

Employment Law Update: Department of Labor Issues Final Rule Defining Independent Contractors

01/14/21

The United States Department of Labor (DOL) has issued a Final Rule on independent contractors under the Fair Labor Standards Act (FLSA) with an effective date of March 8, 2021. However, the Final Rule and/or its effective date could be revised by the incoming Biden administration.

The Final Rule clarifies the standard for independent contractors under the FLSA, which has become a point of concern for employers due to the ever-growing 'gig' economy, which relies on independent contractors. The Final Rule sets forth five factors that employers should consider to determine whether a worker is an independent contractor. The factors are not exhaustive and no single factor is dispositive.

The Final Rule: The Five Factors

1. **The nature and degree of the control over the work.** This factor weighs in favor of independent contractor status if the worker "exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors." However, this factor weighs in favor of an employee-employer relationship if the employer exercises substantial control over key aspects of the performance of the work.
2. **The worker's opportunity for profit or loss.** "This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work."
3. **The amount of skill required for the work.** "This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide."
4. **The degree of permanence of the working relationship between the individual and the potential employer.** "This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic."
5. **Whether the work is part of an integrated unit of production.** "This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service."

The Final Rule further clarifies that factors one and two above are more probative of the question of economic dependence or lack thereof when compared to the other factors, and therefore typically carry greater weight in the analysis than any other factors.

The Wilentz Employment Law team will continue to monitor the status of the Final Rule under the incoming Biden administration. If you are an employer with a question about this legal alert or have another employment law concern, please contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law](#) team.

Attorney

- Tracy Armstrong

Practice

- Employment Law