

Litigation + Dispute Resolution

# U.S. Department of Labor Publishes Final Rule on Independent Contractor Status

## The Bottom Line

- The U.S. Department of Labor’s published final rule, effective March 11, 2024, revises its guidance on the distinction between employees and independent contractors under the Fair Labor Standards Act.
- The rule tracks the agency’s [proposed rule](#) and focuses on the “totality of the circumstances” when assessing whether a worker is an employee or independent contractor.

The U.S. Department of Labor (DOL) released a final rule that changes how potential employers assess whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). The final rule, issued January 9, 2024, was [published](#) in the Federal Register on January 10, 2024, and will take effect on March 11, 2024.

The rule uses a multi-factor test that is focused on the “economic reality” of the relationship between a potential employer and a worker. In parallel, the DOL formally rescinded the Trump administration’s independent contractor rule, published in 2021, which prioritized two “core factors” – control and opportunity for profit or loss – for determining worker status under the FLSA.

## How the Final Rule Differs from the Proposed Rule

The final rule tracks the agency’s October 2022 proposed rule, with minor variations, and returns the DOL to a six-factor, totality-of-the-circumstances analysis to determine whether a worker is an employee or an independent contractor. The analysis will depend on whether the worker is economically dependent on the employer for work or whether the worker is in business for him or herself.

**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. Factors relevant to this inquiry include:

1. whether the worker determines the charge or pay for the work provided (or can meaningfully negotiate it),
2. whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed,
3. whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work, and
4. whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

**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. The final rule clarifies that workers’ investments should be evaluated on a relative basis with the company’s investments and not only in terms of the dollar value or the size of investments.

**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, continuous or exclusive of work for other employers suggests employee status.

**Factor 4*****“Nature and degree of control”***

If 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, this is evidence of employee status. The final rule clarifies that actions taken to comply with “specific” legal requirements are not indicative of control; however, actions taken by the employer that go beyond compliance with specific legal requirements (such as actions ensuring safety, quality control and contractual or customer service standards) may be indicative of control and suggest employee status.

**Factor 5**

***“Extent to which the work performed is an integral part of the employer’s business”***

Where the work is important, critical, primary or necessary to the employer’s principal business, this factor weighs in favor of employee status. The final rule specifies that this factor focuses on whether “the potential employer could not function without the service performed by the workers.”

**Factor 6**

***“Skill and initiative”***

Whether the worker uses “specialized skills” in performing that work, and whether those skills contribute to “business-like initiative.” Where the work does not require previous experience, the worker is dependent on training from the employer, or the work requires no training at all, such work likely does not require specialized skills and initiative and indicates employee status.

Like the proposed rule, the final rule also includes 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 The Independent Contractor Final Rule Mean for Employers?**

The rule’s multifactor, totality-of-the-circumstances analysis is likely to result in more workers being classified as employees, and businesses that rely on the use of independent contractors should seek legal guidance as to how the rule impacts their workers’ classifications. The future of the rule, however, remains uncertain as legal challenges are expected.

---

**For More Information**

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

**Jennifer Tafet Klausner**

**Partner**

212 468 4827

[jklausner@dglaw.com](mailto:jklausner@dglaw.com)

**Angela Dunay**

**Associate**

212 468 4995

[adunay@dglaw.com](mailto:adunay@dglaw.com)