Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Potential pitfalls

The updated standards go into effect on March 11. Under the new classification RN, LPN/LVN and CNA roles can no longer be 1099 independent contractors. LTC providers that are using agency staff that are not W2 can be subject to joint employment status that put facilities as a legal liability.

The new standards take note of how much control an employer has over a worker's tasks. Control that is required by regulations will not count against employers whose workers are classified as contractors, but further control might be grounds for reclassification.

"Although certain control must be exerted by a long-term care facility of its workers to maintain compliance with the licensing regulations, certain actions which are deemed to go beyond mere compliance would be indicative of control,".

The complexities of care work and the control facilities typically need to maintain over their workers' activities could signal trouble for facilities that rely on contract work.

"Based on the duties of workers in long-term care facilities, it is very difficult to imagine how they could appropriately be classified as independent contractors under the totality of circumstances analysis," *McKnight's*. "While there could be circumstances where an independent contractor performs services at a nursing home like a dietitian who owns her own business and provides services to a multitude of facilities … those situations will be few and far between."

Aiming at clarity

The DOL suggests the new rule will help to clarify the labor market, benefiting both workers and employers.

"This final rule will reduce the risk that employees are misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves," a DOL statement on the final rule claims.

What some see as greater clarity may instead be grounds for greater caution by providers.

“In light of the heightened scrutiny of independent contractor status and the stiff penalties, costs, damages and attorney’s fees involved with defending such claims,” Berdzik said, “long-term care providers should err on the side of caution and when in doubt, and afford the worker the benefits of an employee.”

Misclassifying workers as contractors can deprive them of workplace benefits and pay that they would enjoy as full employees, and leave them on the hook for more taxes.

Some employers may also stand to gain from more consistent rules if fewer employees are initially misclassified as a result. Long-term care facilities that contract with agency care workers have found themselves subject to unexpected misclassification lawsuits — unaware that the agency workers were eligible for joint employment status that put both agencies and facilities at legal liability.

The updated standards go into effect on March 11 and replace a Trump-administration rule that the DOL argues was less consistent with the FLSA. In particular, the DOL criticized the prior rule for giving too much weight to certain factors of analysis and for not considering whether an employee’s work was “central” to a potential employer’s business operations.

Click here for FAQ’s on the 1099 worker Classification.