

UPDATE: U.S. Dept. of Labor withdraws independent contractor rule



By [Michele C. Spillman](#)

The United States Department of Labor is withdrawing its new rule regarding classification of workers as independent contractors under the Fair Labor Standards (FLSA) on [May 6, 2021](#). [According to DOL](#), the rule was “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 precedent.”



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The FLSA entitles employees, but not independent contractors (aka “freelancers,” “gig workers,” and “consultants”) to certain protections, such as minimum wage and overtime requirements. Classification of workers has long been a

confusing issue for employers because neither the FLSA nor its regulations define “employee” or “independent contractor.”

In January 2021, under the prior administration, DOL published a final rule titled “Independent Contractor Status Under the Fair Labor Standards Act” (the “Independent Contractor Rule”). The rule was set to take effect on March 8, 2021 and would have modified the “economic reality” test historically used by DOL to determine whether a worker is an employee or independent contractor.

Under the economic reality test, “[I]n the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves.” [Department of Labor. \(2008\). *Employment Relationship Under the Fair Labor Standards Act* \[Fact Sheet 13\].](#)

The Independent Contractor Rule reaffirmed the “economic reality” test, but identified and explained two “core factors” that are most probative to the question of whether a worker is in business for herself (an independent contractor) or someone else (an employee):

1. The worker’s nature and degree of control over the work.
2. The worker’s opportunity for profit or loss based on initiative and/or investment.

DOL stated that the Independent Contractor Rule was withdrawn because its “prioritization of two ‘core factors’ for determining employee status under the FLSA would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring review of the totality of the circumstances related to the employment relationship.”

It seems unlikely DOL plans to adopt a new rule regarding worker classification. According to Jessica Looman, principal

deputy administrator for the DOL Wage and Hour Division, “We are going back to the decades-old analysis and...really feel that this is the space where we can best protect workers.”

We will continue to post updates on new guidance from DOL and other federal agencies on our website. For more information, consult with a Phillips Murrah [labor and employment](#) attorney.

With a background in both commercial litigation and labor and employment law, [Michele C. Spillman](#) offers clients comprehensive solutions to meet their business goals.

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