This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice.

Always consult an attorney to address your particular situation.

ARE YOU PROPERLY CLASSIFYING YOUR INDEPENDENT CONTRACTORS?

Gene Droder*

Nonprofit organizations that rely significantly on the work of independent contractors should proceed cautiously. On July 15, 2015, the U.S. Department of Labor issued interpretive guidance saying "most workers" who are classified as independent contractors are actually employees under the Fair Labor Standard Act's "broad definitions" of employment.

Whether a worker is properly classified as an independent contractor is the subject of increasing DOL action and private litigation. The DOL and many courts use the following factors, called the "economic realities" test, to analyze the classification:

- the extent to which the work is an integral part of the organization's business;
- the worker's opportunity for profit or loss;
- whether the work requires special skills;
- the permanency of the relationship;
- and the degree of control exercised by the organization.

Under these factors, courts generally regard independent contractors as those who operate a separate business and are economically independent from the organization. But those who are economically dependent on the organization are employees under the FLSA, according to the DOL.

An organization that misclassifies a worker as an independent contractor may face significant exposure under the FLSA, including liability for any failure to pay the minimum wage and failure

to pay overtime for work in excess of 40 hours per week. Failing the FLSA economic realities test may also indicate possible misclassification under other federal and state statutes, which may carry even greater exposure, including liability for failure to reimburse employee expenses, provide various employee benefits, withhold income taxes and FICA, pay unemployment insurance contributions, or provide workers' compensation insurance coverage.

When analyzing an independent contractor's classification, organizations should be mindful that no single factor of the "economic realities" test is determinative. Also, courts may consider additional factors depending on the circumstances. (The DOL's July guidance is not binding authority that courts must follow, even in an FLSA case.) A written contract or agreement that identifies the worker as an independent contractor may be helpful but is not determinative. The method of payment – such as hourly or flat-fee – is instructive but also not determinative. Despite the different tests and factors, the more an organization is able to show that the worker is in business for him or herself, and not primarily in business for the organization, the more likely it is the worker will be considered an independent contractor.

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