

Misclassification of Employees As Independent Contractors Can Be A Costly Mistake For Employers

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On January 9, 2024, the United States Department of Labor (“USDOL”) announced a [final rule](#) on how to analyze whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (“FLSA”). The new rule will be effective on March 11, 2024. It rescinds the prior 2021 Independent Contractor Rule and replaces it with a rule and guidance that the USDOL believes will reduce the misclassification of employees as independent contractors and make classification of workers consistent across various industries.

The final rule uses six factors to analyze whether a worker is an independent contractor or employee:

- opportunity for profit or loss depending on managerial skill;
- investments by the worker and the potential employer;
- degree of permanence of the work relationship;
- nature and degree of control;
- extent to which the work performed is an integral part of the potential employer’s business; and
- skills and initiative

The factors listed should be considered by an employer to determine the worker’s “economic reality” and whether the worker is in business for themselves (independent contractor) or economically dependent on the employer for work (employee). The worker does not have to satisfy all six factors to qualify as an independent contractor. In addition, none of the factors should be given more weight in the analysis than any other.

Misclassification of employees as independent contractors can be a costly mistake for employers. If the USDOL audits an employer and finds that employees have been misclassified, the company may owe overtime, health insurance and other benefits to the employees. The company will also have to pay any back payroll taxes that are owed. This may result in large lump sums assessed against the employer which could have been avoided. Misclassification may also result in individual or class actions against employers.

Takeaway: If you are an employer and need help analyzing whether your workers are independent contractors or employees under the USDOL final rule, contact [Stephanie D. Gironda](#), or any member of the Wilentz [Employment Law](#) Team.

Attorney

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