



# U.S. Department of Labor Clarifies Independent Contractor Definition Under the Fair Labor Standards Act

January 8, 2021

On January 6, 2021, the U.S. Department of Labor (“The Department”) issued a [final rule](#) clarifying the standard for distinguishing employees from independent contractors under the Fair Labor Standards Act (FLSA). In a [news release](#) accompanying this final rule, the Department writes that the rule offers clarity on the issue and makes it easier for employers to determine who are employees covered by the FLSA. Further, the Department believes that this rule “will reduce worker misclassification, reduce litigation, increase efficiency, and increase satisfaction and flexibility.”

At the heart of this final rule is the reaffirmation of an “economic reality” test which determines whether an individual is economically dependent on an employer or is in business for him or herself.

The final rule lists two “core factors” essential to this question of economic dependence. First, the nature and degree of control over the work, and, second, the worker’s opportunity for profit or loss based on initiative and/or investment.

If these two factors conflict with each other, three additional factors may be relevant. These factors are (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship between the worker and the potential employer, and (3) whether the work is part of an integrated unit of production.

Finally, the final rule notes that “the actual practice of the worker and the potential employer is more relevant than what may contractually or theoretically possible.” Therefore, when applying this economic reality test, employers should analyze these factors through the lens of the true nature of a worker’s job rather than one which is hypothetical.

It is important to note that this test only applies to the FLSA; other authorities have different definitions of independent contractors. For example, the IRS emphasizes control (categorized as behavioral, financial, and relationship) in its employee/independent contractor analysis.

Similarly, New York State has its own set of tests for defining independent contractors. For example, for purposes of unemployment insurance, the New York State Department of Labor defines independent contractors as those who are free from supervision, direction, and control in the performance of their duties. Further, such workers “are in business for themselves, offering their services to the general public.”

Employers should be aware of this final rule regarding independent contractors under the FLSA, understand its clarifications, and note its similarities and differences from definitions set forth by other authorities.

This final rule takes effect on March 8, 2021.

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