



## DEPARTMENT OF LABOR ADOPTS NEW TEST FOR DETERMINING WHETHER ONE IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

On January 9, 2024, the U.S. Department of Labor released a final rulemaking that changed its test for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds the existing 2021 independent contractor rule and replaces it with a multifactor economic reality test. This new test goes into effect on **March 11, 2024**.

The new test adopts a totality of the circumstances approach, and looks to several economic factors to determine if, as a matter of economic reality, an individual is an employee or an independent contractor under the FLSA. No one factor is considered more important than the others; however, situational circumstances could result in one or more factors having differing importance. In determining whether a worker is an employee under the FLSA, the following factors will be considered:

1. *The worker's opportunity for profit or loss depending on their managerial skills* – This criterion looks at a worker's independence in making and exercising managerial decisions. For example, does the worker negotiate what they charge or what they are paid? Can the worker decide which jobs to perform or how to grow their business? Does the worker make hiring or other managerial decisions? "Yes" responses to these and similar questions weigh in favor of finding an independent contractor.
2. *Investments made by the worker* – this criterion analyzes whether any investments made by the worker are capital or entrepreneurial in nature. Investments of new capital or actions that are entrepreneurial in nature typically serve a business-like function by increasing a worker's ability to do more or different work, or to do it more cost effectively. These types of investments are indicative of an independent contractor. They should not, however, be confused with work-related expenses imposed by an employer on a worker required to perform a specific job, such as the cost of tools and equipment necessary for performance.
3. *Degree of permanence of the work relationship* – Where the work relationship is indefinite in duration or continuation, or is exclusive of work for other employers, then this factor would weigh in favor of the worker being an employee.



4. *The nature and degree of control* – This factor looks at who can control the work and economic aspects of the workplace. For example, does the worker have control over factors such as their work schedules or who supervises them? Is the worker free to work for others? Also important to this factor are things like who controls the economic aspects of the working relationship, such as who sets prices or rates for services, or markets the services or products of the worker. An employee relationship is supported where the worker does not control these and similar factors.
5. *The extent to which the work performed is an integral part of the potential employer's business* – Is the function being performed by the worker an integral part of the business? If so, then the work being performed, being critical, necessary, or central to the potential employer's business, weighs in favor of the worker being an employee.
6. *Skill and initiative required for job* – Whether the worker uses specialized skills to perform the work required of the position is considered under this factor. If the work is not specialized, or the employer must train the worker to perform the work, then this factor weighs in favor of finding that the worker is an employee. While both employees and independent contractors can bring specialized skills to a workplace, an independent contractor status arises where the use of those skills supports the worker's, rather than the employer's, business initiatives.
7. *Additional factors* – Factors in addition to the ones highlighted above may also be considered if those factors shed light on whether the worker is in business for themselves, or economically dependent on someone else.

No single factor determines whether a worker is an employee or an independent contractor. Instead, these economic reality factors are assessed and weighted to answer the question. Also, a worker cannot voluntarily choose to be considered an independent contractor. If an employee is an employee under the economic reality factors, then the worker is an employee for purposes of the FLSA.

One last point. The economic reality factors are to be used for determining worker classification under the FLSA. Similar determinations under other laws, such as the Internal Revenue Code or various state laws, are controlled by definitions germane to those laws.

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