

U.S. Department of Labor Proposes New Rule on Independent Contractor Status

The Bottom Line

- The U.S. Department of Labor has proposed a new rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act.
- If adopted, it will replace the rule announced by the DOL in January 2021 and will be more focused on the “totality of the circumstances” when assessing whether a worker is an employee or independent contractor.
- The proposed rule was published in the *Federal Register* on Oct. 13, 2022 and is now in a 45-day public comment period before it can be adopted.

The U.S. Department of Labor (DOL) proposed a new rule that aims to change how employers assess whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). If adopted, the rule will use a multi-factor economic realities test to determine whether a worker is truly in business for themselves.

How Is This Rule Different?

If adopted, the proposed rule would rescind a 2021 rule that placed increased importance on two factors when assessing a worker’s status: control over the work and opportunity for profit or loss. The proposed rule would return the DOL to a traditional six-factor test, which is historically more employee-friendly. The question of whether a worker is an employee or an independent contractor would rest on whether, as a matter of economic reality, the worker is “economically dependent on the employer for work or in business for themselves.”

To answer that question, the DOL sets out six nonexclusive factors to consider:

- **Factor 1:** “Opportunity for profit or loss depending on managerial skill.” The opportunity to earn profits or incur losses based on an individual’s exercise of initiative is indicative of independent contractor status. However, the inability to affect one’s own earnings, or the ability to do so only by working more hours or faster, is indicative of employee status.

- **Factor 2:** “Investments by the worker and the employer.” Investments that are “capital or entrepreneurial” in nature are indicative of independent contractor status. Costs borne by the worker to simply perform their job (i.e. purchasing tools for a specific job) suggest employee status.
- **Factor 3:** “Degree of permanence of the work relationship.” A work relationship that is by design definite in duration or sporadic suggests independent contractor status; whereas a work relationship that is by design indefinite in duration or continuous suggests employee status.
- **Factor 4:** “Nature and degree of control.” This factor considers whether the employer controls the performance of the work and the economic facts of the working relationship, such as by setting the worker’s schedule, supervising the performance of the work or explicitly limiting the worker’s ability to work for others. More control by the employer favors employee status.
- **Factor 5:** “Extent to which the work performed is an integral part of the employer’s business.” Where the work is critical, necessary or central to the employer’s principal business, this factor weighs in favor of employee status.
- **Factor 6:** “Skill and initiative.” Whether the worker uses “specialized skills” in performing that work, and whether those skills contribute to business-like initiative suggests employee status.

The DOL also included a seventh catch-all provision stating that additional factors may be relevant “if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”

What Does This Mean for You?

The proposed rule has not yet been adopted. Since its publication in the *Federal Register* on October 13, 2022, it is now subject to a 45-day public comment period, after which the DOL may decide to adopt the rule in its current form. While the proposed rule will not have an immediate impact on the assessment of a worker’s status, if adopted, it will change how employers assess the classification of their workers. We will provide another update after the comment period closes.

For More Information

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