



U.S. Department of Labor Issues New Independent Contractor Classification Rule

On January 10, 2024, the U.S. Department of Labor (DOL) issued its much anticipated [Final Rule regarding Employee or Independent Contractor Classification](#) under the Fair Labor Standards Act (FLSA). Per the DOL, the Final Rule “will reduce the risk that employees are misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves.”

Correct worker classification under the FLSA is important because businesses and organizations that misclassify workers as independent contractors rather than as employees risk liability for minimum wage and overtime claims under the FLSA. The Final Rule will go into effect on March 11, 2024.

The Old Rule

The Final Rule rescinds the prior 2021 Independent Contractor Final Rule (Old Rule), issued under the previous presidential administration, which established a more business-friendly approach to the independent contractor classification standard. The Old Rule considered five factors, with a focus on two specific factors – (1) the nature and degree of control an employer had over a worker’s work; and (2) the individual’s opportunity for profit or loss. Additionally, the Old Rule assigned the following three remaining factors with less weight – (3) the degree of permanence of the work relationship; (4) the amount of skill and initiative; and (5) whether work performed is integral to the employer’s business.

The “New” Final Rule

The Final Rule returns to the original six-factor analysis using a “totality of the circumstances” approach, meaning that no one factor carries more weight than any of the other factors. The six factors to be considered when determining whether an individual is properly classified as an employee or independent contractor now include:

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control over the worker;
5. Whether work performed is integral to the employer’s business; and
6. Skill and initiative of the worker.

The Final Rule differs from the Old Rule in several additional ways. First, the revised Final Rule provides additional analysis regarding the degree of control factor, exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. Second, the Final Rule analyzes whether the work is integral to the employer’s business rather than whether it is exclusively part of an “integrated unit of production.” In addition, the Final Rule omits a provision from the Old Rule which minimized the relevance of an employer’s reserved but unexercised rights to control a worker.

Notably, in relation to the “degree of control” factor, the Final Rule has been revised to explain that “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.” Thus, if an employer takes specific actions for the sole purpose of complying with law, those actions cannot be used to support a finding that the employer exercises sufficient control over a worker to establish an employment relationship.

Overall, the changes to the Final Rule provide more consistency between the analysis that is already applied by the majority of courts and the analysis that will now be relied on by the DOL. The DOL maintains that this revised Final Rule will allow for greater clarification and more streamlining for organizations to address and avoid worker misclassification issues. Nevertheless, the revised Final Rule is at least arguably more employee-friendly, in that it likely provides for greater opportunities

for findings of an employment relationship under the new six factors. As a result, it appears likely that employers will face an increased number of misclassification claims going forward under the new Final Rule.

Key Takeaways

Employers should:

- Ensure they are using the economic realities test when determining a worker's classification and applying equal weight to all six factors.
- Take a closer look at the degree of control they have over workers classified as independent contractors, exclusivity of the working relationship with such individuals, and the independent initiative involved for the worker.
- Consider re-evaluating their workforce to ensure workers are all properly classified prior to the Final Rule's effective date of March 11, 2024, and make necessary changes if needed.

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