



ALERTS

Department Of Labor Publishes Final Independent Contractor Rule, Set To Be Effective March 11, 2024

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Highlights

The Department of Labor's latest independent contractor rule is set to go into effect on March 11, 2024, though it has been challenged in court, making its effective date uncertain

The rule looks to the "economic reality" test and weighs six non-exclusive factors to determine whether the worker is economically dependent on the employer or is in business for themselves

The rule formally repeals the "core factors" test

More than a year after the proposed rule, the U.S. Department of Labor (DOL) published its [final rule](#) on independent contractor classification on Jan. 10, 2024. With limited modification to the proposed rule, the final rule codifies the now familiar, six-part "economic reality" test and formally repeals the 2021 "core factors" test. The final rule is to become effective on March 11, 2024, but has been challenged in court, so its effective date is uncertain.

The six-factor economic reality test looks broadly to the "totality of the circumstances" to determine whether a worker is an independent

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Mark Wallin

Partner

Chicago, Minneapolis, Los Angeles

P 312-214-4591

F 312-759-5646

mark.wallin@btlaw.com

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contractor or employee under the Fair Labor Standards Act (FLSA). Positioned as a guide, the rule will undoubtedly provide less certainty for businesses that utilize independent contractors.

The DOL goes to great lengths [to explain](#) that its latest iteration of the independent contractor rule is merely a codification of existing precedent, interpreting the FLSA.

Regardless, permeating the rule is the DOL's apparent view that an independent contractor should be entrepreneurial in nature. At least four of the six factors look for entrepreneurial or business initiative, skill or acumen – i.e., opportunity for profit or loss; investment by the worker; the control factor; and skill and initiative. Notably, the DOL explains that while most of the final rule is the same or similar to the proposed rule, in response to comments, it sensibly modified the proposed control factor, which initially stated that control implemented for purposes of complying with legal obligations may be indicative of control.

The DOL also modified the investment factor by clarifying that comparisons should not be made solely in terms of dollar value, but also whether the worker is making the same types of investments as a business, but on a smaller scale.

Six-Factor Economic Reality Test

While the final rule provides six factors, it notes that “additional factors” may also be considered where applicable to underscore the notion that the six enumerated factors should not be mechanically applied and that “economic reality” is what matters, not labels or formalities. The analysis of these factors should be fluid in order to assess the reality of the relationship in its totality, with no one factor receiving greater weight.

According to the rule, these factors are only a guide “to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themselves.”

The six factors, which are to be viewed holistically, are:

1. Opportunity for profit or loss depending on managerial skill

This factor analyzes whether business skill, such as marketing efforts, affects economic success or failure, including ability to negotiate job pay and/or timing of work.

This factor also looks at whether the contractor hires other workers or rents office space.

If a worker has no opportunity for profit or loss, this factor points towards employee, rather than independent contractor. Working more hours or taking more fixed-rate jobs generally does not indicate independent contractor status.

2. Investments by the worker and the potential employer

This factor analyzes investments by the worker that are capital or entrepreneurial in nature. Costs for tools or equipment to do a job, or costs unilaterally imposed by a potential employer suggest employee status.

Investments that increase a worker's ability to do more or different types

of work, reduce costs, or extend market reach are all examples of capital investments that indicate independent contractor status.

The proposed rule also explains that a worker's investment should be compared on a relative basis to a business's investment and not based on monetary values alone. Rather, focus should be on whether the worker is making the types of investment that a business would, but on a smaller scale.

3. Degree of permanence of the work relationship

This factor notes that exclusive, indefinite, or continuous work relationships generally are evidence of employment, whereas non-exclusive, sporadic and project-based work is indicative of contractor status.

Temporary, seasonal, or short-term work is not necessarily indicative of contractor status alone, if it does not result from independent business initiative.

Work that is of a short duration due to operational characteristics that are intrinsic to the business or industry are not necessarily indicative of contractor status.

4. Nature and degree of control

This factor analyzes the businesses ability to control performance and all economic aspects of the relationship, including scheduling, supervision, and prices or rates. This factor further looks to the worker's ability to work for other businesses as well.

The proposed rule also notes that supervision may be imposed through the use of technology (i.e. tracking or remote monitoring), and need not be in-person, direct supervision.

In a change from the proposed rule, the final rule provides that actions taken by a business to comply with specific, applicable laws or regulations are not indicative of control over an employee; however, if the actions go beyond compliance with a specific law or regulation and serve the business's "own compliance methods, safety, quality control, or contractual or customer service standards," such actions are more indicative of control.

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

This factor analyzes whether the work is critical, necessary, or central to the business – where the work performed is integral to the business, employment status is more likely.

The key question is whether the work or function performed is integral to the business, not whether the individual worker is an integral part of the business.

6. Skill and initiative

This factor analyzes whether the worker is using his or her specialized skills and taking business-like, entrepreneurial initiative to advance his or her independent business.

Where a worker is dependent on training from the business to perform the work, employment status is more likely; whereas if the worker possesses

specialized skills and demonstrates entrepreneurial judgment, contractor status is more likely. However, specialized skill alone is not sufficient, but must be used in connection with business-like initiative.

Core Factors Test

In contrast, the core factors test, promulgated in 2021, prescribed a five-factor test to guide the analysis, two of which are designated as “core factors” carrying more weight in the inquiry: 1) nature and degree of control over the work, and 2) the worker’s opportunity for profit or loss. Under the core factors test, if these two factors point in the same direction toward independent contractor, it is likely that the worker is properly classified as an independent contractor (and vice versa).

The DOL explains in the final rule that the core factors rule is to be repealed because it is inconsistent with the FLSA’s text and existing judicial precedent.

Whatever the explanation, the final rule is significantly more nuanced and will result in less definitive answers to the question of whether your independent contractors are properly classified. With less clarity comes the likelihood of more opportunity for courts (or the DOL) to find that the “totality” weighs in favor of “economic dependence” and an employment relationship. Indeed, over the last few years, the DOL has made independent contractor classification a priority. While the final rule has already been challenged in court, as we near the March 2024 effective date, businesses who utilize independent contractors would be wise to review these relationships.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Mark Wallin at 312-214-4591 or mwallin@btlaw.com.

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