

# PUBLICATION

---

## U.S. DOL Withdraws Favorable (to Employers) Independent Contractor Rule

Authors: Donna M. Glover

May 24, 2021

In January 2021, the U.S. Department of Labor (DOL) published a new final rule for determining independent contractor status under the Fair Labor Standards Act (FLSA). See our article here explaining the final rule. The rule had an initial effective date of March 8, 2021, but the Biden administration pressed pause on that effective date and subsequently, on March 12, 2021, the DOL issued a notice of proposed rulemaking to withdraw it. On May 5, 2021, the DOL announced that the rule would be withdrawn effective May 6, 2021, explaining that it "believes that the Rule is inconsistent with the FLSA's test and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent."

As explained in our previous article, the final rule would have focused on two core factors in determining independent contractor status under the FLSA:

1. the nature and degree of control over the work, and
2. the worker's opportunity to earn profits or incur loss based on the worker's actions.

The rule would also have considered three other factors, including:

3. amount of skill required for the work,
4. the degree of permanence of the working relationship between the worker and the employer, and
5. whether the work is part of an integrated unit of production.

Without the more employer-friendly final rule, independent contractor status under the FLSA will continue to be evaluated using the "economic realities" test applied by courts. Some of the most common factors for consideration under the economic realities test are:

6. the extent to which the work performed is an integral part of the employer's business;
7. the worker's opportunity for profit or loss depending on his or her managerial skill;
8. the extent of the relative investments of the employer and the worker;
9. whether the work performed requires special skills and initiative;
10. the permanency of the relationship; and
11. the degree of control exercised or retained by the employer.

The factors and weight given to each can vary significantly among jurisdictions.

Now that the final rule is withdrawn, employers should take note of how courts have applied the test in the jurisdictions in which they do business. And, we expect the Biden administration to re-visit this issue with a result likely not in favor of employers. Employers also must consider state "tests" governing employee versus independent contractor tests. This is a complicated compliance morass that employers may consider addressing now as the Biden DOL (and states) gear up regarding misclassification of workers.