Kilpatrick

Insights: Alerts

Two Factors to Rule Them All: What DOL's New Independent Contractor Rule Means for Your Workforce

NOVEMBER 20, 2026 Written by Drew Williamson and Jeralyn H. Baran

On November 19, 2026, the U.S. Department of Labor's Wage and Hour Division (WHD) released a final rule that scraps the 2024 independent contractor rule and largely restores the simpler 2021 test, with some updates. For the first time, the same test will also apply under the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), not just the Fair Labor Standards Act (FLSA), which governs minimum wage and overtime.

For businesses that use contractors, freelancers, owner-operators, or app-based workers, the big news is more predictability. Two "core" factors now drive the analysis, and when both point the same way, that is very likely the right answer. But this is not a free pass. How the relationship *actually works* still matters more than the paperwork, and the rule does *not* override courts or stricter state laws.

The rule takes effect 60 days after it is published in the Federal Register, which has not yet happened.

How We Got Here: Six Years of Whiplash

If this sounds familiar, it should. This is DOL's third major independent contractor rule in six years. The 2021 rule focused on two "core" factors. The 2024 rule replaced it with a six-factor test that gave every factor equal weight. DOL stopped enforcing the 2024 rule in May 2025 and proposed the new rule in February 2026.

The takeaway is that federal standards shift with each administration, so build compliance around the facts every version of the test cares about.

The New Test in Plain English

The basic question has not changed. Is the worker really running his or her own business (a contractor), or does the worker depend on your company for work (an employee)? The rule uses five factors to answer it.

Factor	Weight	What tends to point toward contractor status
Nature and degree of control over the work	Core	The worker, not the business, decides key things like when to work, which jobs to take, and whether to work for others, including competitors.
Opportunity for profit or loss	Core	The worker can make or lose money through business decisions or investments, such as hiring helpers or buying equipment. A worker who can earn more only by working more hours or faster looks like an employee.
Amount of skill required	Other	The worker brings specialized skills, such as a licensed electrician or a freelance graphic designer.
Permanence of the relationship	Other	The work is for a set project or comes and goes, rather than an open-ended, ongoing relationship.
Part of an integrated unit of production	Other	The worker operates separately from your workforce rather than side by side with your employees.

The three "other" factors matter less and will rarely outweigh the core factors when those two agree. Still, every factor must be considered, and when the core factors split, the others can decide the outcome.

The rule also stops counting the same facts twice (for example, working for other companies now counts only under control). And it no longer compares the worker's investment with the company's, a comparison the worker almost always loses.

What Is Genuinely New (Beyond a 2021 Rerun)

1. **A sharper line on "compliance" rules.** Requiring a contractor to follow the law, meet health and safety standards (even voluntary ones), carry insurance, or hit agreed deadlines and quality standards still does not suggest employment. But labels do not control. Detailed instructions on how, when, or where to work (for example, a required script, route, or daily schedule) can still signal employment even if called "safety" or "quality control."
2. **Fourteen real-world examples.** The rule now includes 14 examples, up from six, covering app-based workers, farm labor contractors, and truck drivers. For instance, a driver who leases a truck, cannot negotiate pay, and has no realistic path to owning it looks like an employee. A driver who negotiates rates and can realistically buy the truck looks like a contractor.
3. **One test for the FLSA, the FMLA, and MSPA.** This matters for HR because FMLA coverage and eligibility depend partly on how many employees work near a given location, so reclassifying contractors can change the count.

Reality Check: What the Rule Does Not Do

- **It does not bind the courts.** The rule governs only DOL investigators. Workers who sue can still rely on existing court tests, and courts may or may not follow the new rule.
- **It does not override state law.** States can still use stricter tests, like California's "ABC" test, which presumes a worker is an employee unless the company proves otherwise.
- **It does not let contracts do the work.** Calling someone a contractor means little if an app assigns routes, sets prices the worker cannot negotiate, and cuts off workers who fall short. Workers also cannot waive employee protections, and the IRS uses its own test.

One upside for careful employers is that federal law protects those who rely in good faith on a written DOL rule while it remains in place. Documenting how you applied the rule, when you apply it, helps preserve that defense.

Five Moves to Make Before the Effective Date

1. **Re-check your contractors against the two core factors.** For each group, ask who really controls the schedule and workload, and whether the person can make money through business choices or only by working more hours. If both answers point to independence, document why. If not, talk to counsel.
2. **Look at what *actually happens*.** Talk to managers who work with contractors day to day. Warning signs include fixed schedules, assigned territories, no other clients, or employee-style training.
3. **Review your "safety" and "quality" rules.** Keep requirements focused on results and common safety standards, and rework detailed instructions on how, when, or where work is done.
4. **Check state law.** Confirm whether a stricter test applies to wages, unemployment, or workers' compensation in each state where your contractors work.
5. **Document your decisions and update FMLA counts.** Record how you applied the factors, and reflect any reclassification in your FMLA headcounts.

Finally, resist converting large groups of employees into contractors. Plaintiffs' lawyers, state agencies, and future administrations will be watching.

We will continue to monitor these developments. In the meantime, for guidance on how the new rule affects your workforce, please contact one of the authors or your regular Kilpatrick Townsend attorney.

Related People



Drew Williamson
t 404.815.6522
drew.williamson@ktslaw.com



Jeralyn H. Baran
t 312.606.3217
jbaran@ktslaw.com