

DOL FINAL RULE – INDEPENDENT CONTRACTOR CLASSIFICATIONS – FAIR LABOR STANDARDS ACT

I. BACKGROUND

The U.S. Department of Labor (“DOL”) has announced a final rule that provides guidance on whether a worker is an employee or independent contractor under the Fair Labor Standards Act. The misclassification of employees as independent contractors may deny workers minimum wage, overtime pay and other protections. **The DOL’s final rule took effect on March 11, 2024.**

II. FINAL RULE-TOTALITY-OF-THE-CIRCUMSTANCES ANALYSIS

The DOL’s new rule aligns with judicial precedent by returning to the totality-of-the-circumstances analysis. Under this analysis, no factor has predetermined weight in assessing a worker’s economic dependence.

The new rule further identifies the following factors to be considered in determining whether a worker is properly classified as an employee or independent contractor:

1. **Opportunity for profit or loss depending on managerial skill:** Whether the worker has opportunities for profit or loss based on managerial skill that affect the worker’s economic success or failure in performing the work.
 2. **Investments by the worker and potential employer:** Whether any investments by the worker are capital or entrepreneurial in nature.
 3. **Degree of permanence of the work relationship:** Whether the work relationship is indefinite in duration, continuous, or exclusive of work for other employers.
 4. **Nature and degree of control:** Whether the employer has control over the worker’s work and the economic aspects of the working relationship.
 5. **Extent to which the work performed is an integral part of the employer’s business:** Whether the work performed is an integral part of the employer’s business.
 6. **Skill and initiative:** Whether the worker uses specialized skills to perform the work, and whether those skills contributed to business-like initiative.
 7. **Additional factors/factors relevant to the ultimate question of whether the workers are economically dependent on the employer for work or in business for themselves.**
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III. WORKERS CAN NOT WAIVE EMPLOYEE STATUS

The FLSA does not allow a worker to voluntarily waive employee status and choose to be classified as an independent contractor. Under the FLSA, a worker is an employee and not an independent contractor if they are economically dependent on the employer for work. If a worker is an employee under the FLSA, they cannot waive FLSA-protected rights, such as minimum wage or overtime pay.

IV. IMPACT ON OTHER WORKER CLASSIFICATION LAWS

The final rule only revises the DOL's interpretation of worker classification under the FLSA. As a result, other laws that utilize different standards for employee classification are not affected. For example, according to the DOL:

“[T]he Internal Revenue Code and the National Labor Relations Act have different statutory language and judicial precedent governing the distinction between employees and independent contractors, and those laws are interpreted and enforced by different federal agencies. Similarly, this rule has no effect on those state wage-and-hour laws which use an ‘ABC’ test, such as California or New Jersey. 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.”

V. CONCLUSION

Businesses using independent contractors should review their worker classifications to determine whether they are consistent with the DOL's final rule.

The foregoing Compliance Update is for informational purposes only, and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.