

U.S. Department of Labor Finalizes New Independent Contractor Rule, But Will It Last?

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On Jan. 7, 2021, the U.S. Department of Labor (DOL) published a new test to determine whether workers are independent contractors or employees under federal law. For the first time, the DOL's independent contractor test is stated in a federal regulation so that employers, workers, the DOL, and courts alike can rely on the same test. The big question is whether the Biden administration will prevent the new rule from going into effect as scheduled on March 8, 2021.

DOL's New Independent Contractor Rule

The DOL's final rule is largely the same as its proposed rule from September 2020. According to the agency, the new rule makes it easier to identify which workers are employees covered by the minimum wage, overtime, and other provisions of the Fair Labor Standards Act and related laws enforced by DOL. In a news release, DOL described the new rule as "streamlining and clarifying the test," which will "reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction and flexibility."

Like the prior version, the new independent contractor test will continue to be an economic realities test aimed at ultimately deciding whether workers are in business for themselves or are economically dependent on the potential employer. However, it reduces the number of test factors from six to five and restates some to remove overlaps. The final factors are:

1. The nature and degree of the worker's control over their work
2. The worker's opportunity for profit or loss based on initiative and/or investment
3. The amount of skill required for the work
4. The degree of permanence of the working relationship between the worker and the potential employer
5. Whether the work is part of an integrated unit of production.

A significant change in the new test is that the first two factors listed above are “core factors” that are more probative of the question of economic dependence and so typically carry greater weight in the analysis than the other factors. If the two core factors “point toward the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual’s accurate classification.”

The other three factors “may serve as additional guideposts” in the analysis, according to DOL’s news release, particularly when one core factor points to independent contractor status and the other to employee status. Additional factors may be considered if they are relevant to the issue of economic dependence. As in the past, the actual practice of the relationship is more relevant than what may be stated in a contract between the parties and what might be possible but in practice is discouraged; for example, the prospect that a worker can negotiate prices if in practice that never happens.

DOL added six short examples to the final rule, each analyzing only one factor of the test under specific facts from various industries. They are: 1) the control factor in the context of the trucking industry; 2) the opportunity for profit and loss in the gig economy; 3) the opportunity for profit and loss in the construction industry; 4) the permanence of the relationship in the seasonal hospitality industry, and 5) and 6) the integrated unit factor in journalism, with one example of independent contractor and the other of employee status.

Will DOL’s New Independent Contractor Rule Take Effect?

A week before the rule was released, the Biden administration announced that it would “potentially freeze this rule” and not allow it to be implemented.^[1] If Biden “freezes” the rule, Biden’s DOL must determine if the rule should be implemented, amended, or repealed. Because Biden’s administration explicitly named the DOL’s independent contractor rule as one it would likely “freeze,” there is little chance that the rule will take effect on March 8, 2021 as written. Much more likely is that incoming administration will suspend the rule and possibly issue a new proposal later. Biden’s administration has negatively characterized the rule as “make[ing] it easier for companies . . . to avoid minimum wage and overtime protections . . . costing workers nearly \$3.7 billion annually.”^[2] This indicates that Biden’s version would be much different than the current version.

If you have any questions or would like further information related to this issue, please contact the author of this article or another member of Nexsen Pruet’s Employment & Labor Law Team.

[1] Audrey McNamara, Biden to halt or delay Trump’s “midnight regulations” on inauguration day, CBS News (Jan. 1, 2021).

[2] Id.