

# DOL Announces Final Independent Contractor Classification Rule

Mark A. Konkel

January 12, 2024

It's a traditional Democrats vs. Republican football: federal agencies under Democratic control want to make it harder to classify workers as independent contractors, and Republicans want to make it easier. Predictably, the standards for classifying individuals as independent contractors loosened during the Trump administration; and just as predictably, the Biden administration has now made it harder.

On January 9, 2024, the DOL announced the final [rule](#) on the independent contractor classification under the Fair Labor Standards Act "FLSA," effective March 11, 2024. Whether a worker is an independent contractor or an employee determines the applicability of minimum wage and overtime requirements, among other legal obligations under the FLSA. This distinction is crucial to companies' employment policies, business decisions, and potential liability. Against that backdrop, understanding the contours of this new final rule is essential for all employers.

## What Test Does the Final Rule Use?

The final rule largely mirrors the October 2022 proposed rule and adopts a non-exhaustive six-factor test analyzing the "economic reality" of the relationship between a potential employer and worker. The six factors are as follows:

1. The degree to which the employer controls how the work is done.
2. The worker's opportunity for profit or loss.
3. The amount of skill and initiative required for the work.
4. The degree of permanence of the working relationship.
5. The worker's investment in equipment or materials required for the task.
6. The extent to which the service rendered is an integral part of the employer's business.

The new rule rescinds a Trump-era independent contractor rule, which focused on two factors of the economic realities test – nature and degree of the worker's control over the work and the worker's opportunity for profit or loss. As we previously [reported](#), that 2021 rule never went into effect. Under this new rule, the degree of control and the opportunity for profit or loss will not necessarily control the analysis, as no factor holds more weight than the others. Additionally, other factors not listed above but relevant to the "totality of the circumstances" may be considered. Prior to the release of the new rule, the DOL noted that the rule does not contain a so-called "ABC" worker classification

test like the one used by California courts, which is a particularly employee-friendly test.

The DOL's disavowal of an explicit "**ABC**" test is interesting. Under the ABC test, some form of which has been adopted in [California and at least 27 other states](#), a worker can be classified as an independent contractor *only* if they meet *each* of the following three criteria:

- A.** The individual has been and will continue to be free from control or direction over the performance of work performed, both under contract of service and in fact; and
- B.** The work is either outside the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed; and
- C.** The individual is customarily engaged in an independently established trade, occupation, profession or business

The "B" and "C" in "ABC" can be the killer. They mean that if a purported contractor is doing the same thing as the company that retained them does, that worker isn't really a contractor: they're an employee. Example: a cabinet-making company retains a carpenter to help with building cabinets. The carpenter is an employee, not an independent contractor, even if all the other common-law factors for independent contractor status (mostly resolving around true independence and lack of company control) are present.

If you have noticed a similarity between the sixth factor in the new DOL rule ("the extent to which the service rendered is an integral part of the employer's business") and B and C in "ABC" (the work is "outside the usual course of the business" of a company and the worker is "engaged in an independently established trade, occupation, profession or business"), then you're paying attention. While the new DOL rule asks employers and enforcement agencies to look at all of the factors, the fact that a worker engages in the same work as the company that retains them is significant. It means that (for example) the DOL, which generally has an interest in finding that individuals are employees rather than independent contractors, will more easily find that a worker in the same trade as the company with whom they contract is an employee. In other words: the new test makes it easier for the DOL to decide that you have misclassified certain workers.

## What Should Employers Do?

Employers should review the final rule and work with counsel to determine if any independent contractors may be classified differently under the application of the new rule. The distinction between independent contractors and employees is crucial in determining whether a host of obligations under the FLSA are triggered and accordingly impacts numerous employment policies. In that vein, when drafting new employment agreements and reviewing existing agreements, employers should closely review this final rule and consult with counsel regarding its potential application.

In addition to reviewing employee classifications, agreements, and policies, employers should continue to monitor Labor Days regarding any successful challenges to the final rule, as it is likely that business-focused groups will commence litigation. Please reach out to a member of Kelley Drye's [labor and employment team](#) for additional guidance and help.