

Electronic Alert

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U.S. Labor Agencies Form Pact to Collaborate on Investigations into Worker Misclassification Claims

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On January 6, 2022, the United States Department of Labor (DOL) and the National Labor Relations Board (NLRB) announced the agencies' plan to collaborate on investigations, specifically targeting allegations of independent contractor misclassification and retaliation against workers. These are increasing areas of contention in the growing gig economy.

The agency collaboration effort is memorialized in a Memorandum of Understanding (MOU) and will make it easier for these agencies to investigate and cite employers for violations of laws that both agencies are tasked with enforcing. The announcement noted that “all too often, workers face adverse action for speaking out about their compensation, whether it is discussing their wages, fighting back against wage theft, or advocating for higher wages.”

As a reminder for employers, under the National Labor Relations Act (NLRA), whether a worker is an employee versus an independent contractor is determined by the following factors, with no single factor being determinative:

- The extent of control the employer has over the work;
- Whether the worker is engaged in a distinct occupation or business;
- Whether the work is usually done under the direction of the employer or without supervision;
- The skill required in the particular occupation;
- Whether the employer or the worker supplies the instrumentalities, tools, and the place of work;
- The length of time for which the worker is employed;
- Whether the worker is compensated by time worked or by the job performed;
- Whether the work is a part of the regular business of the employer;
- Whether the parties believe they are creating an employer-employee relationship;
- Whether the work is part of the regular business of the employer; and
- Whether the principal is or is not in business.

In late 2021, the NLRB invited public comment on whether to revisit this standard. In making independent contractor classification determinations, it is also important to note that not all laws utilize the same criteria. For example, the Oregon Employment Department must use the definition of “independent contractor” from ORS 670.600 which contains a list of slightly different criteria.

In light of these investigation and enforcement efforts, employers should take this opportunity to review whether any workers may be improperly classified as independent contractors.

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