

U.S. Department of Labor Independent Contractor Proposed Rulemaking

On Oct. 13, the U.S. Department of Labor (DOL) Wage and Hour Division published its proposed Independent Contractor (IC) rule, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* ([87 Fed. Reg. 62218](#)). The proposed rule seeks to rescind and replace Trump-era rulemaking, which legal analysts believe applied a more favorable test under the Fair Labor Standards Act (FLSA) for recognizing independent contractor status. The DOL announcement opens a public comment period through Nov. 28, 2022.

According to the Independent Contractor Misclassification and Compliance blog published by law firm Locke Lord, “Once finalized, the regulation would alter the test for IC status under the FLSA as last articulated by the Trump Administration, which had likewise changed the FLSA test for IC status previously issued by the Obama Administration. What does this mean legally for both workers and businesses who are currently classified as ICs? Not much, [per Locke Lord] ... since it is the courts that create law on this subject, not regulatory agencies.” However, the proposed rule does differ from the Trump-era rulemaking in several ways that may lead to different interpretations by the courts.

For background, in the final days of the Trump administration, the DOL finalized a new regulation regarding the test used to determine IC status under the FLSA that was interpreted as providing a more flexible and permissive reading to support IC status under the FLSA rather than a determination that a worker was an employee in circumstances where disputes arose. Since early 2021, the Biden administration has sought to rescind that rule but faced various legal setbacks in federal court, leaving the Trump rulemaking in place. The proposed rule seeks to address deficiencies noted in the court holdings.

As to the differences in the rulemaking schemes, according to the Society for Human Resource Management, the proposed rule primarily seeks to rescind the emphasis “in which two core factors — control over the work and opportunity for profit or loss — carried greater weight in determining the status of independent contractors.” Under the proposed rule, which considers a greater number of factors, “employers would use a totality-of-the-circumstances analysis, in which all the factors do not have a predetermined weight.” This means that each factor would be given full consideration. Specifically, the biggest difference “appears to be the latter Administration’s effort to place more weight on one of the three ‘non-core’ factors: whether the work is integral to the employer’s business.” This factor favors employee status, thereby causing many courts over the past decade to give it less weight than the other factors in affirming IC status. The Biden rule seeks to make that factor more important but it remains to be seen if the courts will interpret the change the same way. According to Scott Mirsky, an employment attorney at Paley Rothman, “With the proposed rulemaking, the pendulum shifts more towards a pro-employee definition of employment, [but] it does not swing all the way in that direction.” [Read more.](#)

Legal analysts believe the proposed rule did not take as extreme of a position as was expected and does little more than formally undo the Trump rule and restore a totality-of-the-circumstances approach to

determining IC status. Those seeking to retain IC status may also be reassured by the DOL’s own language in the rulemaking, noting that “the test for whether the worker is an employee or independent contractor under the FLSA remains the same. This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.” [Read more.](#)

Comparison of Existing Rule vs. Biden Administration Proposed Rule

Current 2021 DOL Rule Issued by the Trump Administration

On Jan. 6, 2021, during the final days of the Trump administration, the DOL published a five-factor “economic realities” test used to determine whether a worker is in business for him or herself (and therefore an independent contractor) or economically dependent on an employer (and therefore an employee). The five factors are:

1. The nature and degree of the worker’s control over the work;
2. The worker’s opportunity for profit or loss.
3. The amount of skill required for the work.
4. The degree of permanence in the working relationship; and
5. Whether the work is part of an integrated unit of production.

The 2021 rule heavily emphasized the first two factors, which were designated as “core factors” to be accorded more probative weight than the others. Under the 2021 Rule, if a worker exercises substantial control over key aspects of the performance of the work and has an opportunity for profit and loss (other than by working more hours or faster), the first two factors weigh in favor of independent contractor classification, and it is “highly unlikely” the three remaining factors could outweigh the first two factors.

Biden Administration Proposed DOL Rule

The DOL’s proposed rule would return a “totality-of-the-circumstances” framework to the economic realities test. The proposed rule does away with “core factors” and lists the following six non-exhaustive factors to be fully and equally considered:

1. The worker’s opportunity for profit or loss based on his or her use of managerial skill;
2. Whether the worker makes capital or entrepreneurial investments related to the performance of work, and if so, whether such investment relative to the employer’s investment indicates the worker is an independent business;
3. Degree of permanence in the work relationship;
4. Nature and degree of control exercised over the performance of work;
5. Extent to which the work performed is an integral part of the employer’s business; and
6. Skill and initiative, including whether a worker uses specialized skills to perform the work.

Economic dependence remains the ultimate inquiry for determining whether a worker is an independent contractor. However, the new proposed rule expands the analysis and requires consideration of all factors with equal probative weight, presumably making it harder for independent contractor classifications to survive legal challenge.

Table Source: *DOL Issues Notice of Proposed Independent Contractor Rule (US)*; Squire Patton Boggs (Oct. 12, 2022); [available here](#).

For AAPL members who would like to participate in the DOL rulemaking process by sharing their input, you may do so here:

[Access information and directions for submitting public comments here](#)

AAPL members can find this and other governmental affairs information in the biweekly Governmental Affairs Reports as well as continuously updated legislative resources in the Bill Tracking Summary spreadsheet on AAPL’s website at <https://www.landman.org/resources/advocacy-and-legal>. And continue to watch the AAPLConnect Government Affairs Network for breaking news and resources here: <https://www.landman.org/resources/member-resources/aapl-connect-member-forum>.