



DOL Withdraws FLSA Independent Contractor Rule

On May 5, 2021, the United States Department of Labor (“DOL”) withdrew the regulations (i.e. the “Independent Contractor Rule”) that were intended to clarify the standard for determining whether a worker qualifies as an independent contractor for FLSA purposes. See [DOL Press Release, US Department of Labor to Withdraw Independent Contractor Rule \(May 5, 2021\)](#); see also [Independent Contractor Status Under the Fair Labor Standards Act: Withdrawal, 86 FR 24303 \(Published: May 6, 2021\)](#). The withdrawal of the Independent Contractor Rule is effective as of May 6, 2021.

As previously reported on this blog, the Independent Contractor Rule was premised on the belief that “[t]he multifactor test [for determining independent contractor status under the FLSA], as currently applied, has proven to be unclear and unwieldy.” See [DOL Proposes New Rule to Better Define Independent Contractor Status \(September 22, 2020\)](#). Therefore, the Independent Contractor Rule, among other things, (1) expressly adopted the economic realities test as the method courts must use to determine a worker’s status as an employee or an independent contractor under the FLSA and (2) instructed courts to give two elements of the economic realities test more weight than the others: (a) the nature and degree of the worker’s control over the work; and (b) the worker’s opportunity for profit or loss. *Id.*

But in its most recent guidance, the DOL abandons the Independent Contractor Rule’s underlying premise and expresses a preference for a totality-of-the-circumstances standard where no single factor is controlling. Notably, the DOL states the following. See [86 FR 24303](#):

- “Upon further review and consideration of the Rule and having considered the public comments, the Department does not believe that the Independent Contractor Rule is fully aligned with the FLSA’s text or purpose, or with decades of case law describing and applying the multifactor economic realities test.” at

24307.

- “[T]he Department believes that elevating two factors of the multifactor economic realities analysis above all others is in conflict with the Act, congressional intent, and longstanding judicial precedent. The Department and courts recognize, as they have since the Act’s inception, that the cornerstone of the FLSA is the Act’s broad definition of ‘employ,’ . . . This standard “stretches the meaning of ‘employee’ [under the FLSA] to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” at 24309.
- “While the Department is always seeking to improve clarity for workers and employers, the [Independent Contractor Rule’s] formulaic and mechanical weighting of factors is precisely what courts have cautioned against for decades in applying an economic reality analysis. This is because a true balancing test that properly considers the totality of the circumstances, by definition, does not mechanically elevate certain factors, and doing so would impermissibly narrow the Act’s broad definition of ‘employ.’” at 24310.

At bottom, the DOL’s withdrawal of the Independent Contractor Rule is a continuation of the status quo. Nonetheless, employers should carefully monitor this issue. The DOL will likely have to offer guidance in the near future to address the inherent difficulty of applying legal principles that were developed in the 1940s (a time when computers, let alone the internet and smartphones, did not yet exist) to modern employment relationships. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

Key Takeaways

- Effective May 6, 2021, the DOL withdrew the Independent Contractor Rule that was intended to clarify the standard for determining whether a worker qualifies as an independent contractor for FLSA purposes.
- The DOL’s withdrawal of the Independent Contractor Rule is a continuation of the status quo. When determining whether an individual is an “employee” or an “independent contractor” for FLSA purposes, courts will conduct a totality-of-the-circumstances analysis in which no single economic reality factor is dispositive.

This blog post was authored by [Brian Peterson](#). He is an Associate in the Spencer Fane Kansas City, Missouri Office.