

Insights: Alerts

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

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On January 6, 2021, the U.S. Department of Labor issued its final rule on Independent Contractor Status under the Fair Labor Standard Act (FLSA) outlining how employers can properly classify workers as independent contractors, instead of employees, which in practice means that the worker does not have to be paid minimum wage or overtime. This Rule, following a 30-day comment period during which the Department received over 1,800 comments, is a boon to employers as it provides clarity and more leeway in defining who is an independent contractor.

The Rule explains that the five-factor economic realities test governs the analysis of whether a worker can properly be classified as an independent contractor. This test is less restrictive on employers than those used in some states, such as California's use of the ABC test. Under the five-factor economic realities test, the following is considered:

1. Degree of control over work: If a worker exercises significant control over how they do the work, they are more likely considered an independent contractor.
2. Opportunity for profit or loss: If a worker can adjust their earnings through their own initiative or business expenditures, they are more likely to be considered an independent contractor.
3. Required skills: If the worker uses skills or training not provided by the employer, they are more likely considered an independent contractor.
4. Permanence of employer-worker relationship: Employment arrangements that are for a specific period of time, or that are unpredictable, are more likely to indicate independent contractor status.
5. Relation to the employer's business: If a worker's job is integral to the employer's core business, they are more likely an employee.

While all five factors are a part of the analysis, the Rule focuses on the first two and gives them the greatest weight. When the first two factors conflict, the remaining three serve as guideposts for the analysis. Nothing in the rule, however, prohibits states from adopting more stringent standards.

The timing of this final rule, nevertheless, places its application in the balance. The Rule is scheduled to take effect on March 8, 2021—60 days after it is published in the federal registrar. However, the incoming Biden administrator does not favor the rule and will potentially delay its implementation. It is not readily apparent if this will occur soon after inauguration on January 20, 2021.

Key Takeaway: The DOL final rule on independent contractor status gives employers more leeway in classifying workers as independent contractors. This will have impacts on industries like the gig-economy where independent contractor work is essential. However, employers should be mindful that this rule, although passed as a final rule, hangs in the balance with the incoming Biden administration.