

U.S. Department of Labor Adopts Final Independent Contractor Status Regulations

On Jan. 7, 2021, the U.S. Department of Labor (DOL) published its final rule to revise and update its regulations regarding classification of employees vs. independent contractors. This determination of independent contractor status is critical to wage liability, as employees are generally guaranteed minimum wage and overtime under the Fair Labor Standards Act—absent some exemption—while independent contractors are not.

This new rule reaffirms the DOL's "economic reality" test and attempts to clarify the test so it can be implemented and interpreted more consistently and with greater precision by the courts to determine whether an individual is an employee or an independent contractor. The determination hinges on five factors:

1. The nature and degree of the worker's control over the work;
2. The worker's opportunity for profit or loss based on initiative and/or investment;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship between the worker and the potential employer; and
5. Whether the work is part of an integrated unit of production.

Considering these factors, the less control an employer exercises over the work and the greater control the worker has over the ability to generate a profit on his or her own work (i.e., controlling expenses, setting a price, etc.), the more likely the worker will be considered an independent contractor. Similarly, extremely specialized work, a shorter working relationship and work that is more stand-alone (compared to work that is part of an employer's production process), are all indicative of independent contractor status, rather than an employer-employee relationship. No single factor is determinative, but factors 1 and 2 are considered "core factors," meaning they are given the most weight in the analysis. Factors 3-5, on the other hand, are considered helpful guideposts, especially when factors 1 and 2 point to different classifications.

The new rule also clarifies that the employer's *actual practices* are entitled to greater weight than what is contractually or theoretically possible. This means that courts applying this test should focus on the power and authority employers have exercised over workers, rather than the terms of any agreement between them.

Along with its new final rule, the DOL published several examples of how it should be interpreted, which can be found [here](#). These examples provide additional clarity on how the DOL intends for this test to apply to various workers, especially gig-economy workers.

While DOL's new rule is not a drastic change from the existing framework for determining independent contractor status, employers should review their classification practices to ensure proper classification of independent contractors. By

taking affirmative steps before this rule becomes effective on March 8, 2021, employers can minimize potential wage and hour liability in the future. That said, employers should consult with legal counsel before implementing any changes, as New York and many other states have their own tests for determining independent contractor status for purposes of state wage and hour laws.

If you have any questions about the information presented here, please contact [Paul Buehler](#), any [attorney](#) in Bond's [Labor and Employment practice](#), or the attorney in the firm with whom you are regularly in contact.



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