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U.S. Department of Labor Initiates Rulemaking to Readopt Its 2021 Interpretation of Who Qualifies as an Independent Contractor Under the FLSA

The proposed rule would rescind the Biden Administration's 2024 interpretation and readopt the first Trump Administration's 2021 interpretation.

Today, the U.S. Department of Labor issued a proposed rule regarding its interpretation of who qualifies as an "independent contractor" under the Fair Labor Standards Act (FLSA). Independent contractors are not subject to the FLSA's minimum wage and overtime requirements as the statute applies only to "employees." The proposed rule would rescind the Department of Labor's 2024 interpretation adopted during the Biden Administration—which narrowed the definition of independent contractor—and replace it with the 2021 Rule the Department previously adopted during the first Trump Administration. Interested parties will have until April 28, 2026, to submit comments on the proposed rule.

Like the 2021 Rule, the proposed rule would codify five factors for determining who qualifies as an independent contractor: (1) the nature and degree of control over the work, (2) the individual's opportunity for profit or loss, (3) the amount of skill required for the work, (4) the degree of permanence of the working relationship between the individual and the potential employer, and (5) whether the work is part of an integrated unit of production. The proposed rule would recognize the control and opportunity for profit or loss factors as "core factors" that "typically carr[y] greater weight."

Although the proposed rule is nearly identical to the 2021 Rule, there are slight changes. First, the proposed rule provides additional clarity on the factors, explaining the inquiry looks to "the dependence that a typical employee has on an employer for work, as opposed to an individual who has more of the nature and character of a business owner who has a separate business." It also explains that the analysis "does not focus on the amount of income the worker earns, or whether the worker has some other sources of income." Second, the proposed rule provides additional examples for how the skills factor would be applied: a worker whose job does not require specialized skills but who develops those skills over time is likely to be classified as an employee. By contrast, a worker who has specialized skills, secures work by touting those skills, and does not receive specialized training from the company is more likely to be classified as an independent contractor.

If adopted, the proposed rule would rescind the 2024 Rule, which had replaced the 2021 Rule. The 2024 Rule codified six factors and did not assign special weight to any of the factors. The 2024 Rule also had adjusted how the traditional factors were applied. For example, it considered the worker's investments relative to the employer's investments. It also considered whether the worker's activity is important or central to the business's operations, an approach that tended to favor employee status in many cases.

Currently there are several lawsuits challenging the 2024 Rule, all of which have been stayed pending completion of the Department's new rulemaking. On May 1, 2025, the Department announced that it will not "apply the 2024 Rule's analysis when determining employee versus independent contractor status in FLSA investigations."[1]

The terms of the Department's final rule will depend on its response to comments submitted by interested parties during the notice-and-comment period. New legal challenges are possible once a final rule is adopted.

[1] https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf.

The following Gibson Dunn lawyers prepared this update: Eugene Scalia, Jason Schwartz, Katherine Smith, Jason Mendro, Michael Holecek, Andrew Kilberg, Tim Kolesk, and Andrew Ebrahem.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders of the firm's Labor & Employment or Administrative Law & Regulatory practice groups:

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