

DOL to Scrap Prior Independent Contractor Rule

Article By:

Christopher M. Pardo

Veronica A. Torrejón

The U.S. Department of Labor's Wage and Hour Division will stop enforcing the prior administration's rule to determine whether workers are "independent contractors" or "employees" under federal wage-and-hour laws.

The definition of "independent contractor" is important because it determines whether the Fair Labor Standards Act ("FLSA") applies to particular workers. Only employees (not independent contractors) are covered under the FLSA's regulations on minimum wages, overtime, and record-keeping. So, in order to comply with federal labor laws, employers need to understand the difference between employees and independent contractors in order to correctly classify workers.

On May 1, the DOL issued a [field assistance bulletin](#) announcing that, when conducting FLSA investigations over worker classifications, the Wage and Hour Division will stop applying a rule established only last year. The "2024 Rule" had been the controlling standard for audits and compliance actions. And while the 2024 Rule remains in effect for purposes of private litigation, the DOL will not apply the rule in department investigations. Instead, the DOL will once again enforce the FLSA based on guidance in [Fact Sheet 13](#), first published in July 2008, and an [Opinion Letter](#) that was first published on April 29, 2019, later withdrawn, and reissued on May 2.

Enforcing the FLSA Based on Guidance From 2008

In enforcing the FLSA, the DOL will look to Fact Sheet 13, which outlines seven non-determinative factors for worker classification. Among the factors the DOL will consider significant are:

1. The extent to which the services rendered are an integral part of the principal's business;
2. The permanency of the relationship;
3. The amount of the alleged contractor's investment in facilities and equipment;
4. The nature and degree of control by the principal;
5. The alleged contractor's opportunities for profit and loss;
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
7. The degree of independent business organization and operation.

Leading Up To the DOL's Decision

Historically, the DOL did not define the term “independent contractor” through regulation and, instead, relied on informal guidance, such as Fact Sheet 13. In 2020, the DOL proposed a five-factor test for when a worker is an independent contractor, emphasizing the principal’s right to control and the worker’s opportunity for profit or loss. The rule was finalized in 2021, under current President Donald Trump’s first administration. However, almost immediately the new rule faced legal challenges and was later rescinded under the subsequent administration.

Then, on January 9, 2024, the DOL published a different final rule defining the term “independent contractor” under the FLSA. The rule, established under former President Joe Biden, introduced a six-factor “economic realities” test. The six-factor test focused on the economic dynamics between employers and workers by examining: opportunity for profit or loss depending on managerial skill; investments by the worker and the employer; degree of permanence of the work relationship; nature and degree of control; extent to which the work performed was an integral part of the employer’s business; and skill and initiative.

The 2024 Rule triggered a number of lawsuits challenging the legality of the rule. These suits are currently pending in district courts across the country and, with a new administration in place, the DOL is taking the position in those lawsuits that it is reconsidering the 2024 Rule and considering rescinding the regulation. In its field assistance bulletin on May 1, the DOL reiterated that it is “currently reviewing and developing the appropriate standard for determining FLSA employee versus independent contractor status.”

Since the 2024 Rule has not yet been rescinded, employers should take a cautious approach for now and continue to monitor the situation for further developments. At the same time, employers should be mindful of the new guidance when it comes to enforcement actions.

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