

Department of Labor Proposes New Rule for Independent Contractor Status

By Jim Paretti, Michael J. Lotito, and Maury Baskin on
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Updated October 25, 2022: The DOL has [extended](#) the comment period for this proposed rule until **December 13, 2022**.

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On October 11, 2022, the U.S. Department of Labor released a [proposed rule](#) to update the test for determining whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor. FLSA requirements relating to minimum wage, overtime, and recordkeeping apply to employees, but do not apply to independent contractors, making the proper classification of a worker under the law critical and consequential. The proposed rule is scheduled to be published in the *Federal Register* on October 13, 2022, and will be open for public comment for 45 days, or until Monday, November 28, 2022.

The proposal would rescind the [independent contractor regulation adopted by the prior administration](#) in January 2021, which clarified and simplified the multi-factor test, and stressed that two “core” factors—a worker’s control over their work, and their opportunity for profit or loss—were paramount in making an independent contractor determination. The proposed rule would instead restore a “totality-of-the-circumstances” analysis of the “economic reality test” historically applied by courts (albeit often in inconsistent and unclear fashion), and largely mirroring the approach taken by the Department in an Administrator’s Interpretation issued during the Obama administration and subsequently withdrawn by the Trump administration. Shortly after the shift in administrations, the Department first delayed the effective date of the January 2021 regulation, and later withdrew it entirely. This delay and withdrawal were subject to legal challenge, and in March 2022, the U.S. District Court for the Eastern District of Texas found that [DOL’s delay and withdrawal of the rule violated the Administrative Procedure Act](#).¹ The court vacated the delay and withdrawal of the rule and specifically held that it became effective on March 8, 2021. It remains in effect today, but would be withdrawn by the new proposed rule.

Broad Definition of Employee

Under the proposed rule, an employee is defined broadly as any individual whom an employer “suffers, permits, or otherwise employs to work” and is intended to encompass all workers who “as a matter of economic reality, are economically dependent on an employer for work.” The proposed rule further explains that an independent contractor

is only a worker who is, as a matter of economic reality, “in business for themselves.” Finally, it states that economic dependence does *not* focus on the amount of income earned by a worker, or whether that worker has other income streams. It sets forth a six-factor test for determining whether a worker is “economically dependent” on an employer under the totality of the circumstances. These factors include:

- *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker exercises managerial skill that affects the worker’s economic success or failure in performing the work, examining, among other things: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee.
- *Investment by the worker and the employer.* This factor examines whether a worker’s investment is “capital or entrepreneurial in nature,” and notes that costs borne by a worker to perform a job, such as tools and equipment, are *not* capital and entrepreneurial, and instead indicate employee status. Additionally, the proposed rule provides that a worker’s investment should be considered on a relative basis with the employer’s investment in its overall business.
- *Degree of permanence of the work relationship.* This factor examines whether a work relationship is indefinite in duration or continuous, which suggests employee status, or whether the relationship is definite in duration, non-exclusive, project-based, or sporadic, thus indicating independent contractor status.
- *Nature and degree of control.* This factor considers the employer’s control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer’s control over the worker include whether the employer sets the worker’s schedule, supervises the performance of the work, or explicitly limits the worker’s ability to work for others. Additionally, facts relevant to the employer’s control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers’ time that do not allow them to work for others or work when they choose. Whether the employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control. More indicia of control by the employer favors employee status; more indicia of control by the worker favors independent contractor status.

- *Whether work performed is an “integral” part of the employer’s business.* This factor considers whether the work performed is an integral part of the employer’s business. It does not examine whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer’s principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer’s principal business.
- *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. Employee status is indicated where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work. Where the worker brings specialized skills to the work relationship, it is the worker’s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

Finally, the proposed rule notes that additional factors may be relevant if they indicate whether the workers are in business for themselves, as opposed to being economically dependent on the employer for work.

None of these factors has a predetermined weight; all factors are considered in view of the economic reality of the whole activity. Most notably, the proposed rule restores consideration of a worker’s investment in a business as a standalone factor; provides additional analysis of the control factor (including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered); and restores the Department’s prior interpretation of the “integral” factor, which considers whether the work is integral to the employer’s business.

The proposed rule is now subject to public comment, which the Department is required to review and consider in fashioning a final rule. While the scope of any final rule remains to be seen, we confidently predict it will dramatically limit the circumstances under which a worker may be properly classified as an independent contractor and is almost surely to be subject again to legal challenge.

Littler Workplace Policy Institute will keep readers apprised of significant developments.