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Department of Labor Applies the Economic Realities Test

On July 15, 2015, the Wage and Hour Division of the Department of Labor announced that the appropriate classification of U.S. workers under the federal Fair Labor Standards Act (“Act”) is dependent on an “economic realities” test.

The economic realities test evaluates a worker’s relationship with an employer to determine if he is economically dependent on the employer as an employee, or whether the worker is in business as an independent contractor. The economic realities test consists of the following six factors:

- 1) Whether the work performed is an integral part of the employer’s business; if so, the worker is likely economically dependent on his employer.
- 2) The extent to which the worker’s managerial skills affect his opportunity for profit or loss. Managerial decisions providing such opportunities leans toward finding economic independence.
- 3) How a worker’s relative investment compares to that of the employer’s. A worker incurring a risk as an investor is more likely to be independently in business.
- 4) Whether the work requires special skill and initiative. The use of a worker’s business skills, judgment and initiative and not *just* his technical skills weigh in favor of economic independence.
- 5) The permanency of the relationship; long-term or indefinite employment suggests the worker is an employee.
- 6) The degree of control exercised or retained by the employer. To be found economically independent, a worker must control meaningful aspects of the work.

The Act establishes both minimum wage and overtime pay. However, the Act only applies to employer and employee relationships; it does not govern any relationship between an employer and independent contractor. Consequently, the question often arises as to whether a worker is considered an employee or independent contractor.

The economic realities test requires all factors be analyzed in relation to one another and no single factor be outcome determinative. The factors should be used to answer the ultimate question of whether the worker is economically dependent on the employer and is thus an employee. Though courts may still find independent contractor status, the Division has acknowledged that in application, the economic realities test will classify a majority of U.S. workers as employees.

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