

The U.S. Department of Labor Issues Proposed Regulations to Determine Independent Contractor Status Under the Fair Labor Standards Act

On September 22, 2020, the U.S. Department of Labor (USDOL) issued [proposed regulations](#) regarding the determination of whether an individual is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor who is not subject to the FLSA's minimum wage and overtime requirements. The proposed regulations are expected to be published in the Federal Register on September 25, and comments can be submitted for 30 days after publication. If the proposed regulations are adopted, it will likely be easier for businesses to classify employees as independent contractors under the FLSA.

Under the proposed regulations, the ultimate inquiry is economic dependence. An individual is considered to be an independent contractor "if the individual is, as a matter of economic reality, in business for him- or herself."

To determine the issue of economic dependence, the USDOL lays out two "core factors" that are given significant weight: (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. According to the proposed regulations, if both of these core factors point toward independent contractor status, then there is a substantial likelihood that the individual is an independent contractor; similarly, if both of these core factors point toward employee status, then there is a substantial likelihood that the individual is an employee.

If an individual sets his or her own schedule, selects his or her own projects, and has the ability to work for other businesses, then the first core factor will likely point toward independent contractor status. If the individual has the ability to earn profits or incur losses based on his or her exercise of initiative or management of his or her investment, then the second core factor will likely point toward independent contractor status.

The USDOL also lists three other less important factors to consider as part of the analysis. The first one is the amount of skill required for the work. If the work requires specialized training or skill that the business does not provide to the individual, then this factor will weigh in favor of independent contractor status. The second one is the degree of permanence of the working relationship. If the work relationship is indefinite in duration or continuous, then this factor will weigh in favor of employee status. The third one is whether the work is part of an integrated unit of production. If the individual's work is only one component in a process to produce a good or service (as opposed to stand-alone work), then this factor will weigh in favor of employee status.

The proposed regulations state that the actual practice of the parties is more relevant than theoretical possibilities. For example, if a business has the contractual authority to supervise or discipline an individual, but does not actually exercise that authority in practice, then this may not necessarily establish the business' control.

The proposed regulations also explicitly rescind prior administrative rulings, interpretations, practices, or enforcement policies regarding the independent contractor analysis that are inconsistent with or in conflict with the analytical framework set forth in the proposed regulations. The USDOL intends the proposed regulations to guide the independent contractor analysis for its investigators and the courts.

Employers should keep in mind that these proposed regulations, even if they are adopted and even if they withstand any legal challenges that may be filed, will only be applicable to the independent contractor analysis under the FLSA. There are other federal agencies (such as the Internal Revenue Service, for instance) that will likely still apply their own standards in determining independent contractor status under other federal laws. Similarly, there are many branches of the New York State Department of Labor (such as the Division of Labor Standards, the Unemployment Insurance Division, and the Workers' Compensation Board) that have historically taken a more expansive view of employee status under state law. For these reasons, employers should still approach independent contractor arrangements with individuals cautiously and should consult with legal counsel to assess the risks of any such arrangements.

If you have any questions about this information memo, please contact [Subhash Viswanathan](#), any [attorney](#) in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.



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