

**CUT AND PASTE POST**  
**SEPTEMBER 2015:**  
**INDEPENDENT CONTRACTORS AND DIGEST OF EEO LAW**

## **Independent Contractors**

### ***Administrator's Interpretation has potential to turn thousands of Independent Contractors into employees -***

For years, businesses have relied on IRS guidance to decide whether a worker is an employee or an independent contractor. The IRS guidance focused on the degree of control and independence when deciding if a worker was an employee or independent contractor. The IRS used the following factors when making this determination:

1. **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (e.g., how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship:** Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

On July 15, 2015, David Weil, Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD), issued [Administrator's Interpretation Letter 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors](#). A ruling or interpretation issued by the Administrator is an official ruling or interpretation of the WHD for purposes of the Portal-to-Portal Act. These Interpretations do not carry the force of law, but are given a certain amount of deference by the Courts.

***"... when applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA"***

While the IRS' test focused on the degree of control over a worker, the Interpretation puts employers on notice that the DOL will focus on a six factor "economic realities" test when determining whether a worker is an employee or independent contractor. The DOL Interpretation describes the six factors of the economic realities test as follows:

- **Is the work an integral part of the employer's business?** (E.g., Workers answering phones at a call center are most likely employees)
- **Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?** (e.g., an independent contractor may decide to hire others or purchase equipment and materials in order to increase profits).
- **How Does the Worker's Relative Investment Compare to the Employer's Investment?** (e.g., Independent contractors must make some significant investment in the business.)
- **Does the work performed require special skill and initiative?** (e.g., a worker's "business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is an economically independent contractor.)
- **Is the relationship between the worker and the company permanent or indefinite?** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. "After all, a worker who is truly in business for him or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness." (e.g., an editor who has

worked for a publishing house for several years, who completes edits using the publishing house's software and only edits books provided by the publishing house, is likely an employee.) However, the Interpretation does say that a lack of permanence or indefiniteness should be carefully reviewed to determine if the reason is indicative of the worker's running an independent business.

- **What is the nature and degree of the employer's control?** The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business." (e.g., a nurse who provides skilled nursing care is referred to clients by a Registry that limits his work hours, and requires him to receive a certain level of pay and attend a certain amount of training, is likely an employee of the Registry.)

The 15-page Interpretation discusses pertinent FLSA definitions and the breadth of employment relationships covered by the FLSA, and provides examples of factors to be considered when determining whether a worker is an employee or independent contractor. Additional guidance on misclassification is available on the WHD's webpage: [Misclassification of Employees as Independent Contractors](#).

In 2011, the federal WHD entered into an agreement with the Montana Department of Labor and Industry with the specific and mutual goals of providing clear, accurate, and easy-to-access compliance information to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by, as appropriate, conducting coordinated enforcement actions and sharing information consistent with applicable law. This agreement would apply to the application and implementation of the Administrator's Interpretation.

#### **What to do:**

- If you use independent contractors, review your practices in light of this new Interpretation.
- If you disagree with this Interpretation and/or if you feel it will have a chilling factor on entrepreneurship and small business, contact your federal representatives.

## **New 'Digest of EEO Law' Issued By EEOC**



### **Discrimination**

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individual characteristics, excluding or restricting members of the group on the grounds of race, sex, or age.

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) has announced the latest edition of its federal sector [Digest of Equal Employment Opportunity Law](#).

This quarterly publication, prepared by EEOC's Office of Federal Operations (OFO), features a wide variety of recent Commission decisions and federal court cases of interest. Additionally, it contains a special article entitled [Gender Identity and Sexual Orientation Coverage Under Title VII Case Law Update: Review of Pre- and](#)

[Post-Macy Title VII Protections for LGBT Employees](#).

"The article on *Gender Identity and Sexual Orientation Coverage* contains an overview of recent Commission decisions in this evolving area of law," said OFO Director Carlton M. Hadden. "The article should provide helpful information to our stakeholders when addressing claims of discrimination filed by LGBT employees."

The August 2015 edition of the *Digest* contains summaries of noteworthy decisions issued by EEOC. This edition features cases involving agency processing [attorneys' fees](#), [compensatory damages](#), [dismissals](#), [findings on the merits](#), [remedies](#), [sanctions](#), [stating a claim](#), [settlement agreements](#), [summary judgment](#), and [timeliness](#).

The summaries are neither intended to be exhaustive or definitive as to the selected subject matter, nor are they to be given the legal weight of case law in citations. In addition to the quarterly *Digest*, Commission federal sector decisions are available on EEOC's website at <http://www.eeoc.gov/federal/decisions.cfm>. The public may also receive federal sector information updates and news items via Twitter: @EEOC\_OFO. Further information about EEOC is available online at [www.eeoc.gov](http://www.eeoc.gov)