

# U.S. Department of Labor Withdraws FLSA Independent Contractor Final Rule

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Unsurprisingly, on May 5, 2021, the U.S. Department of Labor (DOL) withdrew its Independent Contractor Final Rule, published in the last days of the previous administration.

The Final Rule, which never took effect, would have established a uniform standard for determining a worker's status as an "independent contractor" under the Fair Labor Standards Act (FLSA). In a foreshadowing of the Final Rule's withdrawal, earlier this year the DOL withdrew two related Opinion Letters as being prematurely issued.

### Background

The FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. As the U.S. Supreme Court first noted more than 70 years ago, individuals who perform services for a company as an independent contractor are not afforded the FLSA's minimum wage and overtime protections because they are not "employees." The FLSA, however, says little about how to distinguish an employee from an independent contractor.

Over the years, both the courts and the DOL had developed similar, yet somewhat varying, standards and factors that should be used for determining whether an individual is an employee or an independent contractor. Those standards sought to reveal the "economic reality" of the relationship between the employer and the individual, and were derived from six, non-exclusive factors originally presented by the Supreme Court in two cases on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The factors are:

1. The employer's versus the individual's degree of control over the work;
2. The individual's opportunity for profit or loss;
3. The individual's investment in facilities and equipment;
4. The permanency of the relationship between the parties;
5. The skill or expertise required by the individual; and
6. Whether the work is "part of an integrated unit of production."

For the last 70-plus years, federal courts and the DOL have applied these factors inconsistently, sometimes reaching opposite conclusions when applying what appear to be essentially the same facts. The Final Rule sought to lend clarity and uniformity to the analyses, while maintaining the same "economic reality" underpinnings of the analysis, that is, "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves."

### The Final Rule

Rather than treat the analytical factors as unweighted or affording them equal weight, the Final Rule elevated the comparative value of two "core" factors: "the nature and

degree of the individual's control over the work" and "the individual's opportunity for profit or loss." According to the Final Rule, when both of these factors supported, or contradicted, the existence of an independent contractor relationship, courts routinely have relied on them as controlling the determination. The Final Rule stated these factors are the "most probative" and therefore should be "afforded greater weight." However, if these two factors are inconclusive, then three other factors should be considered: the skill or expertise required by the individual; the permanency of the relationship between the parties; and whether the work is "part of an integrated unit of production."

### DOL's Withdrawal of the Final Rule

Now, however, the DOL under the current administration has made an about-turn. After temporarily delaying the Final Rule's effective date, in March 2021, the DOL issued a Notice of Proposed Rulemaking (NPRM) to withdraw the Final Rule and now, less than a month after the public comment period in response to the NPRM closed, the DOL has officially withdrawn the Final Rule. In so doing, the DOL noted that no court or the Wage and Hour Division has ever applied the "core factor"/secondary factor analysis set forth in the Final Rule and, "after careful consideration of the comments received, the Department believes that elevating two factors of the multifactor economic realities analysis above all others is in conflict with the [FLSA], congressional intent, and longstanding judicial precedent."

In short, the DOL now "believes that the Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent." The DOL does not state whether it intends to create new regulations addressing the issues that spurred the previous administration to issue the Final Rule, stating only that it "did not propose and is not now issuing regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced." Rather, it is merely "withdrawing the Rule for the reasons described throughout this final rule, and is not creating a new test, but is instead leaving in place the current economic realities test which allows for determinations that some workers are independent contractors."

### Takeaway

Because the Final Rule never went into effect, and to preclude conflict and confusion if the Final Rule were to become effective for a brief period, the DOL has determined that its withdrawal will take effect *immediately*. Therefore, the judicial precedents and DOL regulations and guidance that were in place prior to the Final Rule's publication continue to apply. The Final Rule would not have impacted how some states (*e.g.*, California under Assembly Bill 5) determine who is an independent contractor under their respective wage and hour statutes. The Final Rule also would not have redefined who is an independent contractor under the Internal Revenue Code, the National Labor Relations Act, or other federal laws.

If you have any questions about this development, the independent contractor analysis, or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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