



## THE NEW OVERTIME RULE AND INDEPENDENT CONTRACTOR CLASSIFICATION – Chapter 5

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### I. THE 2016 REVISED OVERTIME RULE

On May 18, 2016, the Department of Labor (“DOL”) has an updated rule to the Fair Labor Standards Act (“FLSA”). The new rule means that more employees will be eligible for overtime pay due to an increase in the minimum salary requirement for the most common overtime exemptions (executive, administrative and professional), from \$455 to \$913 per week beginning on **December 1, 2016**. The FLSA mandates that all employees not “exempt” from overtime pay be paid overtime for all hours “actually worked” in excess of 40 in any single workweek at a rate of 1 ½ times the “regular rate” of pay. The FLSA applies to employees, but does not protect workers who perform services as independent contractors. If you missed Chapters one through four in this series of articles on the new DOL Rule, you may read them on my website: [www.texaslaborlaw.com](http://www.texaslaborlaw.com).

### II. INDEPENDENT CONTRACTOR CLASSIFICATIONS

There are several benefits to a company using independent contract labor. In addition to tax benefits, many federal and state laws do not apply to independent contractors. For example, Title VII discrimination laws and the FLSA governing wages do not apply to independent contractors. Ordinarily, unemployment and workers’ compensation laws only protect employees. The consequences for mislabeling an employee as an independent contractor may result in tax consequences, liability for overtime pay, unpaid benefits, unpaid expenses and unemployment benefits, as well as other liability under various federal and state laws. Independent contractors are individuals who essentially run their own business, and who provide services to several customers. There is no one factor that controls whether someone is correctly classified as an independent contractor; however, three basic factors are relied upon in determining the degree of control and independence necessary for a worker to be an independent contractor under the FLSA:

1. **Behavioral**: Does the company control or have the right to control the manner in which the worker performs the job? *An independent contractor uses his own skill and experience to complete the job, and sets his own hours, rather than taking directions from managers.*
2. **Financial**: Are the business aspects of the worker’s job controlled by the company? (Consider how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.). *An independent contractor uses his own tools and supplies, and ordinarily submits an invoice for work performed.*
3. **Type of Relationship**: Are there an independent contractor agreement between the worker and the company, and what type benefits are paid (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business? While a well-drafted written independent contractor agreement is important, it is not dispositive. *An independent contractor is generally not be paid and/or provided with company benefits, and*

*is not hired exclusively by the company for a very long period of time, without the opportunity to accept other work concurrently.* The DOL also considers whether the worker is performing a job that the company specializes in, such as a painting subcontractor hiring a painter because there is more likely to be supervision in that case, and thus, employee status.

### **III. Breakdown of Factors to Consider**

1. The nature and degree of the alleged employer's control in terms of how the work is performed; **(Tip - the company should exercise little or no control over details of the work performed. However, job specifications may be provided);**
2. The worker's opportunity for profit or loss based on his or her managerial skills; **(Tip – the worker should be able to negotiate price for each job, and be able to accept other jobs from other customers. The worker is responsible for completing the job per specifications and/or in a good and workmanlike manner);**
3. The worker's investment in the business (equipment or materials, etc.) **(Tip – the company should not pay for equipment or overhead items, such as cell phones, cars, computers, clothes, tools, etc., and should not pay benefits or carry insurance for the worker);**
4. The degree of skill and initiative required to perform the job; **(Tip –a worker must have the required education, certification, degree and/or skill to perform the job independently. If not, the worker will not qualify for independent contractor status, regardless of 1099 forms or written agreements).**
5. The degree of permanency and duration of the working relationship. **(Tip – an individual who works exclusively for a company for a long period of time (about 1 year or more), without a meaningful opportunity to accept other customers, may be an employee).**

### **IV. The Misclassification Prevention Initiative**

The misclassification of employees as independent contractors has been recognized as a serious problem facing workers because misclassified employees are denied many benefits and protections that apply to employees under various federal and state laws. To combat this problem, the Wage and Hour Division of the DOL and the Internal Revenue Service (IRS) have joined forces to cooperate by notifying each other of workers that are misclassified so that the appropriate actions can be taken against those employers. States such as Louisiana have agreed to participate by cooperating with the DOL and IRS to identify misclassified workers. With the new focus on enforcement of the revised overtime rules, misclassification will also be a hot topic for the DOL in the near future.

*Please note that the information contained in this article is not designed to address specific situations, and does not include rules or regulations that apply to all states. If you have questions concerning this topic, you should consult with legal counsel of your choice to obtain advice on fact specific matters.*

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