Senate Bill 197 Testimony

Good afternoon, Chairman Beidle and Committee members.

My name is Matt Auman, and I am an owner of HomeCentris Healthcare, a Maryland RSA. HomeCentris has five offices in Maryland and is one of the largest providers of Medicaid waiver services with approximately 1,300 employees. I am also a Board Member of MNCHA, the trade association for the homecare industry.

I am testifying today in favor of SB-197 which would tie Medicaid reimbursement to the correct and compliant classification of personal care givers as W2 employees.

I would like to open my remarks by referencing the Guidance Document which was required by the General Assembly in 2021 and issued in the fall of 2022. The Guidance Document was written by The Maryland Department of Labor, The Attorney General's office, and the Department of Health. The first two sentences of this document read, "Maryland's RSAs sometimes wrongly classify PCAs (that is, anyone paid to provide personal care services) as independent contractors rather than employees. When this happens, it is called worker misclassification, and it is illegal." In addition, on January 9th of this year, the US Department of Labor issued its final rule on independent contractors which solidifies that these caregivers should be classified as employees.

At this time, there is no longer a question as to the correct classification of these workers. SB-197 simply says that in order for an RSA to receive Maryland Medicaid funds, it must follow the law. Despite this guidance, I have spoken to multiple 1099 agencies who have told me that until the Department of Labor sues them for non-compliance, they will continue with the 1099 model. This non-compliant viewpoint is why the sponsors of this bill rightly believed that without tying reimbursement to labor law compliance, change will not happen.

WHY DOES SB 197 MATTER?

1. <u>The first reason is protection to workers via compliance with labor laws</u>. Allowing a 1099 model to continue negates the employment-related legislation passed by the General Assembly. Laws and regulations that state, "An employer shall…" is immediately disregarded by many 1099 based RSAs as they simply say, "this legislation doesn't apply to me, I don't have any employees." This interpretation by the 1099 agencies immediately wipes out any employee protection laws and benefits for a class of workers that desperately needs them. An example arose at the MNCHA Legislative Reception on January 30, 2024 at the Calvert House. During a presentation by the Maryland Department of Labor on the FAMLI law providing family leave to Maryland employees, an audience member asked whether the law applied to agencies using the 1099 model. The answer was "no." Not only is this bad for the neediest of employees, but it is another indication of the unlevel playing field between compliant and non-compliant agencies.
2. <u>The second reason is the improvement of quality of care and patient safety</u>. By definition, a 1099 model does not allow agencies to provide any training to their independent contractors or control their schedules. This might be okay for highly educated consultants who may be legitimate 1099 contractors. However, our caregiver workforce is not in that category and desperately needs training to help keep Maryland's citizens safe at home. Without this needed

training, a 1099 agency is simply sending out an untrained, unskilled worker to provide care for somebody's mother or grandmother. This is not what our frail elderly citizens deserve. In addition, it is a reasonable assumption that agencies which openly choose to not comply with labor laws may also choose not to comply with healthcare regulations designed to protect patients.

POSSIBLE OBJECTIONS:

1. A conversion will be too difficult. Some 1099 agencies may tell you that a conversion to a W2 model will be too difficult and therefore will cause a loss of providers to Medicaid recipients. I disagree with this objection. Our company converted approximately 1,100 caregivers in a six-month period in 2018. Most Maryland RSAs have fewer than 20 caregivers. Second, there will be no loss of services. If some RSAs decide to close rather than convert, the caregivers and clients can easily switch to a W2 agency.
2. It is going to cost my agency more to use this model. This objection is correct, and this is the crux of the fairness argument. The employer model is more expensive because it includes taxes and fees for needed employee protection programs. For example, under a 1099 independent contractor model, an agency is generally not paying for:
    a. Overtime wages
    b. Payroll taxes
    c. Unemployment insurance
    d. Maryland Sick and Safe Leave
    e. Workers compensation insurance
    f. Health insurance (if over 50 employees)
    g. Maryland FAMLI paid leave law.

    This totals approximately $2.00 per hour in worker protections that these agencies are not paying. Not only is this bad for the caregivers who need these protections, but also immediately disadvantages compliant W2 agencies by driving caregivers and clients from law-abiding agencies to non-compliant agencies which may offer higher hourly wages. By not requiring a consistent model, Maryland is incentivizing non-complaint agencies while penalizing compliant agencies with significant extra costs.
3. Eliminates flexibility for these caregivers to work in multiple agencies. This is incorrect. Many of these caregivers already work for multiple agencies and are free to move from agency to agency as a W2 employee. There is absolutely no loss of flexibility for these caregivers as W2 employees.

Passing SB-197 is very important to Maryland's seniors and to the caregivers who provide these vital services. I ask the committee to recommend SB-197.

Understanding how Maryland's employee protection laws apply to residential service agencies (RSAs) and personal care aides (PCAs)

Maryland's RSAs sometimes wrongly classify PCAs (that is, anyone paid to provide personal care services) as independent contractors rather than employees.[1] When this happens, it is called *worker misclassification* and it is illegal. This guidance document explains (1) some differences between employees and independent contractors in the context of personal care, (2) worker misclassification and how it can cost RSAs money and hurt PCAs, and (3) some steps RSAs can take to ensure that their classification policies comply with Maryland's Labor and Employment Code.

1. What is the difference between "employees" and "independent contractors"?

- **There are two kinds of workers under Maryland's employment laws: employees and independent contractors.** In general, independent contractors are in business for themselves, while employees are not. If an RSA pays a PCA an hourly wage to perform personal care and oversees the PCA's work, the worker should usually be classified as an employee. A worker can sometimes be an "employee" under one law and an "independent contractor" under another, because different laws have different purposes and define these terms differently. Even if the IRS has accepted the classification of PCAs as independent contractors, you should not assume that a court would reach the same conclusion under Maryland's employee protection laws, which are humanitarian statutes designed to broadly protect workers and are therefore more favorable to employees.

- **Maryland's wage laws and sick leave law—including the Wage and Hour Law, Wage Payment and Collection Law, and Healthy Working Families Act—have a very broad definition of employee.** Most workers are employees, not independent contractors, under these laws. A worker's status as an employee cannot be changed by a contract or other document (like an "independent contractor agreement") that labels the worker as an independent contractor. To determine a worker's proper classification, courts consider factors related to whether workers are in business for themselves. When the employer exercises, or has the right to exercise, direction and control over the performance of an individual's work, the worker is an employee and not an independent contractor. The Maryland Labor and Employment Code defines the term "employ" broadly as "to engage an

[1] Maryland law defines "personal care" as "a service that an individual normally would perform personally, but for which the individual needs help from another because of advanced age, infirmity, or physical or mental limitation." Md. Code Ann., Health – Gen. Article § 19-301(n)(1). Personal care includes help in walking, getting in and out of bed, bathing, dressing, feeding, and general supervision and help in daily living. *Id.* § 19-301(n)(2)(i)-(vi).

individual to work," and expressly includes "allowing an individual to work" and "instructing an individual to be present at a work site."

- Applying these factors to RSAs and PCAs, (1) RSAs typically have authority to set and enforce conduct policies, including policies designed to ensure that workers comply with the Maryland Department of Health's rules for Medicaid providers; (2) RSAs typically pay PCAs an hourly wage, which means that PCAs have no opportunity for profit or loss dependent on any managerial skill; (3) PCAs typically do not invest in their own equipment and cannot hire others to do the work instead of them; (4) personal care does not require advanced certifications and does not involve business-like skill; (5) PCAs typically have a working relationship with RSAs that is at least several months long; and (6) RSAs are typically in the business of providing personal care. Therefore, PCAs are more likely to be RSAs' employees than independent contractors within the meaning of Maryland's wage and sick leave laws. In cases where PCAs recruit their own clients, that fact alone does not make them independent contractors if factors otherwise suggest the existence of an employment relationship.

- **Maryland's unemployment insurance law also has a broad definition of employee.** Under this law, a PCA is presumed to be an employee, not an independent contractor, unless the RSA can satisfy a test called the "ABC test." Applying this test to RSAs and PCAs, (1) RSAs typically have the ability to control or direct PCAs' work, (2) PCAs do not customarily have their own business, and (3) although the work is typically performed in individuals' homes, personal care is typically the type of work that RSAs perform. Therefore, PCAs are more likely to be employees than independent contractors within the meaning of Maryland's unemployment insurance law. For illustrations of how Maryland's unemployment insurance law applies to workers like PCAs, see the Code of Maryland Regulations (COMAR) 09.32.01.18-3.

- **Maryland's workers' compensation law also defines employee broadly.** Under this law, a worker is presumed to be an employee unless the employer can show that the worker is an independent contractor under the "common law" test. Applying this test to RSAs and PCAs, (1) RSAs typically have the power to hire PCAs, (2) RSAs typically pay wages to PCAs, (3) RSAs typically have the power to fire PCAs, (4) RSAs typically have the power to control PCAs' conduct, and (5) personal care is typically part of the regular business of RSAs. Therefore, in the context of RSAs, PCAs are more likely to be employees than independent contractors within the meaning of Maryland's workers' compensation law.

2. **How can misclassification of PCAs as independent contractors hurt RSAs and PCAs?**

- **Misclassification hurts RSAs because it is illegal and can lead to costly investigations and lawsuits.** The Maryland Department of Labor or U.S. Department of Labor may investigate, require payment of unpaid wages and money damages to workers, and even get a court order requiring the RSA to change its classification and compensation practices. In addition, PCAs may sue an RSA for unpaid wages that they should have been paid as employees. PCAs may bring these cases individually or, in some circumstances, as class actions on behalf of other workers. A court may order the RSA to pay workers damages up to three times the wages they should have been paid. An RSA held liable under Maryland's Wage and Hour Law and Maryland's Wage Payment and Collection Law may also be responsible for the attorneys' fees of PCAs who sue them. Under these laws, individual owners of a corporation (including an RSA) may also be held personally liable for unpaid wages and attorneys' fees, putting their personal assets at risk.

- **Misclassification can also have severe tax consequences for RSAs.** If the Maryland State Department of Assessments and Taxation (SDAT) or U.S. Internal Revenue Service (IRS) finds that an RSA has failed to pay employment taxes for PCAs who should have been classified as employees, SDAT and/or the IRS may require that the RSA pay tens of thousands of dollars—or more—in back taxes and penalties.

- **Misclassification also hurts PCAs by denying them important legal protections.** These include unemployment benefits, workers' compensation, sick leave, and the right to overtime pay (for hours worked beyond 40 in a workweek) and travel-time pay (for time spent traveling from one client's home to another client's home).

3. **What steps can an RSA take to ensure it follows Maryland's employee protection laws?**

- **Do: Talk to a lawyer.** Employment law can be complicated. Lawyers who practice employment law can help ensure that your RSA follows Maryland law. While it may cost money to ask a lawyer about your RSA's worker classification policies, a labor investigation or a lawsuit could cost far more.

- **Do:** Visit the Maryland Department of Labor's website for guidance and to learn about various outreach programs offered by the Department to employers.

- **<u>Do not</u>: Assume something is legal just because others do it.** People sometimes assume a business practice is legal just because other businesses do it. Some rely on advice from friends when establishing their business's worker classification policies. But this can be dangerous, especially in industries where legal violations are common. And in Maryland, "industry practice" is not a defense to a suit for unpaid wages.

- **<u>Do not:</u>** Assume that if you employ a PCA on a salary basis that you don't have to pay overtime pay. PCAs are entitled to overtime wages.

- **<u>Do</u>: Take action to correct your RSA's employment classification policies if you believe they may be incorrect.** Changing the classification of your RSA's PCAs from independent contractors to employees does not mean you will automatically be subjected to lawsuits or liability. The best way to protect your business—and your own assets—is to make sure your RSA follows the law.

CERTIFICATION

To obtain an initial license from the Maryland Department of Health to operate as an RSA and every 3 years thereafter, an individual with authority over the RSA's pay or employment practices must complete the following certification.

I, _____ [print your name], certify that (1) I have read and understood the above guidance and (2) _____ [name of RSA] will comply with the Maryland Labor and Employment Code's requirements concerning the classification of employees.

If the RSA receives payments from the Maryland Department of Health for the provision of home care, personal care, or similar services through any Medicaid program (CFC, CO, CPAS, ICS, CP, or similar): I certify that _____ [name of RSA] ☐ does / ☐ does not [check one box] use personal care aides who have been classified as independent contractors.

_____ _____

Signature of individual with authority over RSA's pay or employment practices

Date

Wage and Hour Division

Small Entity Compliance Guide

On January 10, 2024, the U.S. Department of Labor published a final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, revising the Department's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds an earlier rule published on January 7, 2021 (2021 Independent Contractor Rule) and replaces it with an analysis for determining employee or independent contractor status that is more consistent with the FLSA as interpreted by decades of court decisions. The Department believes that this final rule will reduce the risk that employees are misclassified as independent contractors, while providing added certainty for businesses that engage (or wish to engage) with individuals who are in business for themselves.

The final rule is scheduled to take effect on March 11, 2024.

Overview of The Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act

To Whom Does the FLSA Apply?

The FLSA is a federal law that establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time employees in the private sector and in federal, state, and local governments. For example, the FLSA generally requires covered employers to pay nonexempt employees at least the federal minimum wage for all hours worked and overtime pay of at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a workweek. The FLSA also regulates the employment of children, prohibits employers from taking employee tips, and requires employers to provide reasonable break time and a place for covered nursing employees to express breast milk at work. Finally, the FLSA requires covered employers to maintain certain records about their employees and prohibits retaliation against employees who attempt to assert their rights under the Act. The FLSA's protections do not apply to independent contractors.

The FLSA does not define "independent contractor." Courts have held that, under the FLSA, the question is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). Independent Contractors play an important role in the economy and are commonly referred to by different names, including independent contractors, self-employed individuals, and freelancers.

What determines whether a worker is an employee or independent contractor under the FLSA?

There is no single rule for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. Rather, an "economic reality test" looks to the facts of a situation, rather than assuming that a written label, contractual arrangement, or form of business decides if a worker is economically dependent on an employer. In assessing economic dependence, courts and the Department have historically analyzed the circumstances of the employment relationship, considering multiple factors to analyze whether a worker is an employee or an independent contractor, with no factor or factors having predetermined weight.

To analyze if a worker is an employee or independent contractor, the final rule provides six factors that businesses and workers should consider when analyzing the economic realities of the working relationship. These factors, described in the economic reality test of the final rule, are:

(1) opportunity for profit or loss depending on managerial skill;

(2) investments by the worker and the potential employer;

(3) degree of permanence of the work relationship;

(4) nature and degree of control;

(5) extent to which the work performed is an integral part of the potential employer's business; and

(6) skill and initiative.

No one factor or subset of factors determines if a worker is an employee or independent contractor. Rather, all the circumstances of the relationship should be examined. The weight given to each factor may depend on the facts and circumstances of the particular relationship. Also, additional factors may be relevant if they in some way indicate if the worker is in business for themself as opposed to being economically dependent on the employer for work.

The Six Factors of The Economic Reality Test

To analyze if a worker is an independent contractor or employee under the FLSA, the final rule considers the six factors listed below.

Factor One: Opportunity for Profit or Loss Depending on Managerial Skill

Does the worker have opportunities for profit or loss based on managerial skill that affect the worker's economic success or failure? Managerial skill can include initiative or business expertise or judgment. The following facts, among others, can be relevant in the determination:

- 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.

Examples: Opportunity for Profit or Loss Depending on Managerial Skill

- **Example 1**: A worker for a landscaping company performs assignments only as decided by the company for its corporate clients. The worker does not independently choose assignments, ask for additional work from other clients, advertise the landscaping services, or try to reduce costs. The worker regularly agrees to work additional hours to earn more money. In this example, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may change based on the work available and their willingness to work more. Because of this lack of managerial skill affecting their opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.
- **Example 2**: In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. These facts indicate independent contractor status under the opportunity for profit or loss factor.

Factor Two: Investments by the Worker and the Potential Employer

Are any investments by a worker capital or entrepreneurial in nature? The following facts, among others, can be relevant in that determination:

- Costs to a worker of tools for a specific job and costs that the employer imposes on the worker are not capital or entrepreneurial investments that indicate independent contractor status. Investments that are capital or entrepreneurial in nature and indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.
- Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker's investments do not have to be equal to the potential employer's investments and should

not be compared only in terms of the dollar values of the investments. The focus should be on whether the worker makes similar types of investments as the employer (even if on a smaller scale) or investments of the type that would allow the worker to operate independently in the worker's industry or field. Such investments by the worker in comparison to the employer weigh in favor of independent contractor status, while a lack of investments that support an independent business indicate employee status.

Examples: Investments by the Worker and the Potential Employer

- **Example 1**: A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. These facts indicate employee status under the investment factor.
- **Example 2**: A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents their own space. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (e.g., they allow the worker to do more work and find new clients). These facts indicate independent contractor status under the investment factor.

Factor Three: Degree of Permanence of the Work Relationship

Is the work relationship indefinite in duration, continuous, or exclusive of work for other employers? That would weigh in favor of the worker being an employee. Is the work relationship indefinite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple businesses? That would weigh in favor of the worker being an independent contractor.

- This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification.
- Where an individual cannot perform work on a permanent basis due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, then this factor would not necessarily indicate independent contractor status unless the worker is exercising their own independent business initiative.

Examples: Degree of Permanence of the Work Relationship

- **Example 1**: A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as decided by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity as the cook does not cook for other venues. These facts indicate employee status under the permanence factor.
- **Example 2**: A cook has prepared specialty meals intermittently for an entertainment venue over the past three years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work from the entertainment venue for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.

Factor Four: Nature and Degree of Control

Does the potential employer have control, including reserved control over the performance of the work and the economic aspects of the working relationship?Reserved control means the employer has the right to control even if they do not actually exercise the control. An example of reserved control is if an employer reserves the right to discipline a worker for declining assignments.

Facts relevant to the potential employer's control over the worker include whether the potential employer:

- sets the worker's schedule;
- supervises the performance of the work;
- explicitly limits the worker's ability to work for others, or places demands or restrictions on workers that do not allow them to work for others or work when they choose;
- uses technological means to supervise the performance of the work (such as by means of a device or electronically);
- reserves the right to supervise or discipline workers; or

- controls economic aspects of the working relationship, such as the prices or rates for services and the marketing of the services or products provided by the worker.

Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control. However, actions taken by the potential employer that go beyond compliance with a specific, applicable federal, state, tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. More facts that show control by the potential employer indicate employee status; more facts that show control by the worker indicate independent contractor status for this factor.

Examples: Nature and Degree of Control

- **Example 1**: A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines the staff assignments. Alpha House's policies prohibit nurses from working for other nursing homes while employed with Alpha House to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.
- **Example 2**: Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse provides therapy sessions to residents at Beta House as well as other nursing homes in the community at the same time. These facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status under the control factor.

Factor Five: Extent to Which the Work Performed is an Integral Part of the Potential Employer's Business

Is the work performed an integral part of the potential employer's business?

- If the work performed by a worker is critical, necessary, or central to the potential employer's principal business, then this factor indicates that the worker is an employee.
- If the work performed by a worker is not critical, necessary, or central to the potential employer's principal business, then this factor indicates that the worker is an independent contractor.

This factor does not depend on whether any individual worker is an integral part of the business, but rather whether the function they perform is an integral part of the business.

Examples: Extent to Which the Work Performed is an Integral Part of the Potential Employer's Business

- **Example 1**: A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because a necessary part of a tomato farm is picking the tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.
- **Example 2**: Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

Factor Six: Skill and Initiative

Does the worker use specialized skills to perform the work and do those skills contribute to business-like initiative?

- This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work.
- Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

Examples: Skills and Initiative

- **Example 1**: A highly skilled welder provides welding services for a construction firm. The welder does not make any independent decisions at the job site beyond what it takes to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding for the next job, or use their welding skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.
- **Example 2**: A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.

Additional Factors

Additional factors that answer the question of whether a worker is economically dependent on an employer may be relevant. Factors that do not help answer this question, such as whether an individual has alternate sources of wealth or income, are not relevant.

Common Questions

1. **Can an employee waive their rights under the FLSA by signing an independent contractor agreement?**

   No. Under the FLSA, a worker is an employee and not an independent contractor if they are, as matter of economic reality, economically dependent on the employer for work—regardless of whether they sign an independent contractor agreement. While businesses are certainly able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most suitable for them, if a worker is an employee under the FLSA, then FLSA-protected rights (such as minimum wage and overtime pay) cannot be waived by the worker. The Supreme Court has explained that permitting employees to waive their FLSA rights would undermine the Act's goal of eliminating unfair methods of competition in commerce.

2. **Can an individual be an employee for FLSA purposes even if they are an independent contractor for tax purposes?**

   Yes. The Internal Revenue Service (IRS) applies its own test (a version of the common law control test) to analyze if a worker is an employee or independent contractor for tax purposes. While the Department of Labor considers many of the same factors as the IRS, the economic reality test for FLSA purposes is based on a specific definition of "employ" in the FLSA, which provides that employers "employ" workers if they "suffer or permit" them to work. Courts have interpreted this language to be broader than the common law control test. This means that some workers who may be classified as independent contractors for tax purposes may be employees for FLSA purposes because, as a matter of economic reality, they are economically dependent on an employer for work.

3. **If an individual is an employee, are they entitled to minimum wage and/or overtime pay?**

   Yes, unless an exemption applies. The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA includes numerous exemptions to the Act's minimum wage and/or overtime pay requirements. For example, section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, or professional employees, as well as computer employees and outside sales employees. For this FLSA exemption to apply, an employee's specific job duties and earnings must meet all the requirements of the Department's regulations. For more information on the FLSA's white-collar exemptions, see Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA).

4. **What is an employer's liability for misclassifying an employee as an independent contractor?**

   If an employee is incorrectly classified as an independent contractor, the employer will be responsible for paying any unpaid wages owed to the employee under the FLSA. Additionally, the employer may have to pay liquidated damages in an amount equal to back wages, as well as civil money penalties. Employers may also have to pay attorneys' fees associated with litigation.

Additional Resources

- Final Rule
- Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)
- Frequently Asked Questions
- Compliance Assistance

Questions?

For questions about this final rule, you may call the Wage and Hour Division's (WHD) Division of Regulations, Legislation, and Interpretation at (202) 693-0406. For questions about the employment classification of a particular worker or group of workers, please contact your nearest WHD District Office, as found at https://www.dol.gov/agencies/whd/contact/local-offices.

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