



Harmonization of Coverage Act (H.R. 3825) and Respondent Misclassification

The Harmonization of Coverage Act would reduce the patchwork of federal tests currently used to define if someone is an employee or independent contractor by updating the definition in the Fair Labor Standards Act (FLSA) to the “common law” test, just like the Social Security Act and the National Labor Relations Act. The FLSA remains the only New Deal statute, of the three, that Congress has not yet amended to adopt a common-law test.¹

Harmonization will protect respondents receiving incentives for participation in marketing research and analytics studies, and the companies conducting those studies, from having to relitigate respondents' independent contractor status under different federal laws that define the term differently, while enabling the federal government to more efficiently ensure proper worker classification.

Background

The U.S. Department of Labor, IRS, and state labor and tax agencies sometimes claim that respondents receiving incentives for participation in marketing research² should be treated as employees of the companies conducting the research. This can bring responsibility for unemployment insurance payments, taxes and fees, minimum wage, overtime pay, extra recordkeeping, and more.

However, marketing research participants who receive compensation for their time and effort are independent contractors and should be treated as such.

Some participants in marketing research studies, such as focus groups, receive reimbursement for their participation in a study, depending on the length and circumstances of the study, the specialized knowledge or background of the participant, etc. However, research companies that conduct these studies sometimes face cases in which a person receiving a small reimbursement for participating in a single focus group study is characterized as an employee of the firm conducting the study.

Research respondents are obtained according to the demographic or other specific needs of a client; participation is voluntary, and participants are free to opt-out at any time.

Respondents may participate in multiple studies at the same time, but that participation is not a profession, and participants cannot easily make a living at it. In fact, the research industry goes to great lengths to prevent individuals from participating in too many research studies, referred to as “cheater-repeaters”. Individuals that attempt to make a living this way produce skewed data instead of representative data. Cheater-repeaters also threaten the integrity of research results because they frequently get onto panels using fake ID and data, and similarly provide fake or erroneous responses to questions.

The Insights Association position: Research companies require certainty in the independent contractor status of respondents

Labor law did not develop with marketing research in mind. The FLSA's existing factor test was conceived in relation to classic professions like construction workers and travel agents, and struggles with research participation, which is not a profession at all.

While it might appear viscerally obvious that marketing research and mystery shopping participants are not employees, the firms that contract with these individuals face troubling challenges to that nonemployee status by government agencies. The cost of defending against these challenges and the uncertainty they create has a material negative effect on the industry. It also threatens the integrity of the research process and the research results that people, companies and the government rely upon every day to be able to learn and understand consumer attitude, behavior and opinion.

The Insights Association supports the Harmonization of Coverage Act because it would significantly lower the chances of an unjustifiable audit or enforcement against a marketing research and analytics company for "misclassification" of respondents.

¹ Under this rule, the worker is an independent contractor if the company has the right to control only the result to be accomplished by the worker's services, and not the details and means by which that result is accomplished. Compared to the “ABC” rule, this rule requires a lesser degree of independence for the worker before the court would conclude that the worker is an independent contractor, and is therefore easier to meet.

² Marketing research is the process of acquiring, analyzing and understanding opinions, attitudes and experiences from the public, regarding products, services, issues, candidates and other topics. That data is used to develop new products, improve services, and guide policy. It is used by all kinds of entities, including health care providers, private businesses and academic institutions. In fact, government is the largest consumer of marketing research in the United States. No sales, promotional or marketing efforts are involved in bona fide research, and it is not intended to influence a participant's attitudes or behavior.