

**M**OST EMPLOYERS are at least aware of the issue of independent contractor versus employee. But making the determination has never been clear. The Department of Labor issued a final rule clarifying the standard for independent contractor versus employee under the Fair Labor Standards Act (FLSA). That may sound encouraging, but it is doubtful that the rule consisting of more than 1,200 pages makes the designation any easier. In reality, the rule only clarified the factors to consider that are still open to interpretation. The effective date of the final rule was March 8, 2021.

Why does this designation make a difference? There is a financial incentive to declare a worker an independent contractor. But declaring one independent does not make it so—under the law. If a worker is deemed to be an independent contractor, the employer is not required to pay either the minimum wage or overtime pay; or withhold income taxes or pay FICA taxes; or keep timecards or other records regarding the worker's activities. The employer's liability is limited. In addition, the employer does not have to provide workers' compensation or unemployment insurance coverage, health insurance, or other benefits employees may be entitled to.

Conversely, if employers incorrectly classify workers as independent contractors when they should be classified as employees, employers would be liable for all these additional expenses plus a potential enforcement action brought against them.

And just to make it more complex, since taxation is an issue here, the IRS has much to say on this subject. In fact, the IRS has its own checklist of generally overlapping questions used to make this determination: The 20 Factor Test. Yes, you have the possibility of both the Department of Labor and the IRS questioning the status of workers in your business. The employee can also file suit against an employer for incorrect classification.

### Test Your Knowledge

In many cases, the designation is obvious.

Suppose you need to have a toilet replaced and a sink leak fixed. You call Joe's Plumbing Shop. Joe comes out in his truck that even has his name on it. He brings in his tools and does the work. He hands you an invoice. You write him a check. He leaves and goes to

# Hiring for



*Don't Confuse  
Independent  
Contractors with  
Employees*

by Curtis D. Rostad

his next job. This is his business. He is an independent contractor.

You hire a full-time funeral director. They work 40 hours a week (plus probably some overtime) for you. They are entitled to the benefits you offer. They are on the payroll and get paid every two weeks. They are an employee.

We all know the difference even if we do not fully understand it. How was that determination made? That is where this new rule comes in.

In the final rule, the Department of Labor reaffirms an “economic reality” test to determine whether an individual is in business (independent contractor) or is economically dependent on an employer for work (an employee).

In our example, the funeral director is dependent on you for her livelihood. Joe the plumber is in business for himself. He might miss the revenue from your job, but he is not going to become homeless if you call another plumber.

The rule identifies and explains two “core factors” that can weigh heavily in favor of whether a worker is economically dependent on someone else’s business or is responsible for his or her own business:

**1. The nature and degree of control over the work.** Being an independent contractor comes into play when the worker exercises substantial control over key aspects of the performance of the work,

such as setting your own schedule, selecting your projects, or working for others, which might include the employer’s competitors. This perfectly describes Joe the plumber.

In contrast, when the employer exercises substantial control over performance of the work, such as controlling the individual’s schedule or workload or by requiring the individual to work exclusively for the employer, this describes the funeral director.

**2. The worker’s opportunity for profit or loss based on initiative and/or investment.** This factor weighs heavily in favor of an individual being an independent contractor when the worker has

an opportunity to earn profits or incur losses based on the exercise of initiative or managerial skills. Again, this describes Joe the plumber. With every job he takes, the quality of his work and business skill determines his financial reward.

This same factor can weigh heavily toward an individual being an employee if the worker is unable to

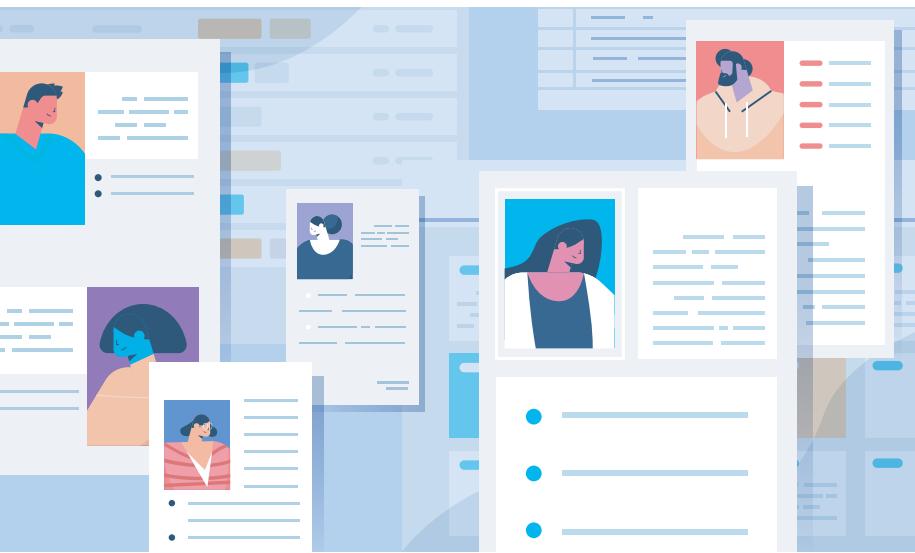
affect his or her earnings or is only able to do so by working more hours or faster. The employee funeral director is paid by the hour or a set salary (in some states) and generally does not earn more money by taking the initiative to do more tasks or do them better.

Unfortunately, these factors do not provide a definitive answer to the question. Imagine a scale with weights in the balance tilting

## Imagine a scale with weights in the balance tilting to one designation or the other. That is how the determination is made. It's not a black or white issue.

# Your Business?





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### **Adding More Fuel to the Fire**

The rule identifies three other factors that may serve as additional guideposts in the analysis.

**1. The amount of skill required for the work.** An individual could be an independent contractor when the work requires specialized training or skill that the employer does not provide.

In contrast, an individual might be an employee when the work requires no specialized training or skill; or the individual is dependent upon the employer to equip him or her with the skills or training necessary to perform the job.

This factor may be confusing in our example because both jobs require specialized training. The difference here is that Joe the plumber already has all the skills he needs to perform the job. In fact, in most cases, you called Joe because you have no idea what needs to be done or how to do it.

While your funeral director has specialized training, he or she is still dependent on you (especially in the case of an apprentice or newly licensed person) to provide additional training based on your own training and experience. That person must work under your guidance and direction; the plumber does not.

**2. The degree of permanence of the working relationship between the worker and the employer.** This weighs in favor of the worker being an independent contractor if the work relationship is short in duration or sporadic. Joe the plumber does his job and goes on to the next one. He will come back the next time you have a plumbing problem, if and when he is available and if he wants to do your job.

[O]ur advice is to talk to an accountant or attorney experienced in employment law, or an HR specialist. The cost of doing so will clearly be less than the cost of making the wrong determination on your own.

This factor also can weigh in favor of the individual being an employee if the work relationship is intended to be indefinite in duration or continuous. Your funeral director reports for work every day and assuming you have a good working relationship, you both hope the employment relationship lasts a long time.

**3. Whether the work is part of an integrated unit of production.** This factor weighs in favor of an individual being an independent contractor when the work is separate from the employer's production process. While having a working bathroom is important to your business, Joe the plumber has nothing to do with actually providing funeral services.

On the other hand, this factor weighs in favor of the individual being an employee if the work is a component of the employer's production process for a good or service. Your funeral director/embalmer performs the essential services your firm provides to the families who call you.

Finally, the actual practice of the worker and the employer is more relevant than any contract that might exist or how things theoretically are to be done. For instance, the IRS and some court cases have considered other factors, including who provided the tools and equipment necessary to do the job and whether the worker is able to engage others to assist.

### **Things That Make You Go, Hmm ...**

There are examples of the Department of Labor or the IRS auditing funeral homes and claiming that musicians (and even ministers, especially if they are retired and are not providing funeral services as part of their church ministry) are employees rather than independent contractors.

After all, there are factors that point in both directions. They do not operate their own music business, but their schedule is set by the funeral home. The funeral home does not really exercise control over their work, they are free to work for any other funeral home, and their "employment" is sporadic and of short duration. We can generally show that these individuals are not

employees. Better yet, if you have the family pay them directly rather than as a cash advance, the issue becomes moot.

Let's use the Department of Labor's criteria and work through some scenarios:

#### **Part-time cemetery or funeral help and drivers?**

While their engagements might be sporadic, they anticipate an indefinite working relationship with your firm, and their work is directly controlled by the funeral director. Are they independent contractors or employees?

#### **Retired minister?**

What happens if one of those part-time employees is also a retired minister? Sometimes they help direct funerals and sometimes they officiate them. Independent contractor or employee? Can they be both?

#### **Funeral director and organist?**

Your funeral director is also an organist at his or her own church. The family asks the director to play at a funeral. Is the director doing so as an independent contractor or as your employee? Does it make a difference if he or she uses the organ in your funeral home or at a church?

#### **Gravediggers at rural cemeteries?**

This would be easier to answer if the person has an excavating business, but what if he is a farmer or rancher who happens to own a backhoe? Independent contractor or employee? Does your cemetery use a third party for grave digging or installation of markers? Independent contractor or employee?

#### **Local college student?**

You engage a college student to mow the lawn at the funeral home and shovel snow in the winter. Independent contractor or employee?

#### **Janitorial service?**

It's easy to determine that an outside janitorial service is an independent contractor. But what if one of your full-time employees and her husband come in after hours and clean the funeral home as a part-time job for both of them? Independent contractors

or employees? Keep in mind that since she is already an employee, if her janitorial work is as an employee, you will have to pay her time and a half for overtime.

#### **Part-time embalmer?**

You have a retired embalmer who embalms for you when you are busy. You also use a trade service in your area occasionally. Does it make a difference if the embalming is done in your prep room or at the embalmer's own facility? They are doing essentially the same thing. Are they independent contractors or employees?

One funeral home used a trade embalmer who did all the preparation work in the funeral home. They used him so often they finally signed a contract with him to do all their embalming. Should he have been classified as an employee all along? Did that contract make him an employee? What if both parties to the contract specify that the worker is an independent contractor?

#### **Don't Take Chances**

When faced with these conflicting factors and no clear guidelines, what should a funeral home or cemetery owner do? You have probably guessed that our advice is to talk to an accountant or attorney experienced in employment law, or an HR specialist. The cost of doing so will clearly be less than the cost of making the wrong determination on your own. □

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