

AMERICAN PAYROLL ASSOCIATION

January 30, 2023

Mr. Paul J. Mamo
Assistant Deputy Commissioner, Services and Enforcement
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224
Paul.J.Mamo@irs.gov

Re: Worker classification between the U.S. Department of Labor and IRS

Dear Mr. Mamo:

As discussed in our meeting on January 13, 2023, the American Payroll Association¹ asks the IRS to better coordinate definitions of employee and independent contractor with the U.S. Department of Labor (DOL). On December 14, 2022, the IRS's SB/SE Specialty Employment Tax signed a Memorandum of Understanding for Employment Tax Referrals with the DOL's Wage and Hour Division to share information regarding misclassification. Payroll professionals would prefer that the DOL and IRS also share information on compliance and help employers reach that goal.

While the APA recognizes that the DOL and IRS have different jurisdictions and thresholds for violations and penalties, the definitions of employee and independent contractor are not different. Yet, the language used by both agencies is different. Ideally, to achieve compliance, the definitions used by both agencies should be the same.

Conflicting Definitions

As offered to the DOL in comments to its "Notice of Proposed Rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act," RIN 1235-AA43, 87 *Fed. Reg.* 62218 (Oct. 13, 2022), the APA is concerned with the conflicting definitions of employee and independent contractor between the proposed DOL rules and the common law definition used by the IRS. The table below shows the factors.

¹ Established in 1982, the APA is a non-profit organization serving the interests of more than 20,000 payroll professionals nationwide. One of the APA's core missions is providing representation for payroll professionals at the federal, state, and local levels. Representation is primarily through APA's Government Relations Task Force in which members educate government and community leaders about the payroll industry and the best practices associated with paying America's workers.

Currently, there are different “tests” that employers and both agencies use to determine whether an individual falls under the “employee” or “independent contractor” umbrella. In some situations, these tests can yield different results for the same individuals. While aspects of the proposed DOL regulations overlap with the IRS, they are not the same and can leave employers in a gray area. Thus, the APA asked the DOL to better coordinate the definition of an independent contractor with the IRS.

IRS	DOL
The extent to which the worker can realize a profit or loss.	Opportunity for profit or loss depending on managerial skills (NPRM § 795.110(b)(1)).
The extent to which the worker has unreimbursed business expenses.	
The extent of the worker's investment.	Extent to which the work performed is an integral part of the employer's business (NPRM § 795.110(b)(5)).
The extent to which the worker makes his or her services available to the relevant market.	Nature and degree of control (NPRM § 795.110(b)(4)): overview of control factors, scheduling, supervision, setting a price or rate for goods or services, and the ability to work for others.
How the business pays the worker.	
	Degree of permanence of the work relationship (NPRM § 795.110(b)(3)).
	Skill and initiative (NPRM § 795.110(b)(6)).
	Additional factors (NPRM § 795.110(b)(7)).

To discuss APA's request further, please contact me at 202-669-4001 or ajacobsohn@americanpayroll.org. Thank you.

Sincerely,



Alice P. Jacobsohn, Esq.
Director, Government Relations

For: GRTF Federal Issues Subcommittee
Cochairs Rebecca Harshberger, CPP, and Jon Schausten, CPP