



Employment Law Note

MARCH 2026

New Administration, New Rule?



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Assessing whether a worker is an employee or independent contractor presents serious risks. An incorrect designation carries with it considerable liability: employees – but not contractors – are generally entitled to the full spectrum of employment protections, including the right to a minimum wage, overtime, rest and meal breaks, sick leave, paid time off, and so on. A business found to have incorrectly classified its “employees” as “contractors” may thus find itself tagged for a panoply of wage and hour violations.

To assist businesses, workers, and the federal judiciary in delineating between “employers” and “contractors,” the U.S. Department of Labor (“DOL”) promulgates “misclassification” guidelines. However, since the DOL is an executive body whose direction and objectives change depending on the operative presidential administration, its independent contractor test is routinely revised, amended, or repealed following the election of new leadership.

This note explores the DOL’s recently announced proposed rule addressing the classification of independent contractors, its revisions to the previous administration’s paradigm, and the implications for employers moving forward.

The DOL’s 2024 Independent Contractor Test

On March 11, 2024, the DOL under President Biden codified its six-factor independent contractor test.

In drafting the rule, President Biden’s DOL sought to prevent businesses from intentionally misclassifying employees as “contractors” as a means of cutting administrative costs. Consequently, the Biden Administration’s independent contractor test was structured in a way that encouraged fact finders (*e.g.*, businesses, courts, arbitrators, etc.) to err on the side of classifying workers as “employees.”

To that end, the 2024 test required that fact finders consider the “totality of the circumstances” when assessing a worker’s

status, and they must do so by analyzing the DOL’s six non-negotiable factors.

Those six factors were: (1) whether the worker had an opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the potential employer, (3) degree of permanence of the work relationship, (4) the nature of degree and control the worker or potential employer has over the work, (5) the extent to which the work performed is an integral part of the potential employer’s business, and (6) skill and initiative. Crucially, the Biden Administration’s DOL advised that no single factor took priority over the others, and that no factor – or subset of factors – was dispositive of the independent contractor question.

This rule remained in place until May 2025, when the new administration under President Trump announced it would no longer be enforcing the 2024 test for a number of cited reasons.

First, the current administration expressed concern that the 2024 test, in application, needlessly complicated and frustrated the independent contractor analysis. Emphasizing the “totality of the circumstances,” while providing little direction regarding how the factors should be weighted or used, resulted in confusingly inconsistent rulings across the federal courts, compounding the lack of clarity miring the independent contractor test.¹

Second, the DOL noted the 2024 test resulted in a “chilling effect” of independent contractor relationships. The DOL found that businesses became less inclined to engage individuals as contractors because doing so had evolved into a “confusing and risky process” – particularly in borderline scenarios where “different factors point to different classification outcomes” under the previous rule. According to the DOL, this disadvantages the many entrepreneurially inclined individuals who would prefer a greater amount of operational freedom as a contractor. The DOL believed, overall, that the rule diminished collaboration, innovation, and efficiency across American industries.

¹ <https://www.federalregister.gov/documents/2026/02/27/2026-03962/employee-or-independent-contractor-status-under-the-fair-labor-standards-act-family-and-medical>. All subsequent quotations throughout this note refer to this draft rule.

Third, the DOL took issue with the 2024 test's redundancies and incoherencies. For example, it is unclear what difference (if any) there is between the factors evaluating "managerial skill" and "skill and initiative." The current administration contends that "these redundancies risk confusing business and workers alike, creating uncertainty about whether the same considerations must be counted multiple times or weighed differently."

The DOL thus concluded that the 2024 test's ambiguities, and lack of predictable application, "pressured business to unnecessarily classify bona fide independent contractors as employees" – something it aimed to fix in promulgating its revised rule.

The Proposed Rule

On February 26, 2026, the DOL published its proposed replacement for the 2024 test. The test, entitled the "economic reality test," focuses on the "ultimate inquiry" of a worker's economic dependence (that is, whether a worker is in business for themselves, or is financially dependent on their employer for income).

The DOL now directs fact finders to focus on two "core" factors when adjudicating classification cases: (1) the nature and degree of the worker's control over their work, and (2) the worker's opportunity for profit and loss. But to determine whether a worker has control over their work, the DOL has posited three additional, non-dispositive subfactors to consider: (1) the degree of skill required for the work (no specialized skill tends to suggest an employee status); (2) the degree of permanency of the working relationship between the worker and the business (where long-term relationships suggest an employee status); and (3) whether the work performed is "integral to" or "segregable from" the business's production process (the more integral, the more likely the worker is an employee). In its proposed rule, the DOL acknowledged the potential for ambiguities or odd outcomes. For example, a worker who is independently wealthy but earns a small income stream from a company may be an employee. Likewise, a worker who moonlights at multiple companies may still be an "employee" for all of those companies.

Nonetheless, the DOL sees considerable advantage in its two-to-five factor test over the prior six-factor test. Chiefly, the two "core" factors have been, by far, the most heavily weighted factors when analyzing wage and hour decisions across the federal Courts of Appeals. Thus, the new rule purports to harmonize the independent contractor analysis amongst the judiciary and executive branches.

Second, the two "core" factors center misclassification cases on "the parties' actual practice" rather than "what may be contractually or theoretically possible." In so doing, "[t]he Department's proposed rule seeks to protect workers' entrepreneurial spirit, and simplify compliance for American job creators navigating a modern workplace, all while maintaining robust protections for employees."

However, it is not immediately apparent that the DOL's proposed two-or-sometimes-five-factor test is any clearer, or more predictable, than the previous six-factor test. One may well assume that the 94 federal district courts – each with their own bespoke body of precedential case law – may nonetheless author confusingly disparate opinions.

Importantly, this proposed test is not yet codified into law, and is, instead, open to public comment until April 28, 2026, after which time the DOL will determine whether its test requires additional revision. Interested parties may submit such comments to www.regulations.gov/docket/WHH-2026-0001.

Implications for Employers

Businesses should expect the DOL's proposed rule, or a substantially similar rule, to go into effect before the end of the year. Businesses should remain mindful that (1) there is already an existing body of case law opining on the issue of employee classification that remains unchanged, and, thus, (2) it is too soon to tell whether the new rule will actually have the impact of encouraging courts to err on the side of enforcing independent contractor relationships.

Businesses with questions about misclassification or interested in forming (or protecting) independent contractor relationships, are encouraged to contact Sebris Busto James.

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