



New Department of Labor guidelines on how to determine if a worker is an independent contractor go into effect March 11. OAN FILE PHOTO



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# A test of independence

## U.S. Department of Labor issues new guidance for the ever-evolving 'employee or independent contractor?' determination

**O**N JANUARY 10, the U.S. Department of Labor (Labor Department) published new guidance for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA).

### Why it matters

As most employers are aware, the misclassification of an employee can expose the business to liability, including employee wage claims, fines, penalties, and back taxes. Depending on the size of your business, misclassifying employees could also lead to a class action and damage to your public reputation. Uber and FedEx are two well-known examples.

According to the Labor Department, the new rule, effective March 11, will reduce the risk of misclassifying an employee by providing a more streamlined analysis.

A brief description of the rule is described below, but please note that

the final rule only revises the Labor Department interpretation of an employee or independent contractor under FLSA; The final rule has no effect on other laws, state, federal, or local. However, states will likely look to the Labor Department guidance.

### Determining factors

Consistent with previous interpretations, the new final rule affirms the concept that a worker is not an independent contractor if they are, as a matter of economic reality, dependent on the employer for work. Ultimately, when determining whether a worker is an employee or an independent contractor under FLSA, courts consider the following factors:

1. 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. Nature and degree of control;
5. Extent to which the work performed is an integral part of the potential employer's business; and,
6. Skill and initiative.

As to changes from the previous version, the new final rule considers six factors instead of five and provides addi-

tional context to some of the factors. For example, when determining the nature and degree of control a business has over a worker, the new rule provides helpful guidance as to how scheduling, supervision, price setting, and the ability to work for another should be considered.

### Consistency

Though the nature of every employment relationship is different, the Labor Department hopes that the new final rule will provide more consistency for businesses that engage with individuals who are in business for themselves and ultimately reduce the risk of employees being misclassified as independent contractors.

Employers always should be mindful of the subtle changes in the independent contractor vs. employee analysis to protect themselves from future liability.

Agricultural employers using farm labor contractors should be careful to verify that labor contractors are also observing the rules and properly paying employees. Under some circumstances, if labor contractors fail to pay their employees properly, agricultural employers may be liable for any unpaid or improperly paid wages and any associated penalties. ☺