

**Thompson Coburn LLP**  
**Labor and Employment News Alert**

DOL claims most workers classified as independent contractors are "employees" covered by the FLSA



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The Wage Hour Administrator has issued a detailed formal interpretation of when someone should be classified as an independent contractor or an employee for purposes of the federal wage-hour laws (Fair Labor Standards Act). A link to this interpretation is available [here](#).

The main point of the interpretation, reflecting the Administration's pro-employee stance, is that the FLSA has a broader definition of "employ" than the common law test for determining whether a person is an independent contractor. According to the Wage Hour Administrator, someone is "employed" under the FLSA when the business "suffers or permits" the individual to work. Therefore, the ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly is in business for himself or herself. To make this determination, the focus should be on the "economic realities" of the relationship, including, but not limited to, whether the worker is in a position to operate at a loss as well as at a profit and can manage the business to achieve that result, whether the individual works exclusively and/or on a long-term basis for the business, and whether the worker makes a substantial investment in tools and equipment for the business. According to the Administrator, when "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA," and therefore enjoy the protections of the Act.

This "interpretation" is not a binding regulation. The courts make the final decision. However, it will be used by federal Wage and Hour field auditors and other DOL staff as guidance in an audit to determine who is an "employee" and whether those workers classified by the company as independent contractors have been deprived of any rights under the FLSA. Further, it is reasonable to expect that this guidance will be used by plaintiff-side class action lawyers as further ammunition to bring independent contractor missclassification lawsuits. It is advisable to review your current independent contractor relationships in light of the factors and considerations cited in this memorandum.

Thompson Coburn has considerable experience in this area and is available to assist in any situation you identify as a potential concern.

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