

Legal Notes: September 2015

“Who are you?”

While I have written on this topic before, I come back to it so that “You Won’t Get Fooled Again.” (OK, enough with the Who quotes.) Are you an employee? Are you an independent contractor?

The Department of Labor (DOL) has recently issued another guideline to help the public decide into which category a person fits. The stakes are high. You don’t need to pay independent contractors a minimum wage or overtime pay. Also, you don’t need to provide benefits or have that person count towards programs such as the FMLA.

Significantly, the DOL recognizes the misuse of the independent contractor designation, and is issuing this guidance to address this pervasive and growing problem. Expect employers to push back. One article I read (written by employer attorneys) concluded that the guidance will be used to limit the employer’s ability to classify people as independent contractors (as if this is a bad thing.)

The new guidance gathers a number of different factors that a court can use to determine what category a person fits. These factors are to help decide the ultimate fact: is the person economically dependent on the employer? Or conversely: Is the person really in business for him or herself?

The DOL emphasizes that use of the factors is not simplistic. An employer doesn’t just check the number of categories and add them up. Four out of six equal independent contractor! No, the whole job needs to be looked at. I won’t be listing the six factors as that would take most of my space here. If you think you or a loved one may be misclassified, please call an attorney to discuss.

To make matters even more confusing, this guidance is just for federal law. Wisconsin has long had separate (and different) tests. The legislature has tinkered with the tests over the years, especially those for unemployment compensation and workers compensation. Application of these state factors may dictate a different outcome than the federal! Keeps us employment lawyers busy.