

Independent contractor rule

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DOL Issues Independent Contractor Final Rule

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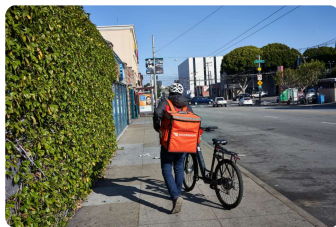
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DOL Issues Independent Contractor Final Rule

January 9, 2024 | Leah Shepherd

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The U.S. Department of Labor (DOL) released a [final rule](#) Jan. 9 that changes the criteria for classifying independent contractors.

The final rule largely mirrors the DOL's [proposed rule](#) and requires companies to weigh a variety of economic factors to determine whether a worker is an employee or an independent contractor. The final rule will take effect on March 11.

In public comments to the DOL on the proposed rule, SHRM had said the proposal would create uncertainty and confusion for employers. It also said the proposed test would require more time and resources from businesses to apply. The proposed changes to the regulations would undercut workers'

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ability to work independently, SHRM added.

“We’re making sure workers get the protections they need while also leveling the playing field for employers,” Acting Secretary of Labor Julie Su said in a press briefing on Jan. 8. When businesses misclassify workers, “it’s not fair to their law-abiding competitors.” Su has been renominated by President Joe Biden to be labor secretary after her nomination did not pass the Senate last year, Bloomberg reports.

The final rule has major ramifications for the gig economy, because app-based platforms have typically classified their delivery drivers and other gig workers as [independent contractors](#). Freelance workers or consultants such as writers, musicians, IT professionals, trainers and other people whose work is project-based may be similarly affected.

Under the federal Fair Labor Standards Act (FLSA), employees are entitled to minimum wage, overtime pay and other benefits. [Independent contractors](#) are not entitled to such benefits, but they generally have more flexibility to set their own schedules and work for multiple companies.

“Misclassified employees don’t get paid for all their hours,” Su said. “They see their economic security eroded because of misclassification. This rule provides greater clarity and consistency in determining a worker’s status.”

Background

The final rule rescinds a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. Under the new rule, employers would use a totality-of-the-circumstances analysis, in which none of the factors carry greater weight.

The new test includes six factors:

1. The degree to which the employer controls how the work is done.
2. The worker’s opportunity for profit or loss.
3. The amount of skill and initiative required for the work.
4. The degree of permanence of the working relationship.
5. The worker’s investment in equipment or materials required for the task.
6. The extent to which the service rendered is an integral part of the employer’s business.

“No factor or set of factors has a predetermined weight, and a totality of the circumstances of the working relationship must be considered,” Jessica Looman, administrator of the DOL’s Wage and Hour Division, said in a Jan. 8 press briefing. “The six factors are not exhaustive, nor are any of them more important than any others.”

Looman confirmed that work-related expenses imposed by the employer are not indicative of contractor status, and actions taken by the employer with the sole purpose of complying with the law do not indicate control exercised by the employer.

She noted that the final rule is meant to apply broadly to all types of workers, not specifically to certain industries or certain types of work.

The DOL intends to release more guidance to help employers comply with the final rule.

NLRB Case

In June 2023, a [decision](#) from the National Labor Relations Board (NLRB) altered the standard employers must use to determine whether someone qualifies as an independent contractor under the National Labor Relations Act (NLRA).

The NLRB rejected a previous standard that held that entrepreneurial opportunity for gain or loss should be the animating principle of the independent contractor test. Instead, the board said entrepreneurial opportunity should be taken into account alongside a list of traditional common-law factors. Those factors include the extent of control the employer exercises over the details of the work, the method of payment, how much skill is required in the work, and whether the employer supplies the tools and the place of work.

Unlike employees, independent contractors can’t form unions and can’t file unfair labor practice charges with the NLRB.

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