

Employee or Independent Contractor?

This is a common question for many business owners, managers and HR professionals – it is also often an area of legal misclassification and which may cost a business significantly in fines and other penalties.

The Department of Labor (DOL) has issues proposed rules that may make it easier to determine. This proposal focuses on two core considerations:

- The individual's control over the work; and
- their opportunity for profit or loss.

If the classification isn't able to be determined based on those initial considerations, the proposal guides us to look to:

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the individual and the potential employer; and
- Whether the work is part of an integrated unit of production.

Keep in mind to check state law in which the individual performs services as they may vary.

I generally share with clients a good place to start is to:

- Assume employee, prove independent contractor.

Similarly for employee wage & hour classifications:

- Assume non-exempt (eligible for OT - (overtime pay) with a requirement of accurate time records, etc.) and prove exempt.
- With exempt employees, be sure to look at the job duties test, then consider the salary basis and level.

Keep in mind wage & hour misclassification are a primary focus of the DOL, and a common class action lawsuit focus. With such there is a lot at risk from penalties, to back pay, tax responsibility and access to benefits, etc.



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