

DOL Final Rule Establishes Independent Contractor Test

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Employers have faced uncertainty over the Fair Labor Standards Act definition of an independent contractor for years, but the U.S. Department of Labor made it more clear this week.

The department issued a final rule that crafts a "clear articulation" designed to "lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy." Reflective of the challenges posed by the new gig economy, nearly half of the more than 1,800 comments on the proposed rule came from Uber drivers.

Because independent contractors are not "employees" for purposes of the federal Fair Labor Standards Act, the FLSA does not require employers to pay independent contractors minimum wage or overtime pay. However, the FLSA does not define "independent contractor," leaving courts and the U.S. Department of Labor to fashion different independent contractor tests over the years. And leaving employers to face the uncertainty of differing standards.

Independent contractors are workers who, as a matter of economic reality, are in business for themselves, as opposed to being economically dependent on the potential employer for work. The final rule sharpens this "economic reality" inquiry into five distinct factors. Although these factors are not exhaustive, and no single factor determines the issue, two are "core factors" that carry greater weight than the others. The two "core factors" are:

- The nature and degree of the worker's control over the work
- The worker's opportunity for profit or loss based on initiative, investment or both

The remaining three factors are:

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

The DOL final rule also weighs more heavily the actual circumstances of the work in practice, rather than what may be contractually or theoretically possible, in the determination of whether a worker is an independent contractor or an employee. In this regard, the final rule attempts to quell an area of dispute among the courts over whether an employer must *actually exercise control* over the manner of the work, as opposed to merely having *the right to control* the manner of the work as suggested in a contract or agreement.

The final rule also illustrates the application of these factors to various employment scenarios. The following is an example from the logistics industry:

Example: An individual is the owner and operator of a tractor-trailer and performs transportation services for a logistics company. The owner-operator substantially controls the key aspects of the work. However, the logistics company has installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS. The company limits the owner-operator's speed to comply with federally mandated motor carrier safety regulations and to ensure that the driver complies with local traffic laws. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and the contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

Analysis: The owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status. The fact that the company has installed a device that limits and monitors the speed of the owner-operator's vehicle does not change that conclusion. This measure is implemented to comply with specific legal obligations and to ensure safety, and thus under [the law](#) would not constitute control that makes the owner-operator more or less likely to be an employee under the FLSA. The contractually agreed upon delivery deadlines, incentives and penalties are typical of contractual relationships between businesses and likewise would not constitute control that makes the owner-operator more or less likely to be an employee under the act

The final rule is scheduled to go into effect on March 8, 2021. However, given that a new administration will take the helm later this month, which has nominated a new Secretary of Labor, we will see if the fate of this Independent Contractor Final Rule is truly final.

If you have any questions on the final rule or how it could affect your business, please [contact me](#) or any member of the [Barley Snyder Employment Practice Group](#).

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Jill Sebest Welch

Partner

Tel: (717) 399-1521

Email: jwelch@barley.com