

INDEPENDENT CONTRACTOR RULES

Taking a step back, it is important to note that the DOL's independent contractor rule technically only applies for the purposes of determining worker classifications under federal wage and hour laws – namely the federal Fair Labor Standards Act (FLSA). There are a whole host of different areas outside of the scope of these rules where the distinction between an employee and an independent contractor comes into play – including federal and state taxes, state unemployment and workers' compensation. But because it is logistically untenable and legally impermissible to have someone classified as an independent contractor for the purposes of some laws (such as unemployment) and an employee for others (such as wage and hour) – businesses must in practice follow the most restrictive rules (whether they be set by the DOL, the IRS, or a state agency) when determining how to classify their workers. For example, changes to the DOL's independent contractor rules shouldn't change how employers in California classify their workers because those employers are already having to comply with the much more rigorous rules set by the state. The distinction would however come into play if a worker's classification was challenged, in which case the nature of the dispute would govern which test would be applied.

To understand the DOL's new proposed rules it is important to understand the history of the rules over the last couple years. Before 2021, the DOL used what is known as the economic realities test to determine if a worker can qualify as an independent contractor. The economic realities test looked at five factors: (1) the nature and degree of the worker's control over the work; (2) the worker's opportunity for profit or loss; (3) the amount of skill required for the work; (4) the degree of permanence of the working relationship; and (5) whether the work is part of an integrated unit of the business.

In the waning days of the Trump Administration, the DOL issued a new final rule that was intended to make it easier for businesses to satisfy the economic realities test and classify workers as contractors. Under the Trump independent contractor rule, the DOL focused primary on the first two factors of the economic realities test. Under that rule, if a worker would qualify as an independent contractor when looking at the factors of control and opportunity for profit and loss then the inquiry would stop there and the independent contractor classification would be permissible. Only if there was uncertainty or ambiguity would the Trump rule call for looking at the third, fourth and fifth factors noted above. The rule also allowed businesses to offer certain benefits to independent contractors without undermining their classification.

The Trump independent contractor rule was originally slated to go into effect on March 8, 2021. Unsurprisingly, when the Biden Administration came to town it issued an instruction that the agencies should hold and reconsider any rules that had been finalized but had not yet gone into effect – thus the effective date of the independent contractor rule was delayed. On March 11, 2021, the DOL issued a notice of its intent to entirely withdraw and strike the Trump independent contractor rule. Shortly after the notice was published, the Coalition for Workforce Innovation, which includes companies like Uber and Lyft, filed a lawsuit challenging the DOL's decision to delay and potentially withdraw the rule. This March, the U.S. District Court for the Eastern District of Texas struck down the DOL's notice. The DOL appealed this decision to the Fifth Circuit Court of Appeals. On request of the DOL, the Fifth Circuit Court of Appeals has stayed that case until December 7, 2022 based on the DOL's plans to release the new proposed rules which would make the issue of withdrawing the 2021 rules moot.

The new proposed rules would reinstate the economic realities test with each factor receiving equal weight and with the worker's and employer's investments into their respective businesses being broken out as its own factor in the test. The proposed rules also provide additional detail on how businesses should assess the issue of control and determining whether the work is integral to the employer's business. The DOL's stated goal in these proposed regulations is to bring the regulations back in line with the case law and standards that employers have become accustomed to.