

NEW DOL RULE CODIFIES INDEPENDENT CONTRACTOR TEST

The United States Department of Labor (“DOL”) finalized a rule aimed to clarify the standard for whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (“FLSA”). The minimum wage, overtime, and other worker protections in the FLSA only apply to employees, not independent contractors. This regulatory guidance supersedes the DOL’s previous interpretations of independent contractor status under the FLSA. The final rule is effective March 8, 2021.

Previously, courts and the DOL have used the multi-factor “economic reality” test to determine whether a worker should be classified as an employee under the FLSA or as an independent contractor. The final rule codifies the inquiry into five (5) distinct factors.

- **The Economic Reality Test.** The ultimate inquiry is economic dependence. As a matter of economic reality, if an individual is in business for him- or herself, such individual is an independent contractor, as distinguished from an “employee” under the FLSA.
- **5 Core Factors.** The five core factors of the economic reality test laid out in the final rule are the following:
 1. The nature and degree of control over the work. This factor weighs towards the individual being an independent contractor to the extent that the individual, as opposed to the employer, exercises substantial control over key aspects of the performance of the work (e.g., the individual’s ability to set his or her own schedule, select his or her projects, and work for others).
 2. The individual’s opportunity for profit or loss. This factor weighs towards the individual being an independent contractor to the extent that the individual has an opportunity to earn profits or incur losses based on his or her exercise of personal initiative, skill or business acumen, and through the ability to manage investment in or capital expenditure on help, equipment, or material to further his or her work.
 3. The amount of skill required for the work. This factor weighs towards the individual being an independent contractor to the extent that the work requires specialized training or skill. Conversely, this factor weighs towards employment to the extent that the work at issue requires no specialized training or skill, and/or the the individual is dependent on the potential employer to provide specialized training or skills.
 4. The degree of permanence of the working relationship between the worker and the potential employer. This factor weighs towards the individual being an independent contractor to the extent that the work relationship is definite in duration or sporadic, rather than when it is indefinite, no specific duration or continuous in the case of an employee.
 5. Whether the work is part of an integrated unit of production. This factor weighs towards the individual being an employee to the extent that the individual’s work is a component of the potential employer’s integrated production process for a good or services, versus when the individual’s work is segregable from the potential employer’s production process in the case of an independent contractor.
- **Probative Value of First Two Factors.** The final rule provides that no single factor is dispositive. However, the rule does specify that the first two factors are “the most probative” as to whether an individual is an economically dependent employee. As a result, these two carry greater weight in the independent contractor analysis than other factors. Furthermore, if both of the first two factors point towards the same classification there is a substantial likelihood that it is the individual’s accurate classification.

- **Additional Factors.** The rule also states that the core factors are not exhaustive, and that additional factors may be relevant in the independent contractor status inquiry, but only if the factors indicate that the individual is in business for him- or herself.
- **Importance of Actual Practice.** The final rule advises that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.

The DOL Rule can be found at <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-29274.pdf>.

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Should you have any questions regarding the above, please contact the [Garfunkel Wild attorney](#) with whom you regularly work, or contact us at info@garfunkelwild.com.

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