



January 2021

U.S. Department of Labor Issues Final Rule on Independent Contractor Classification

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The U.S. Department of Labor (DOL) has issued a [final rule](#) revising its interpretation of a worker's status as an independent contractor or employee under the Fair Labor Standards Act (FLSA). The final rule creates a five-factor test, with two "core factors" that create a "substantial likelihood" of determining a worker's status if they both point in the same direction.

Under the final rule, the "ultimate inquiry" to determine whether a worker is an independent contractor or an employee is economic independence. If a person is in business for themselves "as a matter of economic reality," that person is an independent contractor. If a worker is deemed an independent contractor under this test, FLSA provisions that impose obligations on employers concerning their employees, such as the minimum wage, overtime and record-keeping provisions, would not apply.

The final rule establishes a five-factor test, with two "core factors" that are the most important to the inquiry. If the two core factors are in alignment, the final rule provides that it would be "highly unlikely" that the other three factors, independently or combined, would outweigh the probative value of the two core factors.

These two core factors are (1) the nature and degree of control over work; and (2) the individual's opportunity for profit or loss.

- **Nature and degree of control over work.** This core factor points towards a finding of independent contractor status if the worker, instead of the potential employer,

controls key aspects of the performance of the work, including setting their own schedule, selecting projects and having the ability to work for others, including competitors of the potential employer. This factor will weigh towards finding a person to be an employee if the potential employer controls the person's work, including setting the worker's schedule or workload or requiring the person to work exclusively for the potential employer. The final rule provides that requiring an individual to comply with legal obligations, satisfy health and safety standards, carry insurance or meet deadlines are not factors that would make someone more or less likely to be considered an independent contractor.

- **The individual's opportunity for profit or loss.** This factor weighs towards finding a person to be an independent contractor to the extent the worker has the opportunity to earn profits or suffer losses based on their exercise of initiative or management of their investment in capital expenditures on other workers, equipment or materials to further their work. This factor weighs towards finding a person to be an employee to the extent the person is unable to affect their earnings or is only able to do so by working more hours or faster.

If both these core factors point in the same direction, then there is a "substantial likelihood" that direction is the correct finding as to the

worker's status. If these two factors are not in agreement, then three additional factors must be considered: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the individual and the potential employer; and (3) whether the work is part of an integrated unit of production.

- **The amount of skill required for the work.** This factor weighs in favor of a finding that the person is an independent contractor if the work at issue requires specialized training or skill that the hiring entity lacks. This factor weighs in favor of a finding of an employee if the work requires no specialized training or skill and/or the person is dependent on the hiring entity to equip him or her with any skills or training to perform the job.
- **The degree of permanence of the working relationship between the individual and the potential employer.** This factor weighs in favor of finding someone to be an independent contractor if the work relationship is definite in duration or sporadic, including regularly occurring fixed periods of work, although seasonal work would not necessarily support an independent contractor classification. If the work relationship is by design indefinite or continuous, this factor weighs in favor of finding the person to be an employee.
- **Whether the work is part of an integrated unit of production.** If the person's work is a component of the possible employer's integrated production process for a good or service, this factor weighs in favor of finding the person to be an employee. If the person's work can be segregated from the possible employer's production process, this would weigh towards a finding of independent contractor. The final rule notes that this analysis is

different from the concept of the importance or centrality of the individual's work to the potential employer's business.

The final rule also allows for other unspecified factors to be considered, but only if the factors indicate whether the person is in business for him or herself, as opposed to being economically dependent on the potential employer for work. In conducting this analysis, the final rule provides that the parties' actual practice is more important more than what may be contractually or theoretically possible. For example, if a business retains the contractual authority to supervise or discipline an individual, it may be of little relevance in the analysis under the final rule if the business does not actually exercise such authority.

The final rule is scheduled to take effect on March 8, 2021. It remains to be seen, however, what impact, if any, the incoming presidential administration will have on the final rule, including whether it will withdraw the final rule before it goes into effect. Companies also should be aware that the final rule only addresses the independent contractor under the FLSA and the analysis required under state law may be different. Companies that do business with independent contractors should consult with counsel to discuss how this final rule may impact their business.

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