

Update: U.S. Dept. of Labor Proposes New Independent Contractor Rule

The United States Department of Labor proposed a new rule regarding classification of workers as independent contractors under the Fair Labor Standards Act (FLSA) on October 11, 2022. This proposal is part of the Department's efforts to remedy misclassification issues, which it believes is "one of the most serious problems facing workers, businesses, and the broader economy." The proposed rule will be published in the Federal Register on October 13, 2022, and the public will have 45 days to comment.

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."

With this [new proposal](#), the Department of Labor seeks to clarify when an individual should be classified as an employee versus an independent contractor. To guide this classification, the proposed rule would implement a multi-factor economic realities test (similar to guidance issued under the Obama administration) that would consider various factors to determine whether an individual is "economically dependent" on the company. The proposal notes that the changes implement a "totality-of-the-circumstances" analysis, with the following factors given equal weight:

- (1) Whether workers have an opportunity for profit or loss
- (2) The permanency of their jobs
- (3) Investment by the worker and employer

- (4) The nature or degree of control
- (5) The extent to which the work is integral to the employer's business
- (6) The degree of skill and initiative the worker exhibits

According to the Department, it “believes that this proposal, if finalized, will provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors.”

The proposed rule broadens the definition of an “employee” and would make classifying individuals as independent contractors more difficult, impacting certain businesses (such as ridesharing and delivery businesses) more than others.

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