

JacksonLewis

Independent Contractor Updates

Arizona Commerce Authority: Small Business Boot Camp

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Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, we understand the importance of having a workforce that reflects the various communities we serve.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

- Fair Labor Standards Act
- State Specific Laws
- National Labor Relations Act
- Questions?

Employee vs. Independent Contractor

- There is no single definition of employee.
- Definition of employee may change based upon jurisdiction (Federal/State/Local) or statute.
- Different agencies and governing bodies have different tests
 - DOL (FLSA)
 - NLRB (NLRA)
- Businesses using independent contractors must comply with all applicable tests



The Fair Labor Standards Act ("FLSA")

- The FLSA was adopted by Congress in 1938 in order to create disincentives for employers to require employees work in excess of 40 hours per week.
- It does two things:
 - Requires payment of minimum wage for all hours worked
 - Requires employers pay 1.5 times an employee's "regular rate of pay" for all hours worked over 40.
 - All requirements apply on a weekly basis



Who is an “Employee?”

- The FLSA and state wage and hour laws only apply to “employees,” which begs the question of who is an “employee?”
- In order not to be an “employee” under the FLSA and the majority of state laws, a worker must satisfy the requirements of being an “independent contractor”
- There are various tests, but the most important factors are:
 1. The employer’s versus the individual’s degree of control over the work;
 2. The individual’s opportunity for profit or loss;
 3. The individual’s investment in facilities and equipment;
 4. The permanency of the relationship between the parties;
 5. The skill or expertise required by the individual; and
 6. Whether the work is “part of an integrated unit of production.”
- Under a 2021 DOL rule, control over the work and opportunity for profit or loss carried greater weight

Why Does this Matter?

- If an employee is misclassified as an independent contractor, employers can be liable for:
 - Unpaid overtime (with no records to prove how many hours the employee worked)
 - Attorney's fees
 - Unpaid meal and rest periods in some states
 - Penalties including liquidated damages under the FLSA
 - Back taxes
 - Unpaid employee benefits
- Can be brought as a class action
- Personal liability of owners/decisionmakers

Exemptions

- The FLSA (and state laws) provide employers with exemptions to minimum wage and overtime.
- The burden is on the employer to establish exemptions, so close calls should result in an employee being non-exempt and eligible for overtime.
- There are many exemptions
- Nearly all of these exemptions have a “salary basis” test, which means an employee must be paid a predetermined amount of compensation of at least \$684/week without regard to how many hours they work.
- There are very limited circumstances in which an employer can make deductions from an exempt employee’s salary.
 - Full day absences for personal reasons, other than sickness or disability.
 - Full day absences due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences.
- Catastrophic effects for making unlawful deductions
- The \$684 likely changing in October.

Department of Labor's (DOL) Proposed Rule

- The DOL issued a Notice of Proposed Rulemaking in October 2022 seeking to revise the standard for whether an employee is an “independent contractor” under the FLSA
- Largely mirrors the rule prior to the Trump administration’s January 2021 final rule which reduced the factors considered and raised the standard for misclassification
- Proposed rule considers 6, equally weighted factors that, with some “slight variation,” both the DOL and the federal courts historically have applied

Department of Labor's (DOL) Proposed Rule

- These factors are:
 - Degree of control exercised by the employer over the worker
 - Worker's skill or initiative
 - Permanency of the relationship between the parties
 - Worker's opportunity for profit or loss dependent on managerial skill
 - Worker's investment in equipment or other resources as compared to the employer's investment
 - Whether the work is an integral part of the employer's business

Department of Labor's (DOL) Proposed Rule

- Under the proposed rule, in some cases one or more factors may be more probative than others, and in some cases one or more factors may be irrelevant
- Six factors are non-exhaustive and other considerations may arise in a given situation
- Rule is anticipated to be published in October 2023

State Laws

- Because the FLSA's requirements are really very narrow, state law has filled in the gaps to:
 - Create higher minimum wages
 - In some cases require overtime by day
 - Mandate meal and rest breaks
 - Create private rights of action for “straight time”
 - Broaden definition of “employees”
- State laws vary dramatically in substance and enforcement



Arizona – Who is an Independent Contractor

- No statutory definition, but courts have established a general right to control test or economic realities test which will look at employer exercising of control over results or over means used to achieve results.
 - The extent of control over work and the degree of supervision
 - The distinct nature of the worker's business
 - Required specialization
 - Provider of materials and place of work
 - Duration of employment
 - Method of payment
 - Risk of profit and loss
 - Relationship of work done to regular business of employer
 - Belief of parties

Arizona – Who is an independent contractor

- AZ law allows employers to establish the existence of an independent contractor relationship by having the contractor sign a declaration, Declaration of Independent Status.
- Execution of a declaration creates a rebuttable presumption that an independent contractor relationship exists
- Use of the declaration is optional
 - Model language and criteria ARS 23-1601

Arizona – Who is an Independent Contractor

- The law provides sample language for the declaration, including the following:
 1. Acknowledgement that the contracting party does not restrict the contractor's ability to perform services for or through other parties
 2. Expectation that the contractor provides services for other parties, and the employer does not dictate the performance, methods, or process the contractor uses to perform services, and
 3. Acknowledgement that the independent contractor is paid by the job and not on a salary or hourly basis, and is not covered by the employers' health or workers' compensation insurance

Arizona – Qualified Marketplace Contractor

- Only industry specific in AZ – Gig economy.
- Person that enters into agreement with a marketplace platform for use of the digital platform to provide services to third-parties.
 - Platform must be digital and facilitates provision of services
 - Platform accepts service requests only through the platform

California – Who is an Independent Contractor

- Uses the “ABC” Test
 - The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - The worker performs work that is outside the usual course of the hiring entity’s business; and
 - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
- All three factors must be met unless there is an applicable exemption

National Labor Relations Act ("NLRA")

- Why does independent contractor status matter under the NLRA?
- Section 2(3) of the Act excludes independent contractors
- As a result, under the NLRA true independent contractors cannot
 - Organize
 - Participate in elections
 - File unfair labor practice (ULP) charges
 - Collectively bargain
- The Act does not define “independent contractor”



History & Context

Historically, the NLRB applied the common-law agency test consisting of 10 factors:

1. Who controls the details of the work
2. Is the work performed a distinct occupation or business
3. Is the work being performed typically done under the supervision of an employer
4. Does the work require special skill
5. Who supplies the tools or equipment
6. The length of the engagement
7. Is compensation based on time spent or completion of a job
8. Is the employer in the business of work that is performed
9. Do the parties believe they have created an independent contractor relationship
10. Whether the employer is in business

History & Context

- Traditional guiding principles used to determine independent contractor status:
 - All factors must be assessed and weighed
 - No one factor is decisive
 - Other relevant facts may be considered depending on circumstances
- Over time, the NLRB increasingly weighed entrepreneurial opportunity for gain or loss as an indicia of independent contractor status
 - In 2019, the Board determined the “entrepreneurial opportunity” component was the most prominent consideration of the independent contractor/employee analysis, overturning prior Board law

Current Standard

- In June 2023, the NLRB returned to its earlier standard, requiring all incidents of the working relationship be assessed, with no one factor being decisive
- NLRB also noted “entrepreneurial opportunity” factor will depend on whether the individual is rendering services as part of an independent business or if they are performing functions that are essential to employer’s normal business operations
 - Does individual have a realistic ability to work for other companies?
 - Does individual have a proprietary or ownership interest in their work?
 - Does individual control important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, purchase of equipment, and commitment of capital?
- Weight given to entrepreneurial opportunity must be actual, not theoretical

Why Does this Matter?

- The decision may have a significant impact on employers, primarily those frequently hiring contract or gig workers.
 - Independent contractors are not considered employees under the Act and are excluded from the law's coverage
 - Independent contractors do not have Section 7 rights to engage in protected concerted activity and, therefore, do not have the right to unionize
- Employers will need to carefully analyze contractual relationships with employees to ensure classifications meet NLRB standards for independent contractors

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Questions?

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Thank you.