

“Economic Reality” Test

The protections of the wage and hour laws enforced by BOLI apply to “employment relationships.” Because an “independent contractor” is excluded from the definition of an “employee” (at ORS 652.310(2)(a)), a worker is either an independent contractor or an employee, but never both.

BOLI’s Wage and Hour Division applies the “economic reality” test to determine whether there is an employment relationship.

The “economic reality” test consists of the following five factors which gauge the degree of a worker's economic dependency on the business to which he or she is providing services. Generally speaking, the more dependent a worker is on a particular business, the more likely they are to be an employee.

In weighing these factors, it is important to remember that no single factor is determinative for an investigator, administrative law judge or a trial court judge to find that a worker is an independent contractor or an employee. The elements are:

- (1) The degree of control exercised by the alleged employer**
- (2) The extent of the relative investments of the worker and alleged employer**
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer**
- (4) The skill and initiative required in performing the job**
- (5) The permanency of the relationship**

Although not part of the official test, the following questions may help to illustrate whether a worker is performing work as an employee or an independent contractor:

- (1) The degree of control exercised by the alleged employer
 - Who sets the hours of work?
 - Who is responsible for quality control?
 - Does the worker have other customers?
 - Who determined the rate of pay? Was it negotiated?
 - Who determines how the work gets performed?
- (2) The extent of the relative investments of the worker and alleged employer
 - Does the worker supply his or her own tools?
 - Does the worker purchase materials necessary to do the job?

- Has the worker invested in bonds / insurance / advertising?
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer
- Is the worker free to bring on additional workers to speed up the job? At whose expense?
 - Does working or managing the project more efficiently increase profit for the worker?
 - Does the worker risk a loss if the job goes awry?
- (4) The skill and initiative required in performing the job
- Does the level of skill and initiative required for the job rise to the level demonstrated by an independent business competing in an open market?
 - Is a license required to perform the work?
- (5) The permanency of the relationship
- How long has the job lasted? Is an ending date contemplated (upon completion of the work)?
 - Is the contract (if any) subject to periodic review or automatic renewal?

THE LEGAL PRECEDENT....

The current test applied by BOLI was adopted in *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148 (1996). In that case, the Commissioner adopted the “economic reality” test articulated in *Circle C Investments, Inc.* 998 F.2d 324 (5th Cir 1993), a similar case brought by US DOL involving the question of whether certain dancers were employees under the FLSA. In adopting the test, the Commissioner noted that the relevant definitions of “employer” and “employ” in state law were taken from the FLSA and that federal courts have adopted an expansive interpretation of the definition of “employer” under the FLSA in order to effectuate “its broad remedial purposes.” As noted by the *Circle* court in its analysis, the focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services.”