

## Biden Administration Rescinds Trump-Era Rule on Independent Contractors

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On May 5, 2021, the United States Department of Labor (DOL) issued a final rule rescinding a 2020 rule promulgated by the Trump administration that made it easier for workers to be classified as independent contractors rather than employees for the purposes of the Fair Labor Standards Act (“FLSA”). As a result, the DOL will return to assessing independent contractor status under federal law using a form of the “economic realities” test – a stricter test that the DOL announced it will apply in every case where the DOL considers worker classification issues.

The distinction between classifying a worker as an “employee” rather than an “independent contractor” under the FLSA is an important one for employers. The FLSA entitles “employees” to certain protections, such as minimum wage and overtime requirements, while “independent contractors” are not afforded such protections. Worker classification issues have become more prominent with the ongoing rise of the “gig economy,” and have been subject to varying interpretations depending on the administration in power.

The economic realities test dates back to a [2008 fact sheet](#). Under this test, a worker’s status is determined by examining seven factors, with no factor controlling:

1. The extent to which the services rendered are an integral part of the principal’s business.
2. The permanency of the relationship.
3. The amount of the alleged contractor’s investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor’s opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

The economic realities test, however, was widely viewed as a demanding standard for businesses to meet. Accordingly, in September 2020, as we wrote about [here](#), the Trump DOL proposed a new, more employer-friendly standard that would allow more workers to be classified as independent contractors under the FLSA. The Biden administration’s decision to abandon this proposed rule, which was widely expected, returns the DOL to a stricter approach. The move increases the likelihood that the DOL will deem a given worker an employee for the purposes of the FLSA.

It remains to be seen whether the DOL will issue further guidance or rulemaking as to the implementation of the economic realities test. Another point that will bear watching is whether the DOL seeks to prioritize enforcement actions against gig economy and other employers that currently operate on an independent contractor model. Employers will want to keep a close eye on these developments, and should remain aware that various state laws, such as those in Massachusetts and California, set forth stricter standards for independent contractor classification than the DOL.

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