

## HR Weekly Podcast

August 5, 2015

Today is Wednesday, August 5, 2015. Welcome to the HR Weekly Podcast from the Division of State Human Resources. This week's topic concerns whether workers should be considered employees or independent contractors.

On Wednesday, July 15, 2015, the United States Department of Labor expanded its guidance regarding which workers should be considered employees rather than independent contractors. In its guidance, the Department of Labor narrowed its definition of independent contractor. This new interpretation could cause more workers to be treated as employees not only for FLSA purposes, but other employment laws as well.

Generally, an employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. Conversely, employers, in most cases, do not have to withhold or pay any taxes on payments to independent contractors.

The FLSA defines "employ" as "to suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Using the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees; however, independent contractors are workers with economic independence who are in business for themselves. The Department of Labor suggests using the "economic realities" test to determine whether the worker is economically dependent on the employer or in business for him or herself. This test considers several different factors when making this determination. In conducting an economic realities test, the Department of Labor noted that employers should generally consider these factors in determining if an individual is an employee or independent contractor:

1. the extent to which the work performed is an integral part of the employer's business;
2. whether the worker's managerial skills affect the opportunity for profit and loss;
3. a comparison of the relative investments of the worker and the employer;
4. does the work performed require specialized skills and initiative;
5. the permanency of the worker's relationship with the employer; and
6. the nature and degree of control by the employer.

It is important to note that no single factor is determinative. For example, the degree of control by the employer should not be given undue weight. In undertaking this analysis, each factor must be examined and analyzed in relation to one another.

In addition, there are certain factors that are immaterial in determining the existence of an employment relationship. These factors include, for example:

- the fact that a worker has signed an agreement stating that he or she is in an independent contractor relationship with the employer;
- the fact that the worker has incorporated a business or is licensed by a governmental agency; and
- the fact that employee status is not determined by the time or mode of pay.

The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor under the FLSA, but has held that the totality of the working relationship is

determinative. Remember that factors which are relevant in one situation may not be relevant in another. Employers must look at the entire work relationship, consider the degree or extent of the right to direct and control, and finally, document each of the factors used in making a determination. A misclassification of a worker as an independent contractor could result in the employer being held liable for employment related taxes for the worker. In addition, the Internal Revenue Service could impose interest and penalties.

For additional information regarding employees and independent contractors, visit the Department of Labor's website at: [www.dol.gov](http://www.dol.gov)

Thank you.