



RIN: 1235-AA34

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

October 26, 2020

DOL Wage & Hour Division:

On behalf of the nearly 180,000 members of the IEEE in the United States, I want to thank you for working to clarify the distinction between independent contractors and employees. Approximately 10% of IEEE members in the U.S. are involved in some sort of consulting. For many, it is a full-time form of employment. For others it is a lucrative addition to their regular job, a hobby, or a part of their retirement plans. Thus, the definition of who, exactly, may be classified as an independent contractor is of great concern to our professional ranks.

IEEE membership covers a wide variety of fields, and our members have diverse skill sets. Members range from aerospace engineers to web designers, big data analysts to computer hardware engineers. They typically have advanced expertise in mathematics, physics, computer science, or engineering. At a minimum, IEEE members usually possess a 4-year degree from an accredited university with multiple years of experience practicing in their chosen area of technology. Many of our members possess advanced degrees and are considered subject matter experts in their fields. Members that choose to practice their profession as consultants provide companies with the ability to leverage their expertise without the necessity of having to make them a full-time employee.

As the American economy becomes more complex and the American workforce more specialized, opportunities for individuals to go into business for themselves increases. This is, generally speaking, a good thing for the individuals involved, for their clients, and for the American economy. Independent contracting adds adaptability to our economy, allowing individual workers to respond quickly to changing economic circumstances. Contracting gives companies access to talented and innovative people, especially in the technology sector, whom they could not otherwise work with. And contracting gives individuals a way to flexibly respond to changing family and health situations.

For example, in our Covid world, the ability to work independently on his or her own schedule is a lifesaver for many parents who suddenly find themselves with children at home all day.

It is important to note that the majority of independent contractors in IEEE became contractors willingly and are pleased with their decision. Some of our consulting members are among the highest paid professionals in our membership. Most do not want regular formal jobs and would oppose efforts to re-classify themselves as employees.

However, this is not always the case. In some instances, IEEE members and other technology professionals have been forced into contracting roles by businesses trying to save money. For example, some businesses routinely force new employees to become contractors so that the company can “test-drive” them before offering full employment contracts. These instances are typically abuses of the independent contracting rules. Clearer lines between contracting and employment would be helpful to end these few, but damaging, cases.

IEEE-USA believes that the basic approach being suggested by the Wage and Hour Division of the DOL is correct – that the independent contracting rules ought to be based on economic reality, rather than technical concepts. The American economy is extremely complicated - and becoming more so over time. The diversity of independent employment arrangements that have been negotiated by individuals and companies across the economy is staggering. Attempting to devise a simple rule, or rules, that classify individuals as employees or contractors neatly is not manageable. Trying to do so will either erroneously classify a good number of successfully consultants as employees, thereby ending careers prematurely, or require an endless list of exemptions, exceptions, and special rules that will needlessly complicate and confuse the life of independent contractors and their clients.

Instead, a relatively straightforward set of criteria that can flexibly be applied to different situations is the preferred approach – which is what the Wage and Hour Division (WHD) has proposed.

But while we applaud the basic approach being taken by the WHD, IEEE-USA believes some clarifications are required before the rules can be applied to the technology sector. As mentioned, there are an impressive number of independent contracting arrangements to be found in the technology space, with significant differences between them. Rules that protect technology workers, especially new technology workers, from exploitation need to also allow freelance software engineers, university professors with contracting businesses on the side, retired aerospace experts, licensed professional engineers, and technology start-up experts to flourish as legitimate consultants in their chosen fields. IEEE-USA believes this is possible without creating a laundry-list of exemptions and special rules, but some clarity would be helpful to ensure that legitimate and productive consultants may remain so.

NATURE and DEGREE of CONTROL

The WHD is right to place an evaluation of the nature and degree of control over their work as the first criteria for evaluating an independent contracting arrangement. Control is, in our minds, the defining characteristic of a true independent consultant.

Within this criterion, the right to sell one's work to whomever an individual wants is paramount. In a true independent contractor arrangement, the company is paying for a result, not for time, talent or loyalty. Contractors are hired to produce something, whether it is a piece of a computer program, a design for a product, or a business plan. They are not hired for their skills per se, but rather what they can produce with those skills. Importantly, the contractor's skills and knowledge belong entirely to themselves, and may be sold to anyone else in addition to their original client.

To IEEE-USA, this is a crucial test – if an individual has the right and ability to sell their services to other clients, even competing clients, then the individual is probably legitimately an independent contractor. If they do not have this right, or are required to adhere to working conditions that effectively prohibit doing exercising this right, then the individual is probably an employee.

Noncompete agreements and other employment restrictions ought to be deeply suspect when added as part of an independent contractor contract. Restricting a consultant's ability to work for another client – any other client – does not always mean the consultant ought to be classified as an employee, but that should be the assumption, and the client company ought to have the burden of proving why such restrictions do not deprive the contractor of control over his/her work.

It is important for the WHD to note that for many legitimate contractors in the high-tech world hours, location, and conditions may be set by the client. For example, an expert on installing supercomputers can't generally work from his/her home. He/she has to work where the supercomputer is located, and therefore may also be required to work during normal business hours. Similarly, aerospace consultants with expertise on designing parts of satellite navigation systems can't take the satellite home over the weekend to work on it. The nature of many experienced, and highly valuable, technology consultants requires less control over working conditions than many other independent contractors.

But all ought to have the right to sell their services to other companies.

OPPORTUNITY for PROFIT or LOSS

This second criterion is, to IEEE-USA, less important than control, but still crucial. After control, the right to benefit from one's own efforts, talent and training is the primary reason independent contractors become contractors. True consultants have the effective rights to negotiate their own pay and are compensated for the results of their efforts, rather than the effort itself.

In its Request for Comments, the WHD noted that a key component in determining if an individual has the opportunity for profit or loss is their own investment in their work. According to a number of court decisions, individuals who have to buy the equipment needed to do their job, for example, were more likely to be correctly classified as independent contractors.

This concept works well for the technology sector, but requires a slight clarification. Many technology consultants don't need tangible things for their work, other than a computer and a WIFI connection. For example, just about everything a web designer does is virtual. As such, their investment is not primarily in equipment or tools (other than their computer) but in training. Technology consultants invest in their business by keeping their skills sharp and their knowledge up-to-date in an incredibly fast moving field.

IEEE-USA recommends that the WHD clarify that individuals who pay most of the expenses associated with broadly keeping their skills up to date are more likely to properly be classified as independent contractors than those whose training is paid for by a company. This is not a hard rule. IEEE-USA is regrettably aware of many companies that do not feel the need to train their own employees, and thereby require the employees to take responsibility for their own training. But as a weighted factor, the cost of training an individual is a useful criterion to consider.

IEEE-USA agrees with the WHD that these two criteria – control and opportunity for profit/loss – are the two most important criteria for determining if an individual is appropriately classified as an independent contractor. The remaining three may have value in certain cases, but in general are far less useful, and may in fact create difficulties for high-tech workers.

SKILL REQUIRED

Every worker employed as an engineer or other professional in the technology sector has a unique skill set. Most have skills far beyond the average American. Therefore, the mere presence of skill is useless in determining if a technology professional is an independent contractor.

However, if the WHD clarifies that the appropriate measure is skill relative to others in his or her field, then this criterion becomes more helpful.

The abuses of the independent contractor designation in the technology sector are most prevalent for entry-level employees. As mentioned previously, some technology companies like defining new employees as contractors for a set amount of time to evaluate their performance. "Contractors" who make the grade are then offered employment contracts. Those that don't can be dismissed without formally firing them and without compensation.

But these "contractors" are, by definition, less experienced and less skilled than the overall technology workforce. Applying the "skill" criterion to their contracts would appropriately call into question their status as contractors. (Although it is also true that the "Control" criterion would usually lead one to the same conclusion.)

This criterion is not dispositive, as the WHD notes in its request for comments. There are a number of fields including programming and web design where individuals can start their careers as properly defined

consultants. But in general consultants in the technology sectors tend to be more experienced and more qualified than the average professional in their field.

PERMANENCE of the WORKING RELATIONSHIP

This criterion is not especially helpful in most cases involving technology workers. The WHD is right to note its weaknesses, while still correctly concluding that it is, sometimes, useful to consider.

There are numerous examples within the IEEE membership of properly classified consultants who have worked with the same company for many years. This is especially true for the most highly skilled consultants who may have a particular skill a company needs to produce their product, and which few other people anywhere possess. In these cases, the company in question depends on an on-going relationship with their consultant, who is appropriately compensated for their skill.

It is more helpful, in many cases, to focus, not on the number of years a person has been a consultant for a given company, but rather on how often that person actually provides a service for the company. Business relationships that are episodic¹ (or “sporadic,” as the WHD and courts call it) are more likely to be correctly identified as consulting relationships than those that are year-round. In the case of high-end technology consultants, they may have an on-going relationship with a client for a decade or more, but only actually provide a service to that company once or twice a year when their specific skill is required. The episodic nature of their work argues in favor of being a consultant.

In the case of entry-level workers who ought to be classified as employees, the permanence criterion could lead one to an erroneous conclusion. Those workers will only be considered “consultants” for a year or two before being hired as an employee or let go. Therefore, the permanence test would fail to recognize that they ought to be classified as employees. On the other hand, these jobs are full-time, and therefore not episodic. Again, the consistent nature of the work is more telling than the duration of the relationship.

INTEGRATED UNIT

Like the “Permanence” criterion, this test is of limited value in the technology space. In fact, there are many instances where it could be harmful, erroneously pointing to a classification of “employee” for properly identified contractors.

Many major engineering and software projects are not single projects, but rather a series of discrete tasks, each done by an expert or team of experts. It is common for some of these tasks to be done by consultants with highly specialized skills. For example, software companies may contract with a specialist

¹ IEEE-USA prefers the term “episodic” to “sporadic” because the situations described may be regular, predictable, and last for several months. This suggests a more structured relationship than the term “sporadic” implies.

to write the authentication code for a larger computer system, aerospace companies may use independent contractors to design the guidance systems for rockets, and car companies may hire contractors to write the code used to control anti-lock brakes.

In each of these cases, it is entirely appropriate to classify the workers as contractors, rather than employees – yet the integrated unit test could point towards classifying the workers as employees because the tasks involved are crucial to the production of the companies’ products. That is, the workers involved are integrated units of the production team, even if they are independent contractors.

This does not mean that the “Integrated Unit” criteria should be dropped. Rather, as the WHD has done, caution needs to be used when applying it. As in the case of the Permanence criterion, this criterion may be helpful in some cases, but only in cases where the primary criteria of control and profit/loss are inconclusive.

CONCLUSION:

IEEE-USA supports both the decision to create clearer rules for determining independent contractor status, and the structure the WHD has put forward for doing so. The five criteria have the advantage of already being endorsed by multiple courts. They are relatively easy to understand, yet allow the flexibility required in our increasingly complex and innovative economy. We ask that the WHD consider a number of clarifications in the final version of your rules, as noted above, but the basic framework you have proposed would be a helpful improvement over the current uncertain system.

Lastly, IEEE-USA asks that you remember as you develop this guidance that, for hundreds of thousands of Americans, being a contractor is a freely made choice that has improved their lives. Many Americans find being an independent contractor to be rewarding, liberating, lucrative, and fun. While some companies have exploited the designation, it is important that any final rules in this area seek to empower individual Americans to creatively find ways to be their own bosses while contributing to society and their families. The DOL should not assume that all contractors need or want to be protected from companies, but rather recognize that contractors are a valued part of our modern economy who ought to be empowered, not burdened, by regulations.

Sincerely,

A handwritten signature in black ink that reads "James M. Conrad". The signature is written in a cursive, flowing style.

Dr. James Conrad
President, IEEE-USA

