

EMPLOYEE OR INDEPENDENT CONTRACTOR: **NEW FINAL RULE** **EFFECTIVE MARCH 2024**

Effective March 11, 2024, a [new final rule](#) to help employers and workers better understand the qualifications for an employed individual to be classified as either an employee or independent contractor under the Fair Labor Standards Act (FLSA) was [put in place by the U.S. Department of Labor](#). This rule was established to address the misclassification of employees as independent contractors, aiming to solve ongoing concerns that impact workers' rights to receive minimum wage and overtime pay, among other protections. As [used in this rule](#), the term "independent contractor" refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves.

CHANGES UNDER THE EMPLOYEE OR INDEPENDENT CONTRACTOR RULING

This rule intends to reduce employers' risks associated with misclassifying employees as independent contractors, while providing a consistent approach for organizations that engage with individuals that are in business for themselves.

In a [news release](#) from the Department of Labor, Acting Secretary of Labor Julie Su stated, "Misclassifying employees as independent contractors is a serious issue that deprives workers of basic rights and protections...This rule will help protect workers, especially those facing the greatest risk of exploitation, by making sure they are classified properly and that they receive the wages they've earned."

The rule also eliminates the 2021 Independent Contractor Status Under the FLSA rule ([2021 IC Rule](#)) and replaces it with updated analysis for determining a worker's classification, aligning more consistently with the FLSA as interpreted by longstanding judicial precedent. The [final rule provides](#) broader discussion of how scheduling, remote supervision, price setting and the ability to work for others should be considered under the control factor.

HOW TO APPLY THE FINAL RULE

According to the Department, the new final rule will rely on the long-standing multifactor totality-of-the-circumstances “economic reality” test (where no single factor or group of factors is assigned any predetermined weight) used by courts to determine whether a worker is an employee or independent contractor. The economic reality test leverages multiple factors to establish if an employment relationship exists under the FLSA (29 CFR 795.110) with the ultimate goal of determining if an individual is economically dependent on an employer for work or is instead in business for themselves.

Under the economic reality test, the six factors that help guide the analysis of a worker’s relationship with an employer are:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Permanence of the work relationship
4. Nature and degree of control the employer maintains
5. Whether the work performed is essential to the employer’s business
6. Worker’s skill and initiative

ADDITIONAL CONSIDERATIONS

Under the final rule, additional factors may be needed to determine workers’ statuses. Some factors, such as what a worker is called or how they receive payment, may not be relevant to whether an employment relationship exists. Further, verbal or written agreement, inclusive of executing an independent contractor agreement, does not make a worker an independent contractor under the FLSA.

The final rule only revises the Department’s interpretation under the FLSA and has no effect on state wage-and-hour laws utilizing the “ABC test.” Both the Internal Revenue Code and National Labor Relations Act differ in language and judicial precedence than the Department, and the laws governing these are enforced by different federal agencies.

Of note, the rule states that a worker cannot voluntarily waive employee status while choosing to be classified as an independent contractor. Under the FLSA, a worker deemed an employee cannot waive FLSA-protected rights, like minimum wage or overtime pay.

Analysis of the final rule will be easily accessible in the Code of Federal Regulations and will apply to workers in any industry. Therefore, the final rule provides helpful guidance for both workers and businesses. If an employee is found to be misclassified as an independent contractor, the business would be liable for paying any unpaid wages owed to the employee under the FLSA, as well as any liquidated damages equal to back wages, civil monetary penalties or even possible attorney fees.

IF AN EMPLOYEE IS FOUND TO BE MISCLASSIFIED AS AN INDEPENDENT CONTRACTOR, THE BUSINESS WOULD BE LIABLE FOR PAYING ANY UNPAID WAGES OWED TO THE EMPLOYEE UNDER THE FLSA, AS WELL AS ANY LIQUIDATED DAMAGES EQUAL TO BACK WAGES, CIVIL MONETARY PENALTIES OR EVEN POSSIBLE ATTORNEY FEES.

MAINTAIN COMPLIANCE

To maintain compliance with this new rule, employers should partner with legal counsel to conduct an internal audit of their current independent contractor engagements. These audits should examine existing engagements to confirm they are defensible under the Department of Labor's new rule and to ensure the proper procedures are in place for establishing future independent contractor engagements.

The three areas that businesses should pay attention to during an audit are:

- **Tenure of the relationship:** If the contractor is not hired on a project basis and the working relationship has no termination date, then it would likely not pass the permanence factor.
- **Responsibilities performed by the contractor:** If the work performed is essential to the employer's business, the contractor status would likely be questioned.
- **Contractor's skills:** If the contractor possesses skills that are unique, aren't available to the business and aren't an essential part of the business, the contractor rule would be satisfied.

It's essential your business meets these compliance requirements.

SOURCES:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>
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