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Department of Labor Finalizes Rule on Employee and Independent Contractor Status

On January 10, 2024, the U.S. Department of Labor (“DOL”) published a final rule, effective March 11, 2024, revising guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (“FLSA”).¹ This final rule replaces the DOL’s earlier rule published in 2021 on the same topic with an analysis for determining employee or independent contractor status, which the DOL deems is more consistent with the FLSA as interpreted by longstanding judicial precedent.²

Employees fall under the protection of the FLSA for issues such as minimum wage and overtime pay. Independent contractors, however, do not.³ In the past, courts have applied an economic reality test in determining whether “the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor).”⁴ When performing this test, courts have typically taken a holistic analysis of the economic reality, considering multiple factors.⁵

The DOL’s 2021 rule marked a departure from the longstanding adoption and application of the economic reality test by courts. It designated two core factors, i.e., the nature and degree of control over the work and the worker’s opportunity for profit or loss, as the most probative. Under the proposed 2021 rule, if these two core factors point to the same classification, then it is mostly likely the accurate one.⁶

The 2024 final rule represents, at least in part, a reversal of course from the DOL’s 2021 rule. It reiterates that “economic dependence is the ultimate inquiry” and that “the economic reality test is comprised of multiple factors that are tools or guides to conduct the totality-of-the-circumstances analysis to determine economic dependence.”⁷ The DOL has identified six factors for economic reality test, but also emphasizes that no single factor determines a worker’s status

¹ “Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43.” *U.S. Department of Labor*.

<<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>> (accessed May 31, 2024).

² *Id.*

³ “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.” Federal Register 89.7 (Jan. 10, 2024) 1638-1743 at 1641.

⁴ *Id.* at 1638.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1640.

and that no one factor of combination of factors are more important than others.⁸ These factors 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,
5. Whether the work performed is integral to the employer's business, and
6. Skill and initiative.

This new rule could have broad, far-reaching implications in the labor market. It is estimated that between 6.9 and 14.7 percent of the U.S. labor force are independent contractors.⁹ Emerging technologies such as generative artificial intelligence also have the potential to transform the conventional organization of work rapidly and radically. All of these create challenges that workers and businesses need to navigate through, under the DOL's latest rule.

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⁸ "Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)." *U.S. Department of Labor* (Mar. 2024). <<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>> (accessed May 31, 2024).

⁹ "Employee or Independent Contractor Classification Under the Fair Labor Standards Act." *Federal Register* 89.7 (Jan. 10, 2024) 1638-1743 at 1730.