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Update on DOL Efforts to Clarify Differences Between Employees and Independent Contractors

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A Matter of Distinction: Update on DOL Efforts to Clarify Differences Between Employees and Independent Contractors.

On February 26, 2026, the U.S. Department of Labor provided a notice of proposed rulemaking to change the analysis employers must use to decide whether a worker is an employee or independent contractor under the Fair Labor Standards Act, the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act.

If implemented as currently framed in the notice, the proposed rule would revoke the current regulations established in 2024 and establish different sub-facts and considerations under the general "economic realities test" standard set forth by the U.S. Supreme Court.

The Economic Reality Test

To resolve the debate around independent contractor status, the U.S. Supreme Court has developed a series of factors as "important" for distinguishing employees and independent contractors. Those factors include "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation." The Supreme Court has emphasized repeatedly that no one factor is controlling nor are the factors an exclusive list. Rather, courts should consider the totality of the factors and their underlying circumstances.

The Current Rule

Under the present regulation, DOL has specified particular factors and areas to be considered when determining an individual's status as an employee or independent contractor. In accordance with the Supreme Court's ruling, no one factor by itself controls whether the worker is an employee or an independent contractor. Instead, potential employers are to look at everything in totality; no particular factor is given more predetermined weight than the others.

The following are the specified factors and some of the areas to be considered:

1. Opportunity for profit or loss depending on managerial skill: Abilities to negotiate pay, accept or decline work, hire own workers, market or advertise their business.
2. Investments by the worker and the employer: Ability to make investments in growth of business, including increasing sales, increasing number of clients, extending marketing reach.
3. Degree of permanence of the work relationship: Whether work is sporadic, project-based with a fixed ending date, whether the worker may make a business decision to take on multiple different jobs.

4. Nature and degree of control: Who has control over hiring, firing, scheduling, prices, or pay rates; who supervises the performance of the work (including via technological means); who has the right to supervise or discipline workers; whether a potential employer takes actions that limit the worker's ability to work for others.
5. Extent to which the work performed is an integral part of the employer's business: Whether work is critical, necessary, or central to the operation of the potential employer's business.
6. Skill and initiative: Whether a worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business.
7. Additional Factors: A catch-all provision which allows for other factors to be used, provided that the factors indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.

Resulting Litigation

After the 2024 Rule became effective, various entities and individuals have brought federal lawsuits against DOL seeking to vacate the Rule in its entirety. During the pendency of these lawsuits, DOL requested that the cases be put on hold because it was reconsidering the 2024 Rule. The various courts granted DOL's requests, and the cases have been stayed through present day.

DOL's Enforcement Position

While the cases have been pending, the DOL Wage and Hour Division issued a May 1, 2025 memorandum to its administrators and directors to cease using the 2024 regulations to enforce the Fair Labor Standards Act. Instead, enforcement staff are to use previous standards referenced in a July 2008 Fact Sheet.

There are two main distinctions between the Fact Sheet and the 2024 Rule. First, the Fact Sheet uses factors that differ from some contained in the 2024 Rule. **The factors are:**

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Also, unlike the 2024 Rule, the Fact Sheet does not contain specific areas under each factor that an employer must consider.

Importantly, the memorandum notes that the 2024 regulations remain in effect for purposes of private litigation.

The Proposed Rulemaking

Per the February 26, 2026 Notice, the analysis would return for the most part to that contained in the 2021 Rule. There would be two "core factors" that would be primarily considered in determining worker status:

- The nature and degree of the worker's control over the work.
- The worker's opportunity for profit or loss based on initiative and/or investment.

  There would be three other factors (plus a catch all "additional factor") to be considered, particularly when the two core factors do not point to the same classification:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential Employer.
- Whether the work is part of an integrated unit of production.

The analysis would also more heavily depend upon the parties' actual practices rather than contractual or theoretical possibilities.

Present Status of Rulemaking

After the publication of the notice of proposed rulemaking on February 26, 2026, there was a two-month period of time where public comments could be submitted. By April 28th, DOL had received over 16,000 comments.

Finally, there is no set timeframe or obligation for DOL to produce a final rule, so it remains to be seen whether and to what extent the landscape changes for determining worker status. Unless and until then, the 2024 Rule remains in effect for private litigation, and the DOL's 2008 Fact Sheet, as well as applicable court decisions, govern the DOL's determination of employee versus independent contractor status.

If you have any questions about determining employee or independent contractor status or need training and policy drafting, please contact your Knox Law attorney, our Labor & Employment group, or call us at 814-459-2800.

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