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Though you might be interested in the New Rules that took effect in September 2024 by the Department of Labor.

Does your business classify some workers as independent contractors instead of employees? You should know that the U.S. Department of Labor (DOL) is trying to make it harder for all businesses to use independent contractors.

The Department of Labor enforces the Fair Labor Standards Act (FLSA), the federal law that requires most employers to pay employees a minimum wage and non-exempt employees time-and-a-half for overtime.

The key word here is "employee." FSLA does not apply to independent contractors. They need not be paid time-and-a-half for overtime or even the minimum wage.

The question is—who is an independent contractor?

Initially, it's up to each business to decide how to classify workers. However, your decision is subject to review by the Department of Labor, other government agencies such as the IRS, and your state unemployment and workers' compensation agencies.

Bad things can happen if the government decides you've misclassified an employee as an independent contractor. The Department of Labor can make you pay back overtime pay for two years (three years if the misclassification is intentional). Your workers can also bring lawsuits for violations!!!!!

For FLSA purposes, workers are employees if, *as a matter of economic reality*, they are *economically dependent* on the hiring firm. The Department of Labor's new test contains six factors hiring firms must consider:

1. Opportunity for profit or loss. Your independent contractor must be able to incur a loss thought their own independent effort and decision-making. Lack of opportunity for profit or loss suggests that your independent contractor is really an employee.
    - Do they negotiate his or her pay;
    - Decides to accept or decline work;
    - Hires his or her own workers;
    - Purchases materials and equipment; or
    - Performs marketing, advertising, or other efforts to get work.

2. Investment in facilities and equipment. Independent contractors typically invest in their own tools, equipment, and workspaces. A lack of such capital or entrepreneurial investment weighs in favor of employee status.

3. Permanency of the relationship. Independent contractors typically work on a sporadic or project basis, or for a specific duration. Long-term, continuous, or indefinite working relationships indicate employee status.
4. Degree of control by the hiring firm. A hiring firm's "control" over an independent contractor is limited to accepting or rejecting the final results the contractor achieves. In contrast, employers have the right to control how their employees perform their work.

5. Integration into the employer's business. If the work performed by a worker is critical, necessary, or central to the hiring firm's principal business, then the worker is more likely an employee. In other words, if a worker's labor is part of the goods or services your company offers (as opposed to a tangential service that worker also offers and provides to others), he or she is more like an employee.

6. Skill and initiative required. This factor focuses on whether the worker uses his or her own specialized skills, together with business planning and effort, to perform the work and support or grow a business. Workers who do so are more likely independent contractors. Works who do not have specialized skills or who are dependent on training from the hiring firm are more likely employees.

These six tests are complex and hard to apply. No one factor is determinative. Rather, you must examine all the circumstances of the relationship.

To make worker classification even more challenging, the Department of Labor test is only one of many. The IRS, for example, uses a more business-friendly right-of-control test. Many states use an even stricter ABC test for workers' compensation, unemployment, and state wage and hour law purposes.

Remember this: A worker can qualify as an independent contractor under the IRS test but be an employee under the Department of Labor and Arizona Wage and Hour laws.

If you use independent contractors, you should review your relationship considering the new Department of Labor test.

If your company uses independent contractors, it should always have them sign an independent contractor agreement with a clause waiving the right to bring or join any class action suit against the company, including suing for workers' misclassification. The clause can avoid ruinously expensive class action lawsuits brought by plaintiff's lawyers. Remember this, when your independent contractor gets hurt on the job, he or she "is coming" after you to cover those medical expenses.

Licensed Contractors only. Did you know that if you have Workers' Compensation Insurance and use independent contractors in your business, you may be liable for uninsured independent contractors injured on the job? Additionally, without valid Workers' Compensation certificates of insurance for your Independent Contractors, you may be charged an additional premium.

I share this because the Internal Revenue Service along with the Department of Labor are coming after you and me. There is a reason the IRS and DOL are hiring thousands of new agents, and I expect some of us are going to be meeting these new agents in the next year or two.

Sincerely,

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