

**§ 795.105**

by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

**§ 795.105 Determining employee or independent contractor classification under the FLSA.**

(a) *Relevance of independent contractor or employee status under the Act.* The Act's minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees. Workers who are independent contractors are not covered by these protections. Labeling employees as "independent contractors" does not make these protections inapplicable. A determination of whether a worker is an employee or independent contractor under the Act focuses on the economic realities of the worker's relationship with the worker's potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themself.

(b) *Economic dependence as the ultimate inquiry.* An "employee" under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). "Employer" is defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an "employee" under the Act, if the worker is, as a matter of economic reality, in business for themself. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

**§ 795.110 Economic reality test to determine economic dependence.**

(a) *Economic reality test.* (1) In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but

rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themself.

(2) The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence. Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular relationship. Moreover, these six factors are not exhaustive. As explained in paragraph (b)(7) of this section, additional factors may be considered.

(b) *Economic reality factors*—(1) *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the potential employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and