

DOL Rescinds and Replaces FLSA Independent Contractor Regulations

EBIA Weekly (January 11, 2024)

Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 29 CFR Parts 780, 788, and 795, 89 Fed. Reg. 1638 (Jan. 10, 2024)

[Final Rule](#)

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The DOL's Wage and Hour Division has issued final regulations for determining whether a worker is classified as an employee or an independent contractor for purposes of the Fair Labor Standards Act (FLSA). Among other things, the FLSA governs minimum wage and overtime requirements that apply to employees but not independent contractors. The regulations rescind and replace regulations issued in 2021. The 2021 regulations were previously frozen, delayed, and withdrawn, but a court vacated the withdrawal and held that the regulations were effective. These final regulations, which make several adjustments and clarifications to the proposed regulations, take effect on March 11, 2024.

The regulations restore a "totality-of-the-circumstances" approach in assessing the economic reality of the working relationship, requiring balanced consideration of six factors, rather than giving greater weight to two "core" factors (namely, control and opportunity for profit or loss) as in the 2021 regulations. The DOL explains that this approach aligns with long-standing judicial precedent in determining worker status. The six factors are the worker's opportunity for profit or loss, investments by the parties, the work relationship's permanency, the nature and degree of control over the work, whether the work is an integral part of the potential employer's business, and worker skill and initiative. Other factors may also be relevant. The outcome ultimately depends on whether the worker is economically dependent on the employer for work or is in business for themselves.

EBIA Comment: While changes to the FLSA's independent contractor analysis may significantly impact many businesses and workers, most employee benefit plan rules determine employee status under ERISA or the Code (not the FLSA), often in conjunction with the common-law standard. It is important to properly classify workers under the appropriate set of rules—particularly for purposes of the Code's rules regarding retirement plans, cafeteria plans, and employer shared responsibility penalties. For more information, see EBIA's Health Care Reform manual at Sections XXI.E.3.a ("Exchange Notice: Who Is an Employee for FLSA Purposes?") and XXVIII.C ("Penalty Tax Hinges on Whether Employer Offers Coverage to Full-Time Employees"). See also EBIA's Self-Insured Health Plans manual at Section XIV.C ("Which Employees and Other Workers Will Be Allowed to Participate?"); EBIA's ERISA Compliance manual at Section IX.I ("Eligibility Issues Involving Independent Contractors, Leased Employees, and Others"); EBIA's Cafeteria Plans manual at Section IX ("Who Can Participate in a Cafeteria Plan?"); and EBIA's 401(k) Plans manual at Section VII.B ("Eligibility Condition #1: Participation Limited to Common-Law Employees, Partners and Sole Proprietors, Some Leased and Statutory Employees").

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