat a worker as an independent contractor, be aware that the savings may be short lived and that the penalties can far exceed any short term savings.

*A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.*

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