

## **Proposed Rule Could Turn Independent Contractors into Employees**

The Biden administration has proposed a new federal rule that will make it more difficult for employers to classify workers as independent contractors.

If the new rule takes effect, companies that use independent contractors will have to reevaluate their relationships with these outside workers. Companies who hire contractors that work exclusively for them will have the hardest time trying to continue classifying them as independent.

The debate about classifying workers has been brewing for decades. Under the federal Fair Labor Standards Act (FLSA), employees have rights to benefits that elude independent contractors, including the rights to a minimum wage, overtime pay, unemployment insurance, health insurance, sick time and employer contributions to Social Security taxes. Their employers also purchase workers' compensation insurance to cover them if they are injured on the job.

Companies that misclassify workers as independent contractors can face significant fines and back taxes, as well as their workers' compensation insurer clawing back premiums the employer should have paid. Misclassifying workers also gives companies that do this an unfair advantage over their competitors that don't.

### **The proposed rule**

The [proposal](#) would allow an employer to classify someone as an independent contractor if, "as a matter of economic reality," that person is in business for themselves.

What "economic reality" is depends on the answers to the following questions taken together.  
**Note:** One answer by itself does not make a person an independent contractor.

#### ***Can the worker increase their pay only by working more hours or producing more?***

If so, this might make the person an employee. Conversely, can he or she do so by negotiating pay, selecting projects, marketing their service, or cutting expenses? That would tend to make them an independent contractor.

#### ***Does the employer purchase most of the worker's tools and equipment?***

This might make the person an employee. On the other hand, if their investments are for purposes like expanding the types and amounts of work they can do or cutting expenses, that might tend to make them an independent contractor.

The proposed rules do not provide a specific dollar threshold for this.

***Does the employment relationship have a definite end date?***

If so, this implies that they're an independent contractor. Otherwise, they might be an employee.

***How does the employer control the worker, and how much?***

The worker may be an employee if the employer:

- Sets their schedule
- Supervises the work
- Explicitly limits their ability to work for others
- Can discipline the individual
- Monitors their activity.

The less control the employer has, the more likely the worker is an independent contractor.

***Is the person's work integral to the employer's business?***

The more integral the work is, the more likely the person is to be an employee. The less integral it is, the more likely they are to be an independent contractor.

***Does the worker use specialized skills developed outside the employment?***

If the worker doesn't use specialized skills or depends on the employer for training, they are more likely to be an employee. If the person brings those skills to work and does not rely on the employer for training, they are more likely an independent contractor.

**The current rule**

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. Still, among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.

- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.

### **The takeaway**

The proposal must go through a mandatory public comment period ending in late November 2022, followed by the publication of a final regulation that may differ from the proposal. This process will take several months.

We'll keep you posted about the new rules and provide further guidance in the future.

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