



New Independent Contractor Rule: Final Regulations on Department of Labor's Independent Contractor Assessment

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After issuing proposed rules and seeking public comment in October 2022, the Department of Labor (DOL) announced the finalized regulations for its new Independent Contractor Rule (the New Rule), which takes effect on March 11, 2024. The New Rule rescinds the 2021 Independent Contractor Rule and, according to the DOL, aligns more fully with the text and purpose of the Fair Labor Standards Act (FLSA).

The Factors

The New Rule takes into consideration a non-exhaustive list of factors to determine if the individual is an employee or independent contractor based on the “economic reality” of the relationship between the worker and the potential employer. The non-exhaustive list of factors assessed in determining whether a worker is economically dependent on the potential employer is as follows:

1. The opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the potential employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control;
5. Extent to which the work performed is an integral part of the potential employer's business;
6. Skill and initiative.

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The New Rule eliminates any enumerated emphasis placed on particular factors and, instead, returns to a totality of the circumstances analysis.

Some Differences Between the New Rule and the 2021 Rule

While many of these factors are the same as the 2021 Rule, the New Rule modifies the analysis of some factors. For instance, under the New Rule, unexercised contractual authority is relevant to the control analysis. And, while the 2021 Rule asked whether work performed was “part of an integrated unit of production,” the New Rule’s fifth factor assesses whether the work performed is critical, necessary, or central to the potential employer’s principal business.

The New Rule’s second factor -- investments by the worker and potential employer -- also was not expressly included within the 2021 Rule. The DOL has clarified that costs to a worker of tools and equipment to perform a specific job, costs of workers’ labor, and costs that the potential employer imposes unilaterally on the worker are not evidence of independent investment and, instead, indicate employee status. While the worker’s investments -- e.g., functions that increase the worker’s ability to perform different types of work, reduce cost, or extend market reach -- do not have to be equal (in monetary value) to the potential employer’s investment, businesses should assess whether the individual is making investments similar to itself such that the worker can operate independently of the business.

Take Action

Employers should review their workers’ classifications and ensure individuals designated as independent contractors under the 2021 Independent Contractor Rule coincide with the New Rule’s independent contractor definition and examples.

Also of note, the DOL’s New Rule does not affect state or local laws. So, employers in states and localities that have wage-and-hour laws utilizing the “ABC” test (or any other guidance different than the DOL’s multi-factor economic reality test) must abide by all applicable laws.