# DOL Issues New Guidance in Distinguishing Between Employees and Independent Contractors

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On January 6, 2021, the Department of Labor ("DOL") issued a final rule distinguishing employees from independent contractors pursuant to the Fair Labor Standards Act ("FLSA"). The effective date of the final rule is March 8, 2021.

Whether particular workers are properly classified as employees or independent contractors is a common challenge for employers and poses a host of costly legal risks. Employers who misclassify employees as independent contractors run the risk of violating the FLSA and are vulnerable to a wide range of penalties for noncompliance, including trebled damages and an award of attorney fees. Liability under the FLSA is just one of the many risks of misclassification that employers face.

The DOL's new rule is intended to resolve years of confusion among federal courts in determining which rule or factors to apply in distinguishing between employees and independent contractors. For more than 70 years, courts have relied on various forms of either a five or six-factor test. In some instances, multiple factors were combined into one analysis, while other factors were effectively ignored.

The new rule endorses the "Economic Reality" test, which provides five factors to determine whether an individual is an independent contractor in business for themselves or is an employee dependent on an employer for work. The first two factors under the Economic Reality test are the "core factors." As such, they are deemed the most important in determining whether an individual is an employee or independent contractor. The core factors are:

- The nature and degree of control over the work.
- The worker's opportunity for profit or loss based on initiative or investment.

The final three factors serve as "additional guideposts," particularly when the core factors do not lead to the same result. These factors are:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and employer.
- Whether the work is part of an integrated unit of production.

The DOL also issued six examples to illustrate how each factor could apply to a particular job or industry, but declined to predict the outcome for each scenario. Employers should review these examples in making classification decisions.

In a rapidly evolving economic and employment climate, employers should consult an attorney to ensure that classification decisions are as defensible as possible in light of the DOL's most recent guidance. Seeking counsel can be a key to avoiding a "willful" violation the FLSA, which subjects an employer to significant additional liability.

GableGotwals' employment and labor law group is committed to helping employers navigate the nuances of emerging issues they face and defending them when accused of noncompliance. Please contact any member of the team for further assistance.


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