



Utilizing Independent Contractors Toolkit



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The final rule restores an earlier standard that required companies to weigh a variety of economic factors together to determine whether a worker is an employee or an independent contractor. It will take effect on March 11.

A top-down view of a desk with a wooden surface. In the upper right, a black calculator is partially visible. In the lower right, a pair of black-rimmed glasses is partially visible. In the lower center, a blue and white pen lies horizontally. The main focus is a white sheet of paper with the text 'Independent Contractors TOOLKIT' written on it. 'Independent Contractors' is in a large, black, serif font, and 'TOOLKIT' is in a smaller, red, bold, sans-serif font.

**Independent
Contractors
TOOLKIT**



Utilizing Independent Contractors Toolkit

By Margie Faulk, PHR, SHRM-CP

The new independent contractor rule from the U.S. Department of Labor (DOL) could spark an increase in misclassification lawsuits and make businesses less likely to hire gig workers, according to some legal experts.

The final rule restores an earlier standard that required companies to weigh a variety of economic factors together to determine whether a worker is an employee or an independent contractor. It will take effect on March 11.



The new rule returns to a more employee-friendly standard, and it may usher in a wave of misclassification lawsuits under the Fair Labor Standards Act (FLSA),

Temporary Workers vs Independent Contractors

- There are specific guidelines for hiring temporary employees, and you need to follow the rules or risk a lawsuit. A temporary employee cannot be treated as a full-time employee minus the benefits.
- Temporary employees can be highly beneficial to your business, but only if you do your homework and follow the rules.
- Temporary employees are a specific category, separate from part-time employees or independent contractors.
- When used appropriately, temporary employees can save your company time and money while boosting your productivity with new skills, fresh dynamics, and new ideas.

The DOL's final rule's six non-exhaustive factors are:

Opportunity for profit or loss depending on managerial skill.

1. Investments by the worker and the potential employer.
2. Degree of permanence of the work relationship.
3. Nature and degree of control over the work.
4. Extent to which the work performed is an integral part of the potential employer's business.
5. Skill and initiative.

6. It's not an official 7th factor, but the final rule does state the agency will consider anything else they believe shows the contractor was an employee or an independent contractor.

Independent Contractor 2021 and 2024 Comparison

	Previous IC Rule (2021)	New IC Rule (2024)
Test used	Five-factor economic reality test	Six-factor economic reality test
Analysis of classification	<p><u>Core factors</u> Relative weight of factors is measured</p> <p><i>Nature and degree of control over the work and the worker's opportunity for profit or loss.</i></p> <p>If the two core factors pointed toward the same classification, there was a "substantial likelihood" it was the worker's accurate classification.</p>	<p><u>Totality-of-the-circumstances</u> Factors do not have a predetermined weight and no one factor is dispositive.</p> <p>Considering the factors as a whole, the worker is not likely to be an independent contractor if the worker is economically dependent on an employer for work.</p>
Business impact	<p>Business friendly Ability to classify as independent contractors based on less factors that implied classification.</p>	<p>Employee friendly When test is applied, consideration of all factors helps to protect employees from misclassification.</p>

Independent Contractor Checklist Section

Contract Development

- Review [Department of Labor](#) and [IRS criteria](#) to ensure an independent contractor relationship.
- Use Form SS-8 for IRS determination of independent contractor status if unclear and the determination cannot be made by the business.
- Develop a written agreement with an assigned specific scope of work for a specific duration.
- Do not have a contractor complete an employment application.
- Require the contractor to supply his or her own workers' compensation and liability insurance.

- Require the contractor to supply his or her own equipment and tools.
- Establish invoicing requirements and payment dates.
- Do not pay contractor expenses; expenses should be built into the contract for the cost of the entire job.
- Do not provide continuing education training. The company may provide training specific to the assignment or company procedures.
- Do not have contractors perform similar work of employees or perform routine work.
- Contractor work should not be close to core business operations and therefore considered employee-type work.
- Require documentation demonstrating an independent contractor relationship, such as a copy of business or professional license, copy of insurance certificates, copies of the independent contractor's advertising, and copy of the contractor's business card and stationery.

Contract Signed; Contractor Work to Begin

- Require the contractor complete Form W-9, Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and taxpayer identification number, or TIN, of the worker. A TIN may be either a Social Security number (SSN) or an employer identification number (EIN).
- Do not complete an I-9 form.
- Do not pay contractors from a payroll account.
- Do not provide an employee handbook.
- Do not allow independent contractors to enroll in any company-sponsored benefit plans or offer other benefits.
- Do not invite or permit contractors to attend company parties or special events intended for employees.
- Do not issue company business cards or employee ID badges to contractors.
- Restrict contractor participation in projects or department meetings.
- Do not give independent contractors authority for hiring, disciplinary action or termination decisions.
- Do not require the contractor to work "full time" or have set hours. Contractors should control when and how they work.

- Do not conduct performance evaluations similar to employee evaluations. Companies should require deadlines and results and can require contractors to follow job and company rules.

Contract Work in Progress (1 month to end of contract)

- Periodically review the contract and assigned scope of work to ensure contractor is working within the contract scope and maintaining independent contractor status.
- Confirm with company contact(s) that the contractor has not been provided additional duties or benefits outside the scope of the contract or anything else that would jeopardize independent contractor status.
- Retain records of all transactions with the contractor, such as the contractor's invoices for billing.

Ongoing

- Review IRS criteria to ensure company is maintaining an independent contractor relationship.
- Confirm W-9 is on record and retained for four years.
- Send form 1099-NEC each year for any contractor (e.g., attorney, accountant, consultant) paid \$600 or more for services provided during the year.
- Review W-9 Record Retention Schedule to purge unneeded files.
- Retain W-9 for four years for future reference in case of any questions from the worker or the IRS.
- Destroy records that have met the retention requirements unless employer is involved in a dispute that has not yet been resolved.

State Independent Contractors Regulations



THE “ABC” FACTOR TEST

When engaging independent contractors for services, hiring companies must demonstrate that the worker can pass the newly adopted “ABC” test. Under these stringent guidelines, it is more difficult to classify a worker as an independent contractor. To do so, hiring companies must demonstrate that the following three factors are met:

- **Factor A:** Worker is free from the control and direction of the hiring entity in connection with the performance of the work.
Even a minor degree of control exercised by the engaging company will not satisfy this factor. As a result, the worker will be classified as an employee.
- **Factor B:** Worker performs work that is outside the usual course of the hiring entity’s business.
The hiring entity must demonstrate that the worker’s services and duties differ from company’s core business to the extent where they would not be viewed as an employee of the company.
- **Factor C:** Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

States Utilizing the ABC Test!

- There are several states that commonly use the ABC test to decide whether someone is an independent contractor.
- They include California, Connecticut, Delaware, Illinois, Indiana, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, Vermont, Washington, and West Virginia.

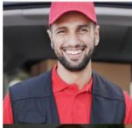










State Laws May Supersede Federal


- While the final rule has a significant impact on classification under the FLSA, employers should note that courts are not required to follow the DOL’s interpretation of the FLSA.
- Employers also should note that many states use different classification tests – such as the ABC test, which the final rule expressly declined to adopt. As the DOL itself noted, “The final rule only revises the Department’s interpretation under the FLSA. It has no effect on other laws—federal, state, or local—that use different standards for employee classification. ...
- The FLSA does not preempt any other laws that protect workers, so businesses must comply with all federal, state, and local laws that apply and ensure that they are meeting whichever standard provides workers with the greatest protection.”
- As such, employers in states like California and Massachusetts must continue to comply with the ABC test and more stringent classification tests, despite the DOL’s final rule.


Between federal and state law, you must follow the one that's most beneficial to your employees.



Resources

	EMPLOYEE	OR	INDEPENDENT CONTRACTOR
	Working for someone else's business		Running their own business
	Paid hourly, salary, or by piece rate		Paid upon completion of project
	Uses employer's materials, tools and equipment		Provides own materials, tools and equipment
	Typically works for one employer		Works with multiple clients
	Continuing relationship with the employer		Temporary relationship until project completed
	Employer decides when and how the work will be performed		Decides when and how they will perform the work
	Employer assigns the work to be performed		Decides what work they will do





WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

[Print Fact Sheet](#)

On January 10, 2024, the U.S. Department of Labor published a [final rule](#) Employee or Independent Contractor Classification Under the Fair Labor Standards Act, effective March 11, 2024, revising the Department's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds the Independent Contractor Status Under the Fair Labor Standards Act rule (2021 IC Rule, 86 FR 1168), that was published on January 7, 2021.

Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)

Revised January 2024

<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

For more information about the impact of Workplace Compliance Regulations, please subscribe to my free compliance Newsletter and receive a free compliance gift,

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