



TECHNICAL ADVISORY

TA 327

November 8, 2016

Subject: Classification of Workers as Employees or Independent Contractors

Background: Distinguishing between who is an “employee” and who is an “independent contractor” has always involved an element of subjectivity in certain situations. This potential for misclassification is compounded by the existence of differing guidelines between major regulators such as the IRS, DOL, and others. In addition, some states have their own guidelines for the purpose of general classification, and virtually every state has its own guidelines for worker’s compensation purposes.

The U.S. Department of Labor (DOL) has recently taken a number of regulatory actions regarding worker classification, overtime, and minimum wage requirements. This is probably due in no small part to the growing use of “independent contractors” by businesses large and small. The Bureau of Labor Statistics reported that 15.5 million people were self-employed in 2015, and increase of 1 million over the previous year. Intuit, the business and financial software company, probably best known as the developer of Turbo Tax and Quick Books, has forecast that by 2020, 40% of the workforce will be “contingent workers.” ["Intuit 2020 Report"](#)

Main Points: Below is a summary of the various regulatory actions taken by the U.S. Department of Labor.

To: IIABL Members & Associate Members

From: Jeff Albright

Re: Classification of Workers as Employees or Independent Contractors

A number of actions by the U.S. Department of Labor (“DOL”) during President Obama’s administration, including an Administrator’s Interpretation issued in July 2015 and revisions to the “white collar” exemptions to overtime and minimum wage requirements finalized in May 2016, have spurred many businesses to reevaluate how they classify their workers.

This reevaluation includes consideration of whether a worker is properly classified as an employee or independent contractor, and if an employee, whether the employee is exempt or non-exempt from overtime pay requirements.

*The Big “I” Office of General Counsel prepared a **IIABA Worker Classification Memorandum** that explores factors an agency may consider when determining whether it should classify a worker as an employee or independent contractor.*

This memorandum expands on **previous articles** about the Department of Labor's July 2015 Administrator's Interpretation, in which the DOL seeks to drastically limit the ability of businesses to classify workers as independent contractors.

The Big "I" has prepared a separate **Q&A Memorandum** that addresses exempt vs. non-exempt status, with a particular emphasis on the 2016 changes to the "white collar" exemptions.

Agencies that want additional information should reach out to an experienced HR consultant or employment counsel. You can also contact Scott Kneeland or Joe Doherty in the Big "I" Office of General Counsel.

Comments:

(1) The *IIABA Worker Classification Memorandum* is a 7-page document which outlines the various tests traditionally used by courts and administrative agencies (IRS, DOL, etc.) in determining employee vs independent contractor status. It also includes key points about important changes being made by DOL regarding worker classification, as well as overtime and minimum wage requirements set forth by the Wage and Hour Division of the DOL, through the Fair Labor Standards Act (FLSA). These changes could also impact the Family Medical Leave Act, the Affordable Care Act, and ERISA.

(2) The *Q&A Memorandum* is a 19-page document that addresses a wide range of issues on worker classification specifically related to independent insurance agencies.

(3) Both these documents, as well as the others listed below, will be very helpful to independent insurance agents in reviewing their own agency force regarding compliance with these new guidelines. At the same time, it is suggested that agency staff should not offer advice to commercial insureds as to the legal status of who is an "employee" vs "independent contractor" of that insured.

Additional Resources.

Resource #1: IIABA Resource Page.

The Independent Insurance Agents & Brokers of America (IIABA) has a [Resource Page](#) that includes links to Big "I" Resources, DOL Resources, and Big "I" News &Views Coverage.

Big "I" Resources:

- [Big "I" DOL Overtime Rule FAQ](#): This document contains 19-pages of frequently asked questions organized into nine topic areas that are geared specifically to help independent insurance agencies comply with the December 2016 DOL rule as well as better understand portions of the FLSA.
- [Big "I" Webinar "Employee Classification and Overtime Regulation"](#) (June 22, 2016): This link contains a 35 minute webinar explaining the new rule and employee classification under the FLSA.
- [Big "I" Exemption EZ Reference Chart](#): This document contains a one page chart outlining employee classifications common in insurance agencies.
- [Big "I" Virtual University Sample Job Descriptions](#): This link contains sample job descriptions to many positions commonly found within independent insurance agencies.
- [Big "I" Memo on Workers Classification](#): This document focuses on issues of whether a worker should be classified as an employee or an independent contractor.

DOL Resources:

- [DOL Overtime Rule](#): This link includes the federal register notice and the full text of the final overtime rule which goes into effect on Dec. 1, 2016.
- [DOL Small Business Compliance Guide to the FLSA "White Collar" Exemptions](#): This link includes a 14-page guide for small businesses compiled by the DOL to assist with compliance with the new rule.
- [DOL Overtime Rule Resource Page](#): This website includes links to various resources provided by the DOL to assist with compliance with the rule, such as FAQs, guidance for non-profits, economic impact studies and blog posts.
- [DOL "Handy Reference Guide" to the FLSA](#): This website explains the basics of the FLSA.
- [DOL Guidance on Agent Classification](#): This link includes a 2009 opinion from the DOL regarding whether life insurance agents qualify for either the outside sales or administrative exemptions under the FLSA.
- [DOL Guidance on Independent Contractors](#): This link includes a 2015 opinion from the DOL regarding the standards for classification of independent contractors under the FLSA.

Big "I" News & Views Coverage:

- [Big 'I' Continues to Support Efforts to Delay Overtime Rule \(Oct. 20, 2016\)](#)
- [House Moves to Delay Overtime Rule \(Sept. 29, 2016\)](#)
- [Big "I" Sues DOL About Overtime Rule \(Sept. 22, 2016\)](#)
- [Overtime Rule Compliance: Could the Fluctuating Workweek Work For You? \(Aug. 18, 2016\)](#)
- [Group of House Democrats Pushes Back on DOL Overtime Rule \(July 21, 2016\)](#)
- [Now Available: Updated Q&A on DOL Overtime Rule \(June 30, 2016\)](#)
- [Spread the Word: Free Webinar on Overtime Rule \(June 9, 2016\)](#)
- [Congress Reacts to Overtime Rule \(June 9, 2016\)](#)
- [Free Webinar: How Will the Overtime Rule Affect Your Agency? \(June 9, 2016\)](#)
- [Overtime Rule: Questions, Answers and Concerns—Oh My! \(May 26, 2016\)](#)
- [New Overtime Rules Will Burden Small Businesses \(May 19, 2016\)](#)
- [Big "I" Pushes Back on DOL Overtime Rule \(May 12, 2016\)](#)
- [New Legislation Would Overturn DOL Overtime Rule \(March 23, 2016\)](#)
- [DOL Prepares to Finalize New Rules \(March 17, 2016\)](#)
- [Department of Labor Issues Guidance on Joint Employment \(Jan. 28, 2016\)](#)
- [Big 'I' Opposes Overreaching Small Business Regulations \(Dec. 10, 2015\)](#)
- [Big 'I' Testifies at Small Business Hearing on New 'White Collar' Overtime Regulation \(Oct. 8, 2015\)](#)
- [Big 'I' Submits Comments on Revisions to Overtime Standards \(Sept. 3, 2015\)](#)
- [Big 'I' Analyzes DOL's Worker Classification Memo \(July 29, 2015\)](#)

Resource #2: Louisiana Workforce Commission

As noted in various documents in these resources above, classification of workers for a state's workers compensation program can be somewhat different than those utilized by the IRS, DOL, etc.

The Louisiana Workforce Commission developed short assessments for use by [employers](#) and [workers](#) that take about 5 minutes, and gives employers and workers instant feedback on whether a worker should be classified as an employee or independent contractor.

For additional information on the LWC assessments, see IIABL Technical Advisory #311: ["Employee vs Independent Contractor"](#)

Necessary Action: Circulate this Technical Advisory to all appropriate agency staff.

Please note that this Technical Advisory is intended to be educational and is not legal advice upon which you should rely. Please seek any legal opinion you may need from a qualified attorney.