

## DOL Publishes Final Independent Contractor Rule (US)

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Way back in October 2022, we [discussed](#) the U.S. Department of Labor's (DOL) issuance of a notice of new rule that would substantially change the test for whether a worker is an employee, and thus covered by the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), or is an independent contractor, and therefore not covered by those FLSA provisions. After an extensive notice-and-comment period, on January 10, 2024, the DOL published the [final rule](#).

As expected, the final rule rescinds the employer-friendly "core factors"[1] standard announced by the DOL during the waning days of the Trump Administration in favor of a more complex and stringent "totality of the circumstances"[2] standard, under which no one factor is assigned any predetermined weight. The new standard broadens the scope of the analysis by requiring employers to apply a highly fact-specific multifactor standard but does not guide employers on how to balance or weigh the factors. As a practical matter, this will likely result in heightened enforcement discretion for the DOL and will make it more difficult for employers to gauge whether they are properly classifying their workers as independent contractors.

Misclassifying employees as independent contractors can be extremely costly for businesses. Under the FLSA, misclassified workers may be entitled to unpaid minimum wages and overtime, liquidated damages, unpaid payroll taxes and other contributions, civil monetary penalties and attorneys' fees and costs. Understandably, employers are concerned about the implications of the DOL's rulemaking, as changes to classification standards carry significant consequences for businesses across industries.

It is important to note that the rule does provide guidance on how the DOL will interpret independent contractor classifications. However, courts are not required to defer to the DOL's interpretations, and the final rule does not impact state or local laws that use different classification standards (and there are many of those, most notably, the stringent "ABC" test used in California (see [here](#)) and several other states).

The final rule goes into effect on March 11, 2024, but is already facing at least two legal challenges in federal courts. Just two days after the rule was published, a coalition of business groups asked the U.S. Court of Appeals for the Fifth Circuit to revive their previous lawsuit challenging the DOL's proposed rule as being in violation of the Administrative Procedures Act. A federal district court in

Texas initially sided with the coalition in 2022 after then-proposed rule was announced, but the action was stayed pending completion of the DOL's rulemaking process. The coalition is now seeking to invalidate the final rule, which it criticizes as "so vague, amorphous, and context-dependent [that] it provides virtually no certainty or assurance that any given worker is classified correctly as an employee or contractor."

In another legal challenge brought just six days after the final rule was published, a group of freelance writers sued the DOL in a federal court in Georgia. The freelancers have asked the court to stop the rule from going into effect, arguing that it is unconstitutionally vague and that the DOL violated the administrative rulemaking process in adopting the final rule. More legal challenges are expected.

We will continue to monitor for further developments and are available to provide guidance to businesses navigating the complexities of independent contractor classification.

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[1] Under the Trump-era rule, the two "core factors" deemed most probative of independent contractor status were: (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit and loss.

[2] The "totality of the circumstances" standard under the final rule requires consideration of the following factors to determine whether, as a matter of "economic reality," a worker is an employee or an independent contractor: (1) the opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) the degree of permanence to the work relationship; (4) the nature and degree of control; (5) whether the work performed is an integral part of the potential employer's business; and (6) skill and initiative. The final rule also instructs that "additional factors may also be considered if they are relevant to the overall question of economic dependence."

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