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Labor & Employment Alert

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DOL proposes new independent contractor rule

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DOL proposes to reverse 2024 changes to the definition of independent contractors, easing the way for businesses to use this classification.

What's the impact?

- In the short term, during the rulemaking process, the prior 2024 rule remains in effect, but subject to legal challenges and not likely to be enforced by the current administration.
- Introducing an "economic realities" test signals a reversion to the analysis established in 2021 and offers greater flexibility for businesses that engage independent contractors.
- Employers need to consider that several states and some municipalities impose different tests/requirements when evaluating the proper classification of workers.

On February 26, 2026, the US Department of Labor (DOL) announced a proposed rule that would rescind and replace the prior administration's 2024 regulations regarding classification of

independent contractors under the Fair Labor Standards Act (FLSA)[1]. The proposed rule, which resembles the analysis established by this administration in 2021, introduces an "economic reality" test that focuses on the nature and degree of control exercised over the work performed by the worker, and the worker's opportunity for profit or loss.

The proposed rule, titled "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act," was published in the *Federal Register* on February 27, 2026. The public comment period will remain open until April 28, 2026.

The current regulations, a totality of the circumstances test, will remain in place through this process. However, these regulations are the subject of multiple legal challenges. Additionally, the current administration has stated that it is not presently enforcing the regulation.

Key changes: The economic reality test and two core factors

The proposed rule establishes two core factors for determining whether a worker is economically dependent on an employer (and thus an employee) or is in business for themselves (and thus an independent contractor):

- **Nature and Degree of Control Over the Work.** This factor examines the extent to which an employer exercises control over how, when, and where the work is performed. Individuals who perform their work with limited to no supervision or direction are more likely to be an independent contractor. Consistent, direct supervision is more likely to result in a determination that a worker should be classified as an employee. However, the proposed rule expressly notes that certain exercises of control including the imposition of deadlines, requiring that contractors comply with health/safety rules or carry insurance do not exclude classification as an independent contractor.
- **Opportunity for Profit or Loss Based on Initiative or Investment.** This factor evaluates whether the worker has the ability to affect their own earnings through entrepreneurial effort, business acumen, or investment. Relationships that provide opportunities for workers to maximize their own profit, or incur losses, are more likely to be deemed independent contractor arrangements. Relationships that provide little to no opportunity for profit/loss, on the other hand, are more likely to be deemed employment.

[1] For information on the 2024 regulations, please see NP's alert, DOL narrows definition of "independent contractor" under FLSA, here.

Additional factors

In addition to the two core factors, the proposed rule identifies several secondary factors that may help determine worker status, particularly in close cases:

- The amount of skill the work requires.
- The degree of permanence of the working relationship.
- Whether the work is part of the contracting entity's core business.

The DOL stressed that "the parties' actual practices are more relevant than what may be contractually or theoretically possible" and indicated that the analysis primarily focuses on the first two factors, which may in and of themselves be dispositive.

Departure from the 2024 rule

The prior administration issued regulations that provided a six-factor test intended to evaluate the "totality of the circumstances" when determining whether workers should be classified as employees or independent contractors. The current administration previously suggested it would not enforce those regulations, which were also subject to a variety of pending legal challenges. The proposed rule would formally rescind the 2024 rule.

According to the DOL, the 2024 rule failed to provide necessary clarity and contained redundancies between factors. The proposed rule further critiques the 2024 rule on the ground that it "may have a chilling effect on independent contracting arrangements," which the proposed rule is intended to facilitate in appropriate cases. On the other hand, the DOL believes that the proposed rule will make it easier "to determine a worker's status as an employee or independent contractor, examining whether a worker is in business for him- or herself (independent contractor) or is economically dependent on a potential employer for work (employee)."

Implications for employers

The proposed rule may offer greater flexibility for businesses that engage independent contractors and more certainty over their independent contractor classifications. By emphasizing control and opportunity for profit or loss as the core determinative factors, the economic reality test could make it easier for companies to establish that workers as independent contractors, as opposed to employees.

Employers should remain mindful, however, that the proposed rule is subject to change following the public comment period. There is also a likelihood that any final rule may be subject to legal challenges.

Further still, employers should be aware that several states and municipalities impose their own test/requirements when evaluating the proper classification of workers. Where these apply, employers must continue to abide by the considerations for classification under those requirements.

Recommended actions

- **Review current classification practices.** Employers should evaluate their existing independent contractor relationships in light of the proposed rule's two-factor economic reality test. Consider proactively whether current arrangements satisfy the control and profit-or-loss factors.
- **Monitor the rulemaking process.** The public comment period closes on April 28, 2026. Employers and industry groups may wish to submit comments to shape the final rule. We recommend monitoring developments as the DOL reviews comments and moves toward rule finalization.
- **Assess contractual arrangements.** Businesses should review contracts with independent contractors to ensure they accurately reflect the operational reality of the relationship, particularly as it relates to control, autonomy, and entrepreneurial opportunity.
- **Prepare for compliance.** Once a final rule is issued, employers should be prepared to update policies, training materials, and classification protocols to align with the new regulatory framework, being mindful of any applicable state/local regulations that may also apply.
- **Consult legal counsel.** Given the evolving regulatory landscape and the stakes involved in worker classification, we encourage clients to consult with counsel before making significant changes to their contractor arrangements.

Conclusion

The DOL's proposed rule represents another significant shift in federal law regarding the classification of independent contractors, moving away from the prior administration's multi-factor approach and reverting back to a more employer-friendly "economic reality test." Nonetheless, employers should proceed carefully and remain attentive to the ongoing rulemaking process. We will continue to monitor developments and provide updates as the DOL rulemaking process continues.

For more information on classification of independent contractors and other FLSA related issues, please contact your Nixon Peabody attorney or:

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