This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Do You Have Independent Contractors Who Are Actually Employees?
DOL Issues New Final Rule on Independent Contractor Status

Individuals who are properly classified as independent contractors under the Fair Labor Standards Act ("FLSA") are not employees and, therefore, are not subject to the minimum wage and overtime requirements of the law. At times, nonprofits engage workers as independent contractors when they should actually be classified as employees. If a nonprofit categorizes a worker as a contractor, but the worker should be considered an employee, the nonprofit may owe taxes, fines and penalties. This analysis is particularly important because nonprofit directors and managers can be held personally liable for the failure to pay employment taxes due to the misclassification of workers.

Federal agencies, including the United States Department of Labor ("USDOL"), the National Labor Relations Board, and the Internal Revenue Service, as well as state agencies, such as the Georgia Department of Labor, all have different tests for making the determination of which workers are employees versus independent contractors. This article will focus on the USDOL's test under the FLSA.

The USDOL recently published a Final Rule, scheduled to go into effect on March 8, 2021, to provide some clarification of the test for independent contractor status under the FLSA.

As you consider this information, please keep in mind that the Biden Administration will be in place before this new final rule goes into effect, and this rule, along with other rules adopted in the last few months of the current administration, may be reviewed again by the new administration prior to its effective date.

The Final Rule re-affirms the use of an "economic realities" test to analyze the status of independent contractors under the FLSA, but it also modifies the test in order to provide greater clarity. Historically, the economic realities test (as interpreted by the courts and the Wage and Hour Division of the USDOL) has examined some form of the following six factors, all of which were considered to be of equal value in determining whether a position should be classified as an independent contractor or as an employee: 1) the degree of control over the work; 2) the worker's opportunity for profit or loss; 3) the amount of skill required for the work; 4) the degree of permanence of the working relationship; 5) the investment in facilities, materials or equipment by the worker; and 6) whether the work is integral to the business.

Under the new rule, the USDOL has now indicated that to determine whether a worker is in business for him or herself as an independent contractor or an employee, the following will be considered the two core factors in the analysis:

The nature and degree of the worker's control over the work. The first factor that weighs toward classifying a worker as an independent contractor is whether the worker, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work. Examples include the worker (and not the employer) setting a work schedule, selecting assignments, and retaining the ability to work for others (including competitors of the potential employer); and

- **The worker's opportunity for profit or loss based on initiative, investment or both.** The second factor that weighs toward classifying a worker as an independent contractor is the extent to which the worker has an opportunity to earn profits or incur losses based on either (1) the exercise of personal initiative, including managerial skill or business judgement; or (2) the management of investments in or capital expenditure on items such as helpers, equipment, or material to further the work. Conversely, if a worker is unable to affect his or her earnings through initiative or investment, or is only able to do so by working more hours or more efficiently, this factor weighs toward classifying a worker as an employee.

If each of the core factors above lead to the same conclusion, then your analysis is complete. However, if there is inconsistency between the two core factors, then, under the new test, the following three additional factors may also be considered in determining whether or not a worker should be classified as an independent contractor:

- **The amount of skill required for the work.** This factor weighs in favor of classifying a worker as an independent contractor if the work at issue requires specialized training or skill that the potential employer does not provide. If no specialized training or skill is required or if the individual is dependent on the employer to equip the worker with necessary skills or training, it weighs in favor of classifying a worker as an employee.
- **The degree of permanence of the working relationship between the worker and the potential employer.** This factor weighs in favor of classifying a worker as an independent contractor if the working relationship with the potential employer is for a limited time or sporadic. In contrast, a working relationship that has no end date or is continuous suggests that the worker is an employee.
- **Whether the work is part of an integrated unit of production.** This factor weighs in favor of classifying a worker as an independent contractor if the work can be separated from the potential employer's production process for goods or services The Final Rule indicates that this factor is different than the "integral to the business" factor previously applied as part of the "economic realities" test. For a nonprofit organization, the analysis would still likely address whether or not the work is integral to the services being delivered by the organization as part of its mission.

The Final Rule indicates that additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to the worker being economically dependent on the potential employer for work. The Rule goes on to state that the actual practices of the parties is more important to the analysis than the theoretical ability to take action or what is written in the contract.

Because it may not become effective in the new administration, employers should not rely exclusively on this Final Rule in determining how best to classify workers (unless it actually goes into effect on March 8, 2021). Nevertheless, the issue of whether a worker qualifies as an independent contractor will remain an important issue under the FLSA and other federal laws. Nonprofit employers should continue to review how their workers are classified. Please seek assistance from your PBPA attorney in making these determinations.