

New DOL Independent Contractor Rules

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The U.S. Department of Labor has announced new rules, effective March 8, 2021, clarifying how to determine if an individual is an employee—entitled to minimum wage, overtime, and other statutory protections—or an independent contractor. Prior guidance led to significant confusion and uncertainty and, while the new rules still have areas that are fact-dependent, they provide some clearer guidance for the employer.

The new test is an “economic reality” test and has two “core elements.” The first is the nature and degree of control over the work. 29 CFR 795.105(d)(1)(i). The more flexibility and control the individual has, the more likely they will have independent contractor status. Significantly: “Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.” *Id.*

The second core element is the individual’s opportunity for profit or loss. 29 CFR 795.105(d)(1)(ii). “This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.” *Id.*

While these two core factors “are the most probative” and therefore carry “greater weight in the analysis than any other factor” [29 CFR 795.105(c)], other factors that may be considered include the amount of skill required, the degree of permanence of the relationship, and whether the work is an integral part of the employer’s production process. 29 CFR 795.105(d)(2)(i), (ii), and (iii).

The Rules include a proviso that “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.” 29 CFR 795.110. It also includes several examples, explaining the application of the Rules to particular fact scenarios. 29 CFR 795.115.

The full Final Rule and commentary are available [at this link](#). Remember that the IRS also has its own set of independent contractor factors which can be found [here](#).

Given the legal consequences flowing from incorrect classification of employees as contractors, careful review of each independent contractor relationship is advised. The Rules are accompanied by over 200 pages of background and explanation, providing insight into how the Rules will be interpreted and applied in particular situations. The Brooks Pierce Labor and Employment team is available to assist you in reviewing these questions. If you have questions about the application of these principles to your business, please contact a member of our team, linked below.

Authors' Note: It has been reported in the press that President-Elect Biden intends to freeze implementation of all rule changes not yet effective when he takes office, so the effective date of March 8 could be postponed, or the rules ultimately rescinded.