

Determining Independent Contractor Status-Eighth Circuit Weighs In

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By Timm Schowalter, of counsel, how do you know if your workers have been misclassified? As the saying goes, this is easier said than done. The tests used to determine whether a worker is an independent contractor or an employee are complex and often differ among jurisdictions as well as government agencies. For instance, the Internal Revenue Service (IRS) has developed three part test that incorporates its former “20-Factor Test” for determining a worker’s proper status, yet the Department of Labor (DOL) applies its own test when conducting a classification audit. To further complicate matters, the DOL and IRS typically do not exchange the information they obtain during misclassification investigations due, in part, to certain restrictions in the tax code on the IRS’s ability to share such information with other federal agencies. The U.S. Supreme Court has also held that there is no single rule or test for determining independent contractor or employee status.

Recently, the Eight Circuit Court of Appeals weighed in on the fray and derived yet another test: “hybrid” test. In *Alexander v. Avera St. Luke's Hospital*, the Eighth Circuit determined that a hybrid of the economic realities test and the common law test should be used in determining whether a worker is an employee or independent contractor. Of paramount importance is the degree of control the employer has over the work of the individual. Professional and economic freedoms of the worker tilt the scale in favor of the individual being an independent contractor. Granting greater freedoms to that individual than to other workers who are inarguably employees gives further evidence that the individual is an independent contractor. Companies should closely monitor the degree of control and influence they exert over an individual's performance if they want to maintain an independent contractor relationship rather than an employer-employee relationship.

If you thought proper classification of workers was an issue that could be put off until later, you should reconsider. For starters, the DOL and IRS are in the midst of a misclassification crackdown. If the DOL or IRS launches an investigation of your company and determines that certain workers have been misclassified, the financial consequences could be quite significant. On the one hand, the DOL could collect back benefits that were improperly withheld from misclassified employees. On the other hand, the IRS could require you to pay all back withholding taxes plus interest and penalties even if the misclassified contractors have already paid their income taxes. Not to mention that once your independent contractors learn they have been potentially misclassified through any government investigation, you may end up facing an expensive and highly publicized class action lawsuit.