

JUN 5 1995

Dear

This is in response to your letter on behalf of concerning the definition of employee as distinguished from independent contractor. In addition, is also concerned about what legal options a company can use to fill a work vacancy.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA), the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of \$4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

The Supreme Court has, on a number of occasions, indicated that there is no single factor rule or test for determining whether an individual is an independent contractor or an employee for purposes of FLSA. It is the total activity or situation which is controlling. Among the factors which the Supreme Court has considered significant are: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of individual investment in facilities and equipment; (4) the opportunities for profit or loss; (5) the degree of independent business organization and operation; (6) the nature and degree of control by the principal; and (7) the degree of independent initiative, judgment, or foresight exercised by the one who performs the services. These are explained in the enclosed "Employment Relationship Under the Fair Labor Standards Act" pamphlet.

Under FLSA, an employee, as distinguished from a person who is engaged in a business of his/her own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business (s)he serves. The employer-employee relationship is tested by "economic reality" rather than "technical concepts"; it is not determined by the common law standards relating to master and servant.

With regard to your constituent's concern about job vacancies, the FLSA does not address the hiring practices of companies. Such matters are, usually, for private agreement between employers and employees or their authorized representatives.

If after reading the enclosed material has any questions concerning the application of the FLSA, you may wish to suggest that she contact the Columbus Wage and Hour District Office located at 646 Federal Office Building, 200 North High Street, Columbus, Ohio 43215-2475, telephone (614) 469-5677.

We also wish to point out that the tests establishing employer-employee relationships for purposes of FLSA application and the Internal Revenue Service's tax code application are different. Therefore, may wish to contact the Internal Revenue Service for its position on this matter.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Washington, D.C., Office