



U.S. DOL's Independent Contractor Rulemaking

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WHY DID THE DEPARTMENT ENGAGE IN RULEMAKING?

01

Why Rulemaking? Clarity & Predictability

Economic Reality Test

- In 1947, the Supreme Court adopted the “economic reality” test.
- In *United States v. Silk* (1947), the Supreme Court articulated five factors under the Social Security Act as important for the decisions: (1) **degrees of control**, (2) **opportunities for profit or loss**, (3) **investment in facilities**, (4) **permanency of relation**, and (5) **skill required in the claimed independent operation**.
- In *Rutherford Food Corp. v. McComb* (1947), the Supreme Court extended the economic reality test to the FLSA. *Rutherford* also articulated the “integrated unit of production” factor in describing the economic reality inquiry.
- *Tony and Susan Alamo Foundation v. Secretary of Labor* (1985), reaffirmed that the employee status turns on economic reality.

Why Rulemaking? Clarity & Predictability

Different Application By Courts of Appeals

- The Courts of Appeals subsequently used different formulations.
- For example, the Ninth Circuit articulated a 6-factor test, and the Second Circuit combined the opportunity for profit or loss and investment factors into one.

Test Became Unworkable & Unwieldy

- As DOL noted, the multifactor standard had become “unclear and unwieldy.”
- Other than the Supreme Court—which has not addressed this issue in decades—DOL is the only national institution that can provide some clarity and direction.

The 2021 Rule

02

The 2021 Rule Features

Economic Reality Inquiry

- Objective: make the economic reality test more administrable and predictable.
- “Actual practice” is more relevant than what is contractually or theoretically possible. Unexercised rights are not irrelevant, but are less probative than rights actually exercised.

Two Core Factors

- (1) control
- (2) opportunity for profit or loss
- If both core factors point the same way, there is a **“substantial likelihood”** the classification is correct.
- **Remaining factors** still matter.

The 2021 Rule

Key Clarifications to the Factors

- **Control:** schedule, project selection, and ability to work for others / competitors.
- **Profit or loss:** opportunity may be based on initiative or investment; both are not required.
- **Skill:** focus on specialized training or skill not provided by the company.
- **Integrated unit of production:** a more targeted concept than whether work is merely “integral” or important to the business.

The 2021 Rule

Illustrative Examples

- **Control:** Truck owner-operator's compliance and contractual obligations \neq control
- **Opportunity for profit/loss:** App-based worker's investment in equipment
- **Integrated unit of production:** Newspaper editor (integrated) v. freelance journalist (not)

The 2021 Rule Reliance/Safe Harbor

29 U.S.C. § 259(a)

“In any action or proceeding ... no employer shall be subject to any liability or punishment ... if he pleads and proves that the act or omission complained of was ***in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation*** ... of the agency of the United States ... ***Such a defense ... shall be a bar*** ... notwithstanding later modification, rescission, or judicial invalidation.”

29 C.F.R. § 795.100

“These interpretations may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 259, notwithstanding that after such act or omission, such interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”

The 2024 Rule

03

The 2024 Rule

Biden Administration's Attempt To Delay & Withdraw

- The 2021 Independent Contractor Rule was scheduled to go into effect on March 8, 2021.
- The Biden Administration's DOL **delayed the effective** date until May 7, 2021, and then **withdrew the Rule** entirely before it became effective.
- The Eastern District of Texas held that the Department's delay and withdrawal **violated the Administrative Procedure Act:**
 - The **Delay Rule's** 19-day notice-and-comment period and limits on content failed to provide a meaningful opportunity to comment.
 - The **Withdrawal Rule** was arbitrary and capricious because it failed to consider alternatives to withdrawal.
- The court **set aside both actions.**

The 2024 Rule Formless Six- Factor Test

- In 2024, DOL again rescinded the 2021 Rule—but also issued a replacement rule.
- The 2024 Rule promulgated a **formless, totality-of-the-circumstances test** that injected **new inconsistencies and incoherence** to the analysis.
- The 2024 Rule enumerated **six non-exhaustive factors** without any guidance on how to weigh them:
 - (1) Opportunity for profit or loss depending on managerial skill
 - (2) Investment by the worker and the potential employer
 - (3) Degree of permanence of the work relationship
 - (4) Nature and degree of control
 - (5) Extent to which the work performed is an integral part of the potential employer's business
 - (6) Skill and initiative.

The 2024 Rule Problems

- **Vague** – By rejecting the “core factors” approach, the 2024 Rule made the inquiry vague and open to any interpretation that DOL sees fit.
- **Abandoned Actual Practice** – The 2024 Rule treated theoretical possibilities as equally or more indicative than the actual practice of the parties.
- **Expanded “Control” Factor** – The 2024 Rule is not limited to control of the performance of the work but includes *the economic aspects of the working relationship*; and includes complying with **legal and safety obligations**.
- **Favored employee classification** - The 2024 Rule converted factors into a **one-way ratchet** that highly increases finding employment status. E.g.:
 - **Replaced “Integrated” With “Integral”** – Everything could be integral to an employer’s business.
 - **Investment** – Counted “investment” as a separate factor from opportunity for profit or loss, “considered on a relative basis with the potential employer’s investments in its overall business.”
 - **Unbalanced “Permanence” Factor** – Permanent relationship definitively weighed in favor of employee classification, but a lack thereof was not necessarily indicative of independent contractor status.
 - **Entrepreneurship** – Injected into multiple factors; weighed the test in favor of employee classification by making a **lack** of entrepreneurialism count against independent contractor status across factors.

Litigation Challenging The 2024 Rule

04

Litigation Challenging The 2024 Rule Non- Enforcement

- In 2025, the Trump Administration's DOL sought to hold the cases **in abeyance** pending **its reconsideration** of the 2024 Rule.
- On May 1, 2025, DOL published a Bulletin stating that the Wage and Hour Division **“will no longer apply the 2024 Rule’s analysis when determining employee versus independent contractor status in FLSA investigations.”**
- Instead, DOL explained it will enforce the FLSA in accordance with prior guidance.

The 2026 Proposal

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The 2026 Proposal

Why Replace the 2024 Rule?

2024 Rule provided **too little guidance** on how to weigh factors when they point in different directions.

- Open-ended balancing can deter bona fide independent contracting or **push businesses toward unnecessary employee classification.**
- **Prioritization is needed** because some non-core factors may have less predictive value in the modern economy.

The 2026 Proposal “Readopt 2021 Rule With Adjustments”

“The Department proposes to rescind the 2024 Rule and replace it with the Department’s **January 7, 2021 rule, with a few modifications.**”

- Restores the core-factor approach.
- Retains “integrated unit of production,” not “integral part.”
- Restores primacy of actual practice.
- Restores / expands examples.
- Extends guidance to FMLA and MSPA.

The 2026 Proposal “Readopt 2021 Rule With Adjustments”

- Adds text clarifying “economic dependence” as **dependence for work**, not income
- Revised illustrative examples:
 - Truck owner example: removes speed-limiter scenario and uses drug/alcohol testing compliance instead (still no control).
 - Adds two new skill examples covering employee-leaning and independent-contractor-leaning fact patterns.

The 2026 Proposal

Noteworthy Discussions in Preamble

- DOL is “**legally constrained**” from adopting an ABC test.
 - The ABC test inconsistent with controlling Supreme Court precedent.
 - An ABC test is more restrictive because each prong can independently bar IC status.
- Cites AB 5 research and frames the 2026 proposal as “**less restrictive.**”
 - DOL cites findings that AB 5 was associated with declines in **both self-employment** and **overall employment** in affected occupations.
- DOL is considering a streamlined version of the core factor test under which **the control factor would apply first**, and if it weighs in favor of finding employee status, the analysis stops. If it doesn't the analysis would move to the opportunity factor and then the other factors.

What's Next

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What's Next

Comment Topics

Comment Deadline: April 28, 2026

- **Effects of Prior Rules** – Consequences of the 2024 Rule and experience using the 2021 and 2024 Rules, including reclassifications.
- **Impacts & Costs** – The cost and impact of the Rule on the economy, as well as DOL's underlying assumptions. For instance, how many independent contractor designations will be assessed under state laws and whether the use of independent contractors will increase.
- **Economic Dependence** – DOL's clarification of "economic dependence": dependence that a typical employee has on an employer for work, without focus on the amount or sources of income.
- **Actual Practice** – Should adopt the "primacy of actual practice" section.
- **Circuit Court Decisions** – The most relevant circuit court cases.

What's Next

Comment Topics

Comment Deadline: April 28, 2026

- **Factors** – The five enumerated factors, and whether certain considerations should be identified as irrelevant.
- **Streamlined Core Factor Test**
- **Additional Examples** – Other illustrative examples DOL should adopt.
- **FMLA & MSPA** – Whether DOL should conform the FMLA and MSPA regulations to the FLSA test, as proposed.

Questions?



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An aerial photograph of a long, white cable-stayed bridge spanning a vast, deep blue body of water. The bridge features several tall, white pylons supporting the deck with numerous white cables. The water is clear and blue, with several small, dark islands scattered across the middle ground. In the background, a range of dark, rugged mountains stretches across the horizon under a clear, bright blue sky. The overall scene is serene and expansive.

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