



Small Business Association of Michigan Understanding & Navigating Revised Independent Contractor Rules

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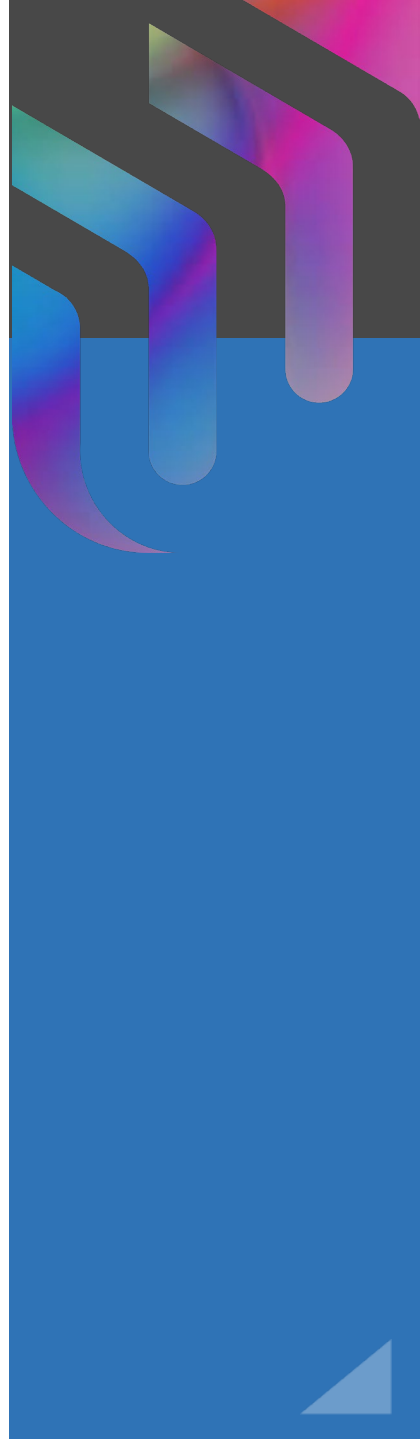


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- Conducts internal investigations for employers involving discrimination, harassment and retaliation claims.
- Counsels employers through disability, leave, workplace safety and health, termination, and wage and hour issues.

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Fair Labor Standards Act

- The FLSA only covers employees. The Act defines employee as “any individual employed by an employer” and employ means “to suffer or permit to work.”





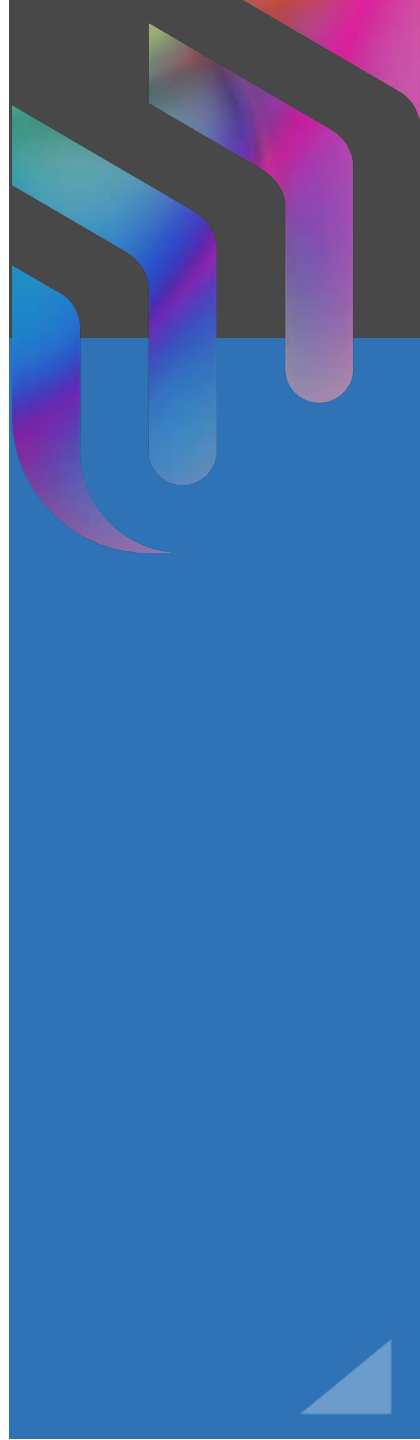
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Employee or Independent Contractor Classification Under the Fair Labor Standards Act

- On January 10, 2024, the U.S. Department of Labor published its final rule, which revises the agency's guidance on this question;
- The final rule rescinds an earlier rule published by the Trump administration;
- The final rule took effect March 11, 2024, but the future of the rule remains uncertain.

Economic Reality Test

- A worker is not an independent contractor if they are, as a matter of economic reality, economically dependent on an employer for work.
 - Opportunity for profit or loss depending on managerial skill;
 - Investments by the worker and the potential employer;
 - Degree of performance of the work relationship;
 - Nature and degree of control;
 - Extent to which the work performed is an integral part of the potential employer's business; and
 - Skill and initiative.
- No one factor controls.



Keep in Mind Other Laws' Tests

The final rule affects worker classifications under the FLSA only. Other laws continue to use different standards:

Law	Standard
<i>Internal Revenue Code</i>	A version of the common law control test (focusing on the parties' behavior, their financial relationship, and the type of their relationship);
<i>National Labor Relations Act</i>	<i>FedEx Home Delivery (FedExII)</i> "Independent-Business" analysis
<i>California, New Jersey, etc.</i>	"ABC" test





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

- Whether the worker determines or can meaningfully negotiate the charge or pay for the work produced;
- 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.

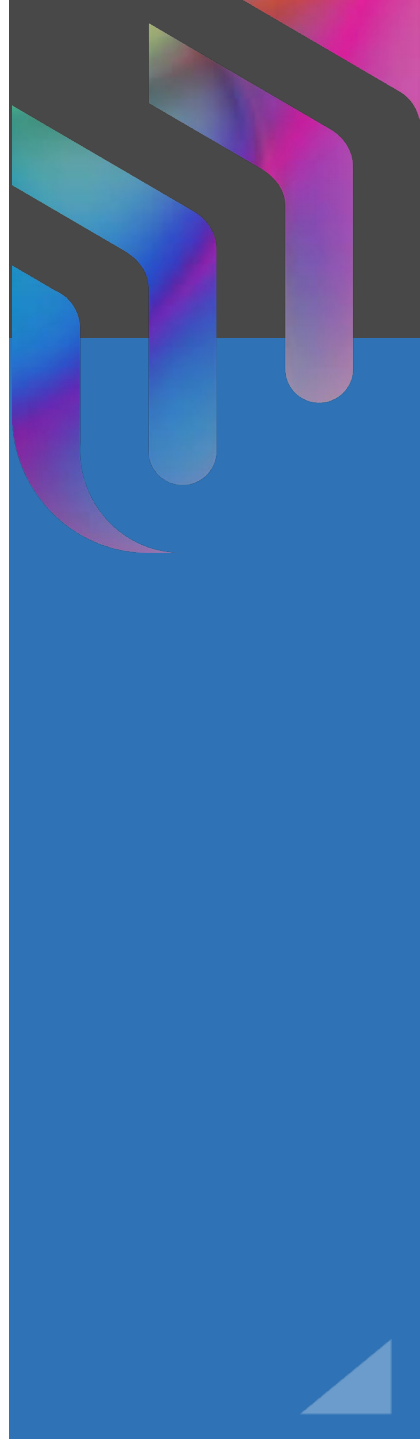


Factor One Example

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.

Factor Two: Investments by the Worker and the Potential Employer

- Whether the worker provides investments into the operation that are capital or entrepreneurial in nature;
 - 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;
 - Capital or entrepreneurial investments 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;
 - The worker should make similar types of investments as the employer (even if on a smaller scale) or investments that allow the worker to operate independently in the worker's field.





Factor Two Example

A graphic designer occasionally completes specialty design projects for a 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

- Whether the work relationship is indefinite, continuous, or exclusive of work for other employers; or
- Whether the work relationship is definite, non-exclusive, project-based, or sporadic based on the worker's business activities.
 - This may include regularly occurring fixed periods of work, although seasonal/temporary work by itself is not indicative of independent contractor status.
 - 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.

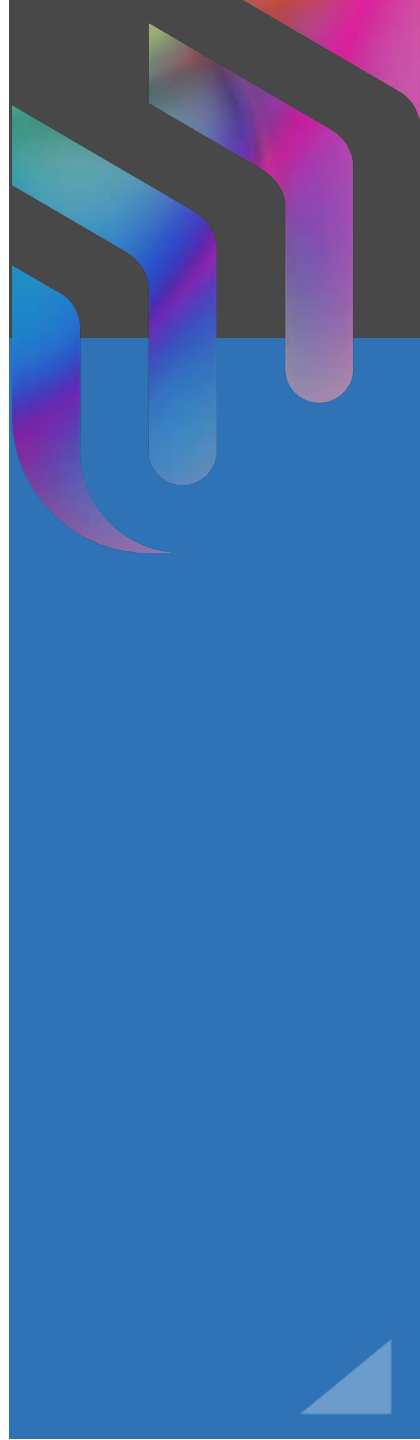


Factor Three Example

- 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.

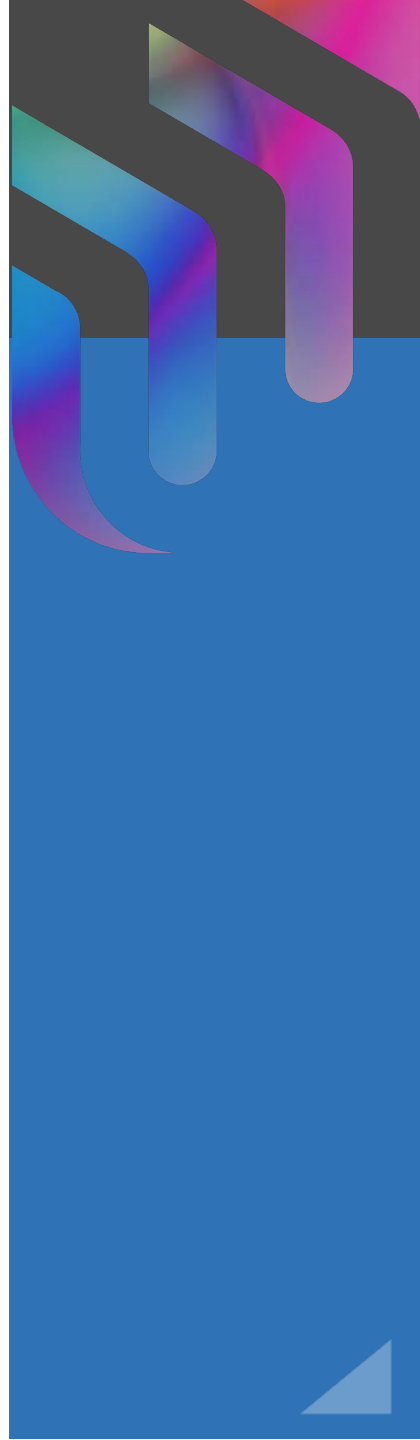
Factor Four: Nature & Degree of Control

- Actual or Reserved Control over:
 - Scheduling;
 - Supervision of work;
 - Worker's ability to work with others;
 - Discipline;
 - Economics, such as prices, rates for services, and marketing.
- Actions taken by the potential employer for the sole purpose of complying with a specific, applicable law or regulation is not indicative of control.



Factor Four Example

- 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.





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Factor Five: Integral Business Operations

- Whether the work performed by the worker is critical, necessary, or central to the potential employer's principal business operations.



Factor Six: Skill and Initiative

- Whether the worker uses specialized skills to contribute to business-like initiative(s);
- Bringing such skills to the work relationship is not itself indicative of independent contractor status.



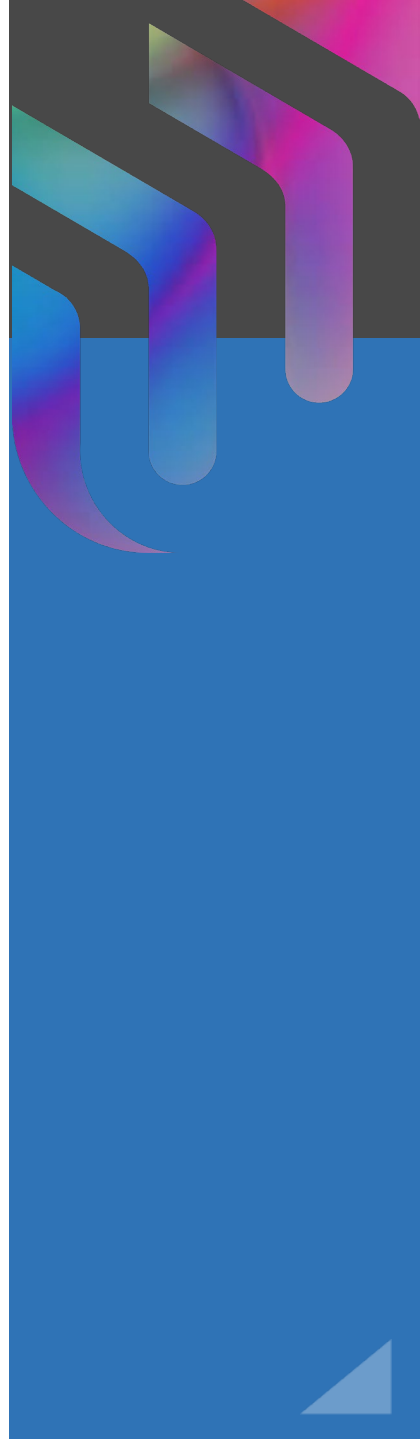


Common Misclassification **Red Flags**

- Independent contractor performs the same work as employees;
- Independent contractor was once an employee;
- The workforce is made up primarily of independent contractors;
- Independent contractor supervises employees or otherwise maintains a key leadership position;
- Independent contractor has a long-term relationship with potential employer, unrelated to a specific project;
- Independent contractor has no written agreement with the potential employer, or the agreement was not negotiated between the parties.

Employer liability for misclassification

- Unpaid wages, plus liquidated damages in an amount equal to unpaid wages, and civil penalties;
- Attorneys' fees due to litigation;
- Unpaid unemployment taxes;
- Unpaid workers' compensation premiums/unable to rely on exclusive remedy provision;
- Unpaid benefits;
- Increased employee count for threshold coverage of anti-discrimination laws.





Thank you!

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