

DOL Proposes New Independent Contractor Rule

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In late February, the Department of Labor (DOL) issued proposed rules that would rescind the 2024 Independent Contractor Rule and reinstate a modified version of the 2021 Independent Contractor Rule for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

Background

The analysis for determining employee versus independent contractor status has been in flux for the last several years. In 2021, final rules were issued that provided an economic reality test that focused on two core factors. In 2024, the 2021 rules were replaced with a new set of final rules that established a six-factor test, which was similar to pre-2020 guidance. Then, in 2025, the DOL issued a field technical bulletin stating they would no longer enforce the 2024 final rules, and instead employers could rely on pre-2020 guidance.

New(ish) Proposed 2026 Independent Contractor Rule

On February 26, 2026, the DOL proposed to once again revise this analysis and go back to a two-core factor test.

Two Core Factors (Most Heavily Weighted)

- **Nature and degree of control over the work:** the individual controls aspects of the work such as setting work schedules and choosing assignments, works with little or no supervision, and is able to work for others.
- **Opportunity for profit or loss based on initiative or investment:** 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 or capital expenditures to further his or her work.

If both these factors support the same conclusion as to employee versus independent contractor status, there is a higher likelihood that is the individual's correct classification.

The analysis would also include three other factors, especially in the case where the two core factors do not point to the same classification.

Three Additional Factors

These carry less weight but remain part of the totality of the circumstances review:

- **Skill required:** this factor favors independent contractor status when the work requires skill or specialized training that the employer does not provide. If the work does not require specialized skills beyond training supplied by the employer, the factor leans toward employee status.
- **Permanence of the relationship:** the employer and individual's relationship is "by design definite in duration or sporadic," this supports an independent contractor. Whereas a long-term relationship is more indicative of employee status.
- **Whether the work is part of an integrated unit of production:** this factor supports independent contractor status when the individual's work can be separated from the employer's overall production process. Conversely, it supports employee status when the individual's work forms an integral part of the employer's unified process for producing a good or delivering a service.

Emphasis on Actual Practice

Under the proposed rule, the DOL reiterates its view from the 2021 rules that determining whether an individual is economically dependent on a potential employer should focus on what actually occurs in practice—not merely on what a contract allows or suggests. The DOL emphasizes that evaluating the "circumstances of the whole activity" requires looking at both actual practices and contractual rights, but the true "reality" of the working relationship is reflected in how the work is carried out day-to-day rather than in "theoretical or contractual possibilities."

Why This Matters to Employee Benefits

Correctly distinguishing employees from independent contractors in plan administration is important because most benefit laws, such as ERISA, ACA, COBRA, HIPAA, and Section 125 apply only to employees. Misclassification can lead to offering benefits to ineligible individuals, jeopardizing a plan's tax-favored status, triggering ACA employer-mandate penalties, COBRA notice failures, and inconsistencies with plan documents that expose the employer to fiduciary and operational risks.

The proposed regulations provided several examples applying these factors to help in the analysis.

Employer Action

Although this is only a proposed rule, employers should consider the following:

- Review current independent contractor relationships - analysis of worker classifications should be done by employment law counsel
- Evaluate risk areas by identifying roles where control is high or profit/loss opportunity is limited
- Stay alert for the final rule and be prepared to update internal processes and training
- Comment period ends April 28, 2026