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Blurred lines can lead to real wage and hour liability

For more information, please contact FordHarrison LLP
Salvador P. Simao, Partner - Berkeley Heights, New Jersey
973-646-7302 or ssimao@fordharrison.com

Wage and Hour Toolkit - The Shadow Workforce

Many individuals perform work or services for businesses; however not all of them are employees as defined by the federal Fair Labor Standards Act (FLSA). It is important to distinguish between employees and non-employee workers because federal and state laws provide various protections and benefits to employees that are not available to non-employees, including minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Additionally, many anti-discrimination laws protect employees, but do not apply to other types of workers.

The U.S. Department of Labor (DOL), together with the Internal Revenue Service and many states, is targeting worker misclassification through audits, litigation, and worker outreach. The DOL takes the position that most workers are employees under the FLSA. State and federal legislatures have introduced measures aimed at misclassification. Allegedly misclassified workers have filed a number of class action lawsuits seeking unpaid wages and benefits. Mistakenly classifying workers as non-employees can be costly. To avoid unnecessary costs and minimize the potential for liability, businesses should carefully examine whether a worker is an employee entitled to the protection of the FLSA.

This Toolkit will help you find clarity in employee classification. It contains practical advice on how to:

- Draw clear lines between employees and various categories of non-employee workers, including independent contractors, interns, and volunteers; and
- take steps to mitigate liability related to non-employee workers with helpful "best practices" checklists.

This toolkit analyzes employment under the FLSA. Analysis under various state laws and other federal laws may differ. Due to the fact-intensive nature of the analysis, this Toolkit is not intended to be legal advice.

Who Are Your Employees?

Establishing a national minimum wage, the forty-hour workweek, and premium pay for hours of work exceeding 40 in a week, the FLSA was a product of president Franklin Delano Roosevelt's "New Deal" – a response to the Great Depression of the 1930s aimed at getting more Americans back into the workforce.

To achieve its purpose, the FLSA broadly defined employment as "to suffer or permit to work."[1] This broad definition was designed to sweep more workers within the scope of the FLSA than the common-law right to control test which previously governed the employment relationship.[2]

However, the FLSA's broad definition of "employment" has created a gray area in the law. The Act did not define "work," and provided very general (and circular) definitions for "employer" and "employee." An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." An "employee" is "any individual employed by an employer."[3]

As these definitions are not particularly helpful to the average employer (much less the average employee), much of the early caselaw attempted to refine these definitions and provide much needed guidance.

"Economic Reality"

The FLSA definition of "employee" was shaped by several Supreme Court decisions dating to the mid-1940s. In these cases, the Supreme Court rejected the common law right-to-control test, reasoning that the remedial nature of the FLSA