
U.S. Department of Labor Finalizes New Rule for Independent Contractor Status Under the Fair Labor Standards Act

By Carolyn M. Horton / Jan 08, 2021

The U.S. Department of Labor has announced a final rule to clarify the standard for determining whether an individual should be classified as an employee or an independent contractor under the Fair Labor Standards Act. This new rule was published in its final form on Jan. 7 and it takes effect on March 8.

In the final rule, the DOL reaffirms the “economic reality” test, which has been used by the courts and the DOL in determining the classification of workers as employees or independent contractors. The test relies on the underlying principle that the difference between an independent contractor and an employee is the nature of the worker’s economic dependence on the working relationship. While an independent contractor is in business for him or herself, an employee is economically dependent on an employer. However, this test has been a source of confusion under the Fair Labor Standards Act because of the various ways it has been applied.

Importantly, the DOL contends that there is no single factor that determines whether a worker is an independent contractor or an employee. Instead, the adopted rule provides a weighted test for making this determination.

First, the rule establishes that there are two “core factors” to be weighed in an initial determination of a worker’s status. These factors are (1) the nature and degree to which the worker exercises control over the work and (2) the worker’s opportunity for profit or loss. The first factor provides that independent contractor status may be indicated where the individual exercises substantial control over key aspects of performing the work, while an employee is subject to the employer’s substantial control over performance. These aspects may include who sets the schedule for work, selects projects for the worker, and determines the ability of the worker to perform work for others. In the second factor, independent contractor status is more likely where the worker has the opportunity to earn profits or incur losses in exercising initiative or managing her own investment or expenditures. In contrast, an employee may be unable to affect her own earnings or may only be able to affect her own earning by working more hours or at a faster rate.

Second, the DOL has provided an additional set of factors for situations where these two core factors do not result in a clear classification for the worker. Specifically, the test identifies three other factors to help make the final determination. These include the following: (1) the amount of skill required to perform the work, (2) the degree of permanence of the worker and potential employer’s working relationship, and (3) “whether the work is a part of an integrated unit of production.” While this second set of factors provides additional clarification for situations where the first set of factors does not provide a clear answer, the rule explains that these are not the only factors that may be relevant to making the final determination. In fact, other factors that provide evidence of the economic dependence may be considered as well.

In the final rule, the DOL has provided six examples for how to apply these factors. One example explains that where the owner-operator of a tractor-trailer who performs transportation services for a logistics company determines the key aspects of her own work, this indicates that the owner-operator is an independent contractor. The mere installation of a GPS device by the company on the owner-operator’s vehicle does not change the conclusion that she is an independent contractor. The example also identifies components of a contract between the owner-operator and the company that would not affect whether she is classified as an independent contractor.

Ultimately, the DOL explains that the actual practice of the relationship is more important than any contractual or theoretical determinations. This means that even if a contract labels a worker as an independent contractor, the worker may be classified as an employee under the Fair Labor Standards Act using this economic reality test.

By establishing the weighted factor test for classifying employees and independent contractors, the DOL has provided courts, employers, employees, and independent contractors with a clearer standard for approaching classifications under the Fair Labor Standards Act. Importantly, potential employers cannot solely rely on what has been written in their contracts to establish their relationship with a worker. Rather, potential employers and employees will need to remain conscious of the realities of their working relationships to determine their roles, rights, and obligations under the Fair Labor Standards Act.

The final rule may be accessed in the Federal Register, [here](#).

If you have any questions about the contents of this article, please contact Carolyn Horton at chorton@clarkhill.com or your Clark Hill attorney.