

DOL Issues Final Rule on Independent Contractor Status

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On January 7, 2021, the U.S. Department of Labor (DOL) issued a [final rule](#) that clarifies how employers should determine who is an independent contractor and who is an employee for purposes of the Fair Labor Standards Act (FLSA).

Independent contractors are not subject to the FLSA's minimum wage and overtime requirements. The DOL's final rule sets forth an "**economic reality**" test designed to determine whether the worker is in business for him or herself (and thus an independent contractor not covered by the FLSA) or economically dependent on another (and thus an employee covered by the FLSA).

Under the final rule there are five factors which makeup the "economic reality" test to determine whether a worker is considered an employee under the FLSA. The factors which are given the most weight are the first two:

- the nature and degree of the worker's control over the work; and
- the worker's opportunity for profit or loss.

If applying two factors results in different classifications, the DOL looks at the remaining three factors of the "economic reality" test:

- the amount of skill required by the worker;
- the degree of permanence of the employer-worker relationship; and
- whether the work is part of an integrated unit of production.

This final rule brings clarity to an area of law that has not always been consistently articulated by courts or the DOL, and provides employers with more opportunity to classify workers as independent contractors. This final rule is likely to have the greatest impact on **industries such as the gig-economy**. However, while this final rule is scheduled to go into effect on March 8, 2021, the Biden administration is not in favor of this rule and could potentially delay its implementation.

If you have questions about independent contractors or other issues, please contact the author or any of McGlinchey's [Labor and Employment](#) attorneys.

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