

Eye on Washington Regulatory Update

DOL Proposes New Independent Contractor Test

The U.S. Department of Labor (DOL) has published a proposed rule that would change the test for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA), and rescind and replace the current 2021 rule.

The Details:

Background:

The DOL uses an "**economic realities**" test to determine whether workers are covered by the FLSA and entitled to minimum wage, overtime, and other wage and hour rules. Prior to 2021, this test looked at the following factors, each carrying equal weight:

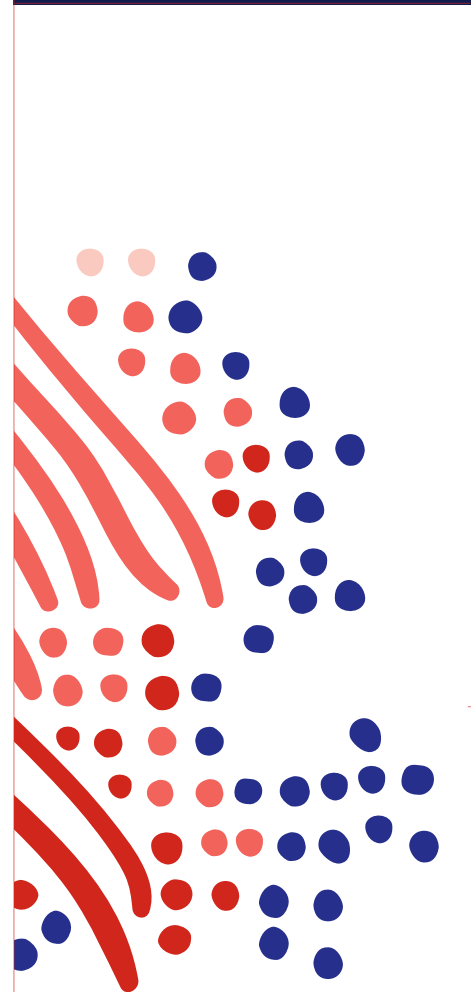
1. The alleged contractor's opportunities for profit and loss.
2. The amount of the alleged contractor's investment in facilities and equipment.
3. The permanency of the relationship.
4. The nature and degree of control by the principal.
5. The amount of initiative, judgment, or foresight in open-market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

2021 Rule:

Toward the end of the Trump Administration, the DOL published a final rule (the 2021 rule) that sharpened the economic realities test into five distinct factors, including:

- **Two "core factors"** that carry more weight in the analysis. These two factors are the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative and/or investment.
- **Three other factors** serve as additional guideposts in the analysis: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production.

The Biden Administration tried to withdraw the 2021 rule, but a federal judge ultimately decided that the 2021 rule went into effect on March 8, 2021, as planned by the Trump Administration.



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2022 Proposed Rule:

The DOL's current proposed rule would:

- Eliminate the use of "core factors" in the economic reality test.
- Restore the multifactor, totality-of-the-circumstances analysis to determine whether a worker is an employee or an independent contractor under the FLSA.
- Require the analysis to be performed without assigning a predetermined weight to a particular set of factors.
- Return the consideration of investment to a stand-alone factor, focusing on whether the worker's investment is capital or entrepreneurial in nature, and considering the worker's investments on a relative basis with the employer's investment.
- Provide additional analysis of the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control over a worker, not just the control that is actually exerted.
- Return to an earlier interpretation of the integral factor, which considers whether the work is integral to the employer's business, rather than whether it is exclusively part of an "integrated unit of production."
- Rescind the 2021 rule.

As a result of the changes, the economic realities test would look at the following factors:

1. Opportunity for profit or loss depending on managerial skill.
2. Investments by the worker and the employer.
3. Degree of permanence of the work relationship.
4. Nature and degree of the business's control over the worker.
5. Extent to which the work performed is an integral part of the employer's business.
6. Skill and initiative.

See the [text of the proposed rule](#) for details on these factors.

Note: Additional factors may also be considered if the factors in some way indicate that the worker is in business for themselves.

Next Steps:

- Review the [proposed rule](#).
- Evaluate the potential impact if the proposed rule were to become final.
- Work with legal counsel and consider submitting comments to the DOL on the proposed rule. The public comment period begins October 13, 2022, lasts 45 days, and will close November 28, 2022.
- Watch for developments.

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