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DOL Issues Final Independent Contractor Rule

On January 9, 2024, the Department of Labor (DOL) issued its Final Rule for analyzing whether a worker is considered an employee or an independent contractor under the Fair Labor Standards Act (FLSA).

This Final Rule rescinds the DOL's prior independent contractor rule that was issued at the end of the Trump administration (the "2021 IC Rule"). The current DOL administration did not believe that the 2021 IC Rule fully comported with the FLSA and its purpose, as interpreted by courts. The DOL states that the new Final Rule more closely aligns with existing judicial precedent and the DOL's longstanding guidance prior to the 2021 IC Rule. The DOL first proposed this rule in its Notice of Proposed Rulemaking issued in October 2022.

Under the prior 2021 IC Rule, the "economic reality test" was used to determine employment status. The DOL identified two factors from the economic reality test that were considered "core factors": (1) "the nature and degree of control over the work"; and (2) "the individual's opportunity for profit or loss" based on his or her own initiative and /or investment. These two core factors were afforded additional weight under the analysis.

The new Final Rule rescinds the 2021 IC Rule and restores the totality-of-the-circumstances analysis used previously. Under the Final Rule, six factors are considered. None of these factors have a predetermined weight. Instead, each factor will be considered against the totality of the entire activity. The list of factors is not exhaustive, and additional factors may be considered to determine whether economic dependence or independence is present within the working relationship.

The six factors are:

- Opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the potential employer;

- The degree of permanence of the work relationship;
- The nature and degree of control;
- The extent to which the work performed is an integral part of the potential employer's business; and
- The worker's skill and initiative.

One of the biggest changes to the list of factors falls under the fourth factor, "the nature and degree of control." The DOL explained that exercising control to comply with specific legal requirements does not conclusively establish the worker is an employee. Therefore, businesses can take action to comply with federal, state, or local laws without necessarily affecting the employee classification.

Ultimately, the heart of the inquiry remains the same, determining whether the worker is economically dependent on the alleged employer. The Final Rule changes how the DOL will interpret and analyze independent contractor relationships. Employers should know that the new rule is likely to expand protections under the FLSA and limit the number of workers who will be considered independent contractors. Businesses that partner with independent contractors should review their classifications to ensure it complies with the Final Rule and ensure that any control exercised is necessary to comply with specific legal requirements. The Final Rule has no effect on other federal, state, or local laws that use different standards for employee classifications.

The Final Rule becomes effective March 11, 2024. For more information, please contact the authors or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

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