

U.S. Department of Labor Issues Much-Anticipated Final Rule Addressing Independent Contractor Status Under the FLSA

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On January 6, 2021, the U.S. Department of Labor released its much-anticipated [Final Rule](#) addressing independent contractor status under the Fair Labor Standards Act. The Department indicates that the rulemaking should appear in the Federal Register on January 7, 2021, with an effective date 60 days thereafter.

The Final Rule is, in substance, very similar to the Proposed Rule the Department issued in September 2020 (and discussed [here](#)). Under the Final Rule, the key points are as follows:

- The “ultimate inquiry” is whether an individual is “economically dependent” on another for work.
- To evaluate economic dependence, one examines the “economic reality” of the situation.
- Economic reality, in turn, depends on several factors. Two of those factors, deemed “core” factors, carry significantly weight in the analysis than the other factors. Those two core factors are:
 - “The nature and degree of control over the work”; and
 - “The individual’s opportunity for profit or loss.”
- In addition to these core factors, three additional factors also influence the economic reality analysis:
 - “The amount of skill required for the work”;
 - “The degree of permanence of the working relationship between the individual and the potential employer”; and
 - “Whether the work is part of an integrated unit of production.”
- The list of economic reality factors is not exhaustive, and other considerations may be

pertinent in any given case.

- In evaluating these various factors, “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.” For example, the potential to exercise control is less significant under the Final Rule than the actual exercise of control.
- The Final Rule provides several examples illustrating how to apply these principles.

With the upcoming change of administration, the big question is what comes next. There may be efforts after January 20 to push back the effective date of the Final Rule, as well as to invoke the Congressional Review Act to strike the regulation. If Congress does not overturn the rulemaking, it seems likely that the validity of the new standard will end up in the courts. If the courts uphold the Final Rule, then the Department has the option of proceeding with a new rulemaking to put in place a different standard.

Keep an eye out for further developments, particularly over the next month or two.

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National Law Review, Volume XI, Number 6

Source URL: <https://natlawreview.com/article/us-department-labor-issues-much-anticipated-final-rule-addressing-independent>