

## [Updates](#)

May 12, 2021

### US Department of Labor Announces Final Rule Regarding Independent Contractors

The Department of Labor (DOL) [announced](#) in May 2021 that it was [withdrawing](#) the rule called "Independent Contractor Status Under the Fair Labor Standards Act." As anticipated, the Biden administration rescinded this Trump-era rule. Companies with questions on their relationships with independent contractors should consult with legal counsel to make sure the company is current on the latest developments in this ever-evolving area of the law.

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On January 7, 2021, the U.S. Department of Labor (DOL) issued its highly anticipated [final rule](#) codifying its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA). The final rule comes in the waning days of the current administration and amidst claims that the DOL rushed the rulemaking process. The rule garnered 1,830 comments with many business groups supporting the proposal while progressive organizations criticized its approach.

Overall, the final regulatory text remains largely unchanged from the proposed rule, which created a tiered test for employee/independent contractor determination under the FLSA. The proposal set forth two core factors for analyzing whether a relationship is one of an independent contractor or employee: (1) the nature and degree of control over the work; and (2) the "opportunity for profit and loss." It then listed three other factors that may be considered in the analysis:

- The amount of skill required for the work
- The degree of permanence of the working relationship between the individual
- The potential employer and whether the work is part of an integrated unit of production

In the proposal, DOL stated that the new rubric clarified the FLSA's economic realities test as interpreted by several legal decisions.

The final rule substantially mirrors the proposed rule. It retains the tiered analysis and does not change the regulatory text. Nonetheless, the DOL responded to many of the changes suggested in the comments. According to the DOL, business groups generally agreed with the existing proposal. Significantly, some commenters sought regulatory language stating that providing benefits did not automatically defeat independent contractor status. The DOL did not adopt this regulatory text change. However, the section-by-section analysis explaining the rule recognized that providing certain benefits, such as payments towards a putative worker's healthcare plan, could be appropriate and would not be determinative of employee status. However, other benefits such as payment of sick leave, contribution into a bonus, or profit-sharing plan or payments into a plan designated for employees would support a determination that the worker is improperly classified as an independent contractor.

Comments from many groups criticized the simplified rule, claiming that the rule narrowed the definition of "employee" to the benefit of companies that want to use more independent contractors.

One notable addition to the final rule was DOL's inclusion of specific examples to assist in analyzing the factors to determine employee status. None of the examples squarely addresses whether independent contractor status exists for gig economy workers. Rather, the second example poses the question of whether a worker who accepts assignments from an "app-based service" for home repairs would have the sufficient opportunity for profit or loss to be considered an independent contractor in light of the disproportionate investment between the worker and the service. Finding that the significant cost of investment by the service in creating and supporting its app is not relevant to the profit or loss inquiry, the answer states that the opportunity for profit or loss favors

independent contractor status.

The [U.S. Department of Labor](#) announced on March 2, 2021, that it was delaying the effective date of the rule called "Independent Contractor Status Under the Fair Labor Standards Act" which was set to be effective on March 8, 2021. The effective date of the Independent Contractor Rule has been delayed [until May 7, 2021](#) to "allow the Department to review issues of law, policy, and fact raised by the rule before it takes effect." Ultimately, it is likely that the new administration will rescind the Trump-era rule. Moreover, state laws vary and mostly are not affected by the DOL's new rule. Companies with questions on their relationships with independent contractors should consult with legal counsel to make sure the company is current on the latest developments in this ever-evolving area of the law.

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