

DOL Adopts New Independent Contractor Test



Effective March 11, 2024, the DOL's new final rule will rescind the 2021 rule.

The U.S. Department of Labor (DOL) has published a final rule that will change the test for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA). The final rule takes effect March 11, 2024.

The Details

Background

The DOL uses an "[economic realities](#)" test to determine whether workers are considered independent contractors or employees. Workers classified as employees are covered by the FLSA and entitled to minimum wage, overtime, and other wage and hour protections. Prior to 2021, this test looked at the following factors, each carrying equal weight:

1. The worker's opportunities for profit and loss.
2. The amount of the worker's investment in facilities and equipment.
3. The permanency of the relationship.
4. The nature and degree of control by the principal.
5. The amount of initiative, judgment, or foresight in open market competition with others required for the worker's success.

6. The extent to which the services rendered are an integral part of the principal's business.
7. The degree of independent business organization and operation.

2021 Rule

Toward the end of the Trump Administration, the DOL published a final rule (the 2021 rule) that sharpened the economic realities test into five distinct factors, including:

- Two "core factors" that carried more weight in the analysis. These two factors were the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative and/or investment.
- Three other factors served as additional guideposts in the analysis: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production.

The Biden Administration tried to withdraw the 2021 rule, but a federal judge ultimately decided that the 2021 rule went into effect on March 8, 2021, as planned by the Trump Administration.

2024 Final Rule

Effective March 11, 2024, the DOL's new final rule will rescind the 2021 rule and:

- Return to a totality-of-the-circumstances economic reality test, where no single factor or group of factors is assigned any predetermined weight;
- Consider six factors (instead of five), including the investments made by the worker and the potential employer;
- Provide additional analysis of the control factor, including a detailed discussion of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the nature and degree of control over a worker;
- Return to the DOL's long-standing consideration of whether the work is integral to the employer's business (rather than whether it is exclusively part of an "integrated unit of production");
- Provide additional context to some factors, including a discussion of exclusivity in the context of the permanency factor and initiative in the context of the skill factor;
- Omit a provision from the 2021 rule, which addressed the relevance of an employer's reserved but unexercised rights to control a worker.

As a result of the changes, the economic realities test will look at the following factors beginning March 11, 2024:

1. Opportunity for profit or loss depending on managerial skill.

This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.

The following facts, among others, can be relevant: 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. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

2. Investments by the worker and the employer.

This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status.

Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business.

The worker's investments do not have to be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

3. Degree of permanence of the work relationship.

This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly

occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification.

Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

4. Nature and degree of control.

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.

Facts relevant to the potential employer's control over the worker include whether the potential 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 potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose.

Whether the potential 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.

Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control. As examples of such compliance actions that are not indicative of control, the final rule identifies a publication's requirement that a writer comply with libel law and a home care agency's requirement that all individuals with patient contact undergo background checks in compliance with a specific Medicaid regulation.

Actions taken by the potential employer that go beyond compliance with a specific, applicable federal, state, tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. For example, a home care agency's imposition of extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control. More control by the potential employer favors employee status; more control by the worker favors independent contractor status.

5. Extent to which the work performed is an integral part of the employer's business.

This factor considers whether the work performed is an integral part of the potential employer's business. This factor does not depend on whether any individual worker in particular is an integral

part of the business, but rather whether the function they perform is an integral part of the business.

This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential 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 potential employer's principal business.

6. 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. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. 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.

Additional factors that look closely at investments by the worker; the employer's control; and whether the work performed is integral to the business may also be considered if the worker is in business for themselves.

Next Steps

- [Review the final rule.](#)
- With the assistance of legal counsel, audit current classifications to determine if changes will be necessary.
- Use the new test beginning March 11, 2024.

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Updated on January 16, 2024