

Distinguishing Between Employees and Independent Contractors: The DOL Provides Long-Awaited Clarity

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The issue of misclassifying employees as independent contractors has been plaguing employers for years. This has become an even bigger concern as the Department of Labor (“DOL”) recently made independent contractor misclassification an enforcement initiative, resulting in hundreds of thousands of dollars in fines for well-meaning businesses. Yet, the courts’ inconsistent handling of misclassification cases caused only more confusion.

Finally, the DOL has shed some light on proper classification of independent contractors in a Final Rule that will take effect March 8, 2021. This Rule clarifies the “economic realities” test that has been used in the past to determine whether an individual is truly in business for themselves or if they are economically dependent on the employer. To determine whether a worker is an employee or independent contractor, one looks to five factors:

1. The nature and degree of the individual’s control over the work;
2. The opportunity for profit or loss;
3. Skill required for the work;
4. Permanence of the working relationship; and
5. Whether the work is part of an integrated unit of production.

The Final Rule puts the greatest emphasis on the first two factors: nature and degree of control, and opportunity for profit or loss. The more control a worker has over their work and the more opportunity they have for profit or loss, the greater the likelihood that they are an independent contractor. If these two “core factors” point to different classifications, the additional three factors can be particularly helpful.

The Final Rule also confirms what we have long known – employers cannot contract out of an employment relationship. If a worker qualifies as an employee, having an Independent Contractor Agreement will not affect the classification.

While this clarification was necessary and will be helpful moving forward, misclassification of employees remains a top priority for the DOL and state agencies. Before classifying workers as independent contractors, it is a good idea for hiring entities to confirm with legal counsel.

Contact any member of **Bodman's Workplace Law Group** for more information. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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