

Texas Business Today

Joe Esparza
Commissioner Representing Employers

April 2024

Welcome to the April issue of *Texas Business Today*!

In recognition of National Internship Awareness Month, I recently welcomed employers and students to our first Texas Interns Unite (TIU) event of the year, which connects and challenges employers to increase and promote internships for students in Texas. As Texas continues to benefit from the largest monthly job add in over a year, now is the time to plan how you will build a dedicated pipeline of qualified workers for your expanding business. Internships are a great place to start.



Additionally, the [Texas Internship Challenge portal](#) is a no-cost site where employers can post internships and where students can search and apply for them. The site offers paid and academic credit internship opportunities around the state. The Texas Internship Challenge was developed as a result of a recommendation from Texas Workforce Commission (TWC), the Texas Education Agency (TEA), and Texas Higher Education Coordinating Board (THECB) to Governor Greg Abbott as part of the Tri-Agency Initiative.

Employers interested in providing paid internships for undergraduate Texas college and university students can be reimbursed through [TXWORKS](#).

The Texas Internship Challenge is a win-win for students and employers. Through an internship, students will benefit from mentoring, career guidance, identification of marketable skills, and can learn firsthand about high-demand occupations. Employers will benefit by leveraging the developing skill sets and perspectives of students, highlighting careers in their industries for a future workforce, and exploring candidates for fulltime recruitment.

Businesses large and small can gain a competitive advantage by taking the Texas Internship Challenge. Post your opportunities here:
www.TxInternshipChallenge.com.

Let's keep Texas the best place in the nation to live, work, and do business!



A handwritten signature in black ink, appearing to read 'Joe Esparza'.

Joe Esparza
Commissioner Representing Employers
Texas Workforce Commission

Texas Business Minute



[Click here to watch the video.](#)

Texas Conference for Employers

Join us in Beaumont on Friday, April 19, 2024



Register Today!



New Independent Contractor Rule from the U.S. Department of Labor

By: Mario Hernandez

Legal Counsel to Commissioner Joe Esparza

Worker classification is an important issue for employers. Some employers might think that properly classifying a worker as an independent contractor is solely a matter of agreement or convenience. However, there are actually tests that regulating agencies will use to determine whether a worker has been properly classified.

One such test is the “economic realities test” used by the U.S. Department of Labor (DOL), and on March 11, 2024 a new rule went into effect regarding how DOL will analyze worker classification issues. Per DOL’s website, the factors of the final rule are the following:

- “(1) opportunity for profit or loss depending on managerial skill;
- (2) investments by the worker and the potential employer;
- (3) degree of permanence of the work relationship;
- (4) nature and degree of control;
- (5) extent to which the work performed is an integral part of the potential employer’s business; and
- (6) skill and initiative.”

(See: <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs#s7>)

It should also be noted that in addition to the factors above, other factors could also be considered in the classification analysis if they demonstrate that the worker is truly in business for themselves, as opposed to being an employee of an employer.



What's Changed?

Prior to the new rule, DOL's analysis of worker classification revolved around two core factors: the nature and degree of control over the work, and the individual's opportunity for profit and loss. Other factors would be considered if the two core factors were not dispositive of the worker's classification.

With DOL's new rule, the focus has shifted away from labeling specific factors as core. Instead, the new rule adopts a totality-of-the-circumstances approach, with no individual factor being assigned a predetermined weight.

For more information on what has changed under the new rule, please visit the following link:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs#s10>.

Why is Worker Classification Important?

Improperly classifying workers can have costly consequences for employers. For instance, worker misclassification could result in penalties for the employer, back taxes, and back wages owed.

DOL has a news release page about misclassified workers, which you can visit at the following link:

<https://www.dol.gov/newsroom/releases?agency=57&state=All&topic=18210&year=all>.

Moreover, DOL is not the only regulating agency that investigates worker classification issues. Other agencies, such as the Texas Workforce Commission and the Internal Revenue Service, have their own worker classification tests and perform investigations to ensure workers are properly classified. For more information on various independent contractor tests, please visit the following link in our online Texas Guidebook for Employers: https://efte.twc.texas.gov/ics_contract_labor.html.

Conclusion

It should be noted that this article is not an exhaustive review of the topics discussed. It is important for employers to familiarize themselves with DOL's new independent contractor rule to help avoid worker misclassification. In fact, DOL has an FAQ page with a breakdown of the new rule, which you can visit at the following link:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs>. By staying up to date with developments regarding independent contractor tests and rules, employers will be in a better position to avoid misclassifying workers.

Additional Links

DOL webpage: Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>

DOL webpage: Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act: <https://www.dol.gov/agencies/whd/flsa/misclassification>

Federal Register: Employee or Independent Contractor Classification Under the Fair Labor Standards

Act: <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>

A promotional banner for the Texas Employer Hotline. The banner has a dark blue border. At the top, the text "TEXAS EMPLOYER HOTLINE" is written in large, bold, red capital letters. Below this, the phone number "1-800-832-9394" is displayed in large, bold, blue capital letters. Underneath the number, a list of topics is provided in red text: "Hiring Issues • Medical Leave-Related Laws • Personnel Policies and Handbooks • Independent Contractors and Unemployment Tax Issues • The Unemployment Claims and Appeals Process • Texas and Federal Wage and Hour Laws". Below the text are three photographs: on the left, a man in a white shirt talking on a phone; in the center, a group of five people (three men and two women) in business attire standing in front of a wooden wall with a circular seal; on the right, a woman with curly hair and glasses looking down. At the bottom of the banner, the text "Employer Hotline Hours: M-F, 8am-5pm" is written in bold red letters. Below that, in smaller blue italicized text, it says "Information provided by employment law attorneys in the Office of the Commissioner Representing Employers at the Texas Workforce Commission".

TEXAS EMPLOYER HOTLINE
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and should not be acted upon without specific legal advice based on the facts in a particular case.

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