

Electronic Alert

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New Year, New Classification Rules: Department of Labor Updates Economic Realities Test for Wage Claims

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Appropriately classifying a worker as an independent contractor or an employee has always required a fact-intensive assessment about the economic realities of the individual's work and weighing a long list of overlapping factors. On January 7, 2021, the United States Department of Labor ("DOL") published a final rule that simplifies the legal standards under the Fair Labor Standards Act for classifying workers as independent contractors to provide greater predictability and flexibility for companies and workers alike.

Core Factors

The DOL's new rule reaffirms that the central importance of the economic realities test assesses whether the individual is economically dependent on the potential employer for work or the worker is in business for themselves. Under the new rule, two "core factors" take center stage: (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss based on initiative, investment, or both. If these factors point toward the same classification, it is likely that they will determine a worker's classification.

Additional Considerations

The DOL will also consider the following factors to a lesser degree: (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship between the individual and the potential employer, and (3) whether the work is part of an integrated unit of production.

This final factor has undergone notable revisions. The DOL will no longer consider the importance or centrality of the individual's work to the potential employer's business or the "line of business" test.

Instead, this factor considers whether the worker depends on the overall production process to perform work duties, such as, for example, a programmer who works on a software development team. The final rule further illustrates this factor by comparing an editor and a freelance journalist. An editor is part of an integrated unit of production because they are involved in the entire production process, from assigning articles to determining layout, and their work is dependent on the constant coordination with other employees. By contrast, a freelance journalist, who only writes discrete articles, does not communicate with employees other than the editor, and provides discrete services to the company. Therefore, the freelance journalist's work can be completely segregated from the other parts of the newspaper's production process, suggesting the worker is properly classified as an independent contractor.

The new rule comes into effect on March 8, 2021, but employers should be aware that this new rule is limited to resolving worker classification issues under federal wage and hour law. It does not preempt or directly affect the tests that are applied under state law or federal discrimination, harassment, or retaliation laws, as those statutes have their own worker classification tests.

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