

DOL Proposes New Rule on Independent Contractor Classification



By [Allan Bloom](#) on September 22, 2020 Posted in [FLSA, Wage and Hour](#)

The U.S. Department of Labor (DOL) published a [proposed rule](#) in the Federal Register on September 25, 2020 to clarify whether a worker is or isn't an independent contractor for purposes of the Fair Labor Standards Act (FLSA). The proposed rule adds a new Part 795 to Title 29 of the Code of Federal Regulations, entitled "Employee or Independent Contractor Classification Under The Fair Labor Standards Act."

Here is a summary of proposed new Part 795:



- It contains the DOL's general interpretations of the text governing individuals' classification as employees or independent contractors under the FLSA. The DOL's Wage and Hour Division "intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the [FLSA]." To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the FLSA are inconsistent or in conflict with Part 795, they are rescinded.
- Part 795 may be relied upon as part of the "safe harbor" defenses to liability and liquidated damages under the FLSA (29 U.S.C. §§ 259, 260).
- Independent contractors are not employees under the FLSA. As such, the FLSA does not obligate an employer to pay minimum wage or overtime to an independent contractor.
- "Economic dependence" is the "ultimate inquiry" as to whether a worker is or is not an employee or an independent contractor. An "employee" under the FLSA is an individual whom an employer suffers, permits, or otherwise employs to work. An employer "suffers or permits" an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work. By contrast, an individual is an independent contractor if he or she is, as a matter of economic reality, in business for himself or herself.
- The following factors guide the determination of whether an individual is properly classified as an employee or independent contractor. The factors are not exhaustive, and no single factor is dispositive. However, the two "core factors" are the most probative, and they are afforded greater weight in the analysis than any other factor. Given the greater weight

afforded each of these two “core factors,” if they both point towards the same classification, there is a substantial likelihood that is the accurate classification:

- **Core factors:**

- **The nature and degree of the individual’s control over the work.** This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the putative employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the putative employer’s competitors. In contrast, this factor weighs in favor of the individual being an employee under the FLSA to the extent the putative employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual’s schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the putative employer. 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 FLSA.
- **The individual’s opportunity for profit or loss.** This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. While the effects of the individual’s exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. 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 more efficiently.

- **Other factors:**

- **The amount of skill required for the work.** This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the putative employer does not provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the putative employer to equip him or her with any skills or training necessary to perform the job.
- **The degree of permanence of the working relationship between the individual and the putative employer.** This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

- **Whether the work is part of an integrated unit of production.** This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the putative employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the putative employer's business.
- In evaluating economic dependence, the *actual practice* of the parties involved is more relevant than what may be *contractually or theoretically possible*. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights. Likewise, a business's contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

The DOL's proposed rule marks a sharp departure—both with respect to the factors themselves and to whether actual practice matters more than theoretical practice or reserved rights—from the approach some states have taken, particularly recently, in determining whether or not a worker is an employee or a contractor. Businesses analyzing their relationships with workers and service providers must consider both federal and state law—as well as local law, where applicable—prior to determining a legally compliant strategy, as workers are generally entitled to the greatest of any applicable protections. That said, in jurisdictions where federal law supplies the guiding principles, the DOL's proposed rule streamlines and provides greater clarity to a classification issue that continues to be top of mind for many businesses.

Public comments on the proposed rule are due on October 26, 2020.

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