

US DOL's Independent Contractor Rule: What it Means for Workers

On January 9, 2024, the U.S. Department of Labor (DOL) published a Rule explaining how it determines whether a worker is an independent contractor or employee under the Fair Labor Standards Act (FLSA). This fact sheet explains the difference between employees and independent contractors, what the Rule does and says, and how it may impact workers.

Independent Contractors (ICs) have risks & responsibilities. Employees have rights & protections.

ICs run their own businesses. They decide what prices to charge and negotiate contracts with their clients or customers. They decide how to market their goods or services and what business investments to make. ICs earn profits or suffer losses. They are responsible for their own tax contributions. And they lack the benefits, protections, and rights of employees.

Employees depend on another person or business for work. Their employer generally determines their pay and terms and conditions of work. Employees have a right to a minimum wage and overtime, the right to a discrimination-free and harassment-free workplace, the right to join a union and collectively bargain, and the right to a safe and healthy workplace. Employees also have workers' compensation and unemployment insurance. ICs lack these bedrock rights and protections.

What does the DOL's Rule do?

The Rule provides guidance for determining who is an IC (and therefore *not* a protected employee) under the FLSA. It affects *only coverage under the FLSA* —i.e., the right to a minimum wage of \$7.25 per hour, and overtime after 40 hours per week.

When a worker files a complaint with DOL for unpaid wages due under the FLSA, the DOL will apply the Rule to answer any questions about whether the worker was a protected employee or exempt IC. The Rule also helps educate businesses and workers on the scope of the FLSA.

Workers who believe their boss denied them earned minimum or overtime wages may file a complaint with USDOL. For instructions, see: <https://www.dol.gov/agencies/whd/contact/complaints>.

The FLSA

Congress passed the FLSA to eliminate “conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹ It sets a national wage floor, entitles covered employees to overtime pay, and prohibits child labor.

The FLSA defines “employ” to include “to suffer or permit to work.”² Congress deliberately adopted very broad definitions to eliminate substandard conditions and expand accountability.³ This very broad definition means that Congress intended that most workers should be covered by our federal minimum wage, overtime, and child labor protections.

While FLSA coverage is broad, it does not apply to independent contractors. The Rule helps determine who does not qualify for the law's protections because they are independent contractors rather than employees. It uses several factors to decide whether a worker is running their own business or is dependent on finding work in the business of another.⁴

The Rule

The Rule adopts factors that courts have relied on for decades, known as the “economic realities” factors. It considers the whole relationship between the worker and potential employer to determine whether the worker is economically dependent on the putative employer or instead operating an independent business. The Rule highlights 6 factors and how each is analyzed:

1. **Opportunity for profit or loss depending on managerial skill.** This factor will weigh in favor of employee status for workers who “simply provide their labor, and/or are paid hourly, by piece rate, or flat rate.”⁵ Managerial skill means having the power to make independent business decisions, not depending on bonuses or penalties determined by another. *A decision to work more hours (when paid hourly) or work more jobs (when paid a fixed rate per job) where another person/entity controls access to those jobs or hours is not a reflection of managerial skill.*

The exercise of true managerial skill means more than technical proficiency at a particular job, and this factor considers the degree to which any ‘profit’ or ‘loss’ is determined by the putative employer. Examples of facts that suggest managerial skill that would weigh in favor of IC status include:

- meaningfully negotiating the charge, price, or pay for the services or goods offered;
- making business decisions on marketing or advertising;
- making decisions on whether or which materials or equipment to purchase, and whether to hire others;
- deciding whether to accept a particular job offer and the order or time in which to perform that job free from interference by the putative employer.

2. **Investments by the worker and the employer.** This factor helps distinguish between real business *investments* and a corporate or business plan to shift costs onto the workforce. *Only where a worker makes investments that are capital or entrepreneurial in nature (meaning investments that would support a business) should this factor weigh in favor of independent contractor status.* Costs borne by a worker to perform their job as required by a particular employer, such as purchasing tools, equipment, or using a personal car, and any other costs an employer unilaterally imposes on a worker, are *not* capital or entrepreneurial investments. This factor overlaps somewhat with the first factor, in that true investment decisions reflect the use of managerial skill impacting profits or losses of a business.

A worker’s investment is also considered relative to the alleged employer’s investment; if the alleged employer is making substantially more business investments than the worker, that would indicate the worker is an employee.

3. **Degree of permanence of the work relationship.** This factor considers whether a work relationship is ongoing: a relationship of indefinite duration suggests employee status. Where the work has a definite end, such as a project, or where the work is non-exclusive or sporadic, this factor weighs in favor of IC status. *However, if a worker’s sporadic, non-permanent relationship with an employer is due to the nature of the job (such as seasonal or temporary work), rather than the worker’s independent business decision, this factor weighs toward employee status.*
4. **Nature and degree of control.** This factor considers the alleged employer’s power to control, even if not exercised, both how the worker performs the work and over the economic aspects of the parties’ relationship. Unless a worker has a great deal of control over the work and power to negotiate the economics of the relationship, they are likely an employee. Aspects of control include:
 - whether the employer can supervise the work (including through *surveillance technology*);

- whether the employer can control economic aspects of the work relationship, such as **setting the worker's rate or prices** and marketing the services or goods provided by the worker;
- whether the employer can set the worker's schedule (though **a worker's scheduling flexibility, without other forms of control such as ability to set pay, does not suggest a worker is an independent contractor**)
- **not as relevant as ability to set rates/prices**); and
- whether the employer can limit the worker's ability to work for others, **including by placing demands on time that make it functionally impossible to work for others or work when they choose.**

5. **Whether the work performed is an integral part of the employer's business.** This factor considers whether the worker's job is central and necessary to the potential employer's business. If so, the factor weighs in favor of employee status.
- Examples: a janitor working for a janitorial business, a tomato picker working for a farm, and a food delivery worker working for an app-based delivery company are all doing the central work of the employer's business, which weighs toward employee status.
 - However, a janitor providing cleaning services for an advertising firm or an accountant providing payroll services to a farm are not doing the central work of the business.
6. **Skill and initiative.** This factor considers **whether the work requires special skills and whether those skills help the worker exercise business-like initiative.** If the worker does not use specialized skills in performing the work or is dependent on training from the employer to perform the work, this factor suggests the worker is an employee. If the worker has specialized skills *but* does not use those skills to build an independent business, then this would suggest the worker is an employee.

Example: "A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, **the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative.** The skill and initiative factor indicates employee status."⁶

Expanded FAQs about the Rule

What does this Rule do?

This Rule will guide the DOL in determining whether a worker is an employee under the FLSA, and therefore, whether their hiring entity (employer) is required to pay federal minimum and overtime wages due under the FLSA. It also educates businesses and workers on when businesses must comply with the FLSA because their workers are employees (and not independent contractors running their own businesses).

Here's an example. A janitorial franchisee believes he is misclassified as an independent contractor. The janitorial franchisor (the alleged employer) finds the clients, negotiates the most important terms of the cleaning services (including what the client pays and when the cleaning gets done), and assigns the franchisee to these clients. The franchisee realizes that, after accounting for all his business expenses, he earns about \$5 per hour – far less than the federal minimum wage. He files a complaint with the DOL alleging that the franchisor is violating the FLSA.

When the DOL investigates the franchisee's complaint, it must make an initial determination of whether the franchisee is properly classified as an independent contractor or is really an employee of the franchisor. To make that determination, the DOL will assess the franchisee's working conditions under the "economic realities" factors laid out in the Rule.

If the DOL determines that the franchisee is a legitimate independent business, then the FLSA does not apply, because independent contractors are not covered. If the DOL determines that the franchisee is an employee who has been misclassified as an independent contractor, then it must determine whether the franchisor violated the FLSA by failing to pay minimum or overtime wages. If it determines the franchisor violated the law, it can bring an enforcement action against the franchisor to recoup wages for the worker and to impose penalties on the franchisor.

Is this Rule a positive development for workers?

Yes! As discussed above, the Rule clarifies how to apply the "economic realities" factors analysis with an eye toward determining whether a worker is in business for themselves or working for someone else.

For example, in analyzing factor 1 (opportunity for profit or loss depending on managerial skill), ***the Rule clarifies that a worker's ability to work longer or harder (working more hours or picking up more jobs) is not, by itself, a reflection of managerial skill, so does not suggest the worker is running an independent business.***

In analyzing factor 2 (capital investments by the worker and employer), ***the Rule states that a worker's use of their personal vehicle (or leasing a personal vehicle when required by the employer) to perform the work is not the type of entrepreneurial or capital investment that would suggest independent contractor status.***

In analyzing factor 3 (degree and extent of control), the Rule clarifies that that all of ways that an employer can control a worker must be considered, including how an employer may use technology to surveil, assign, or discipline workers. Furthermore, while the Rule says that whether an employer sets a work's schedule is one aspect of control, it is a minor one compared to other types of control, like ability to set wages and prices, which are stronger indicators of whether someone is running their own business. ***This means that scheduling flexibility alone does not indicate that a worker is free from the employer's control and thus is an independent contractor.***

Why does this Rule matter?

Proper application of the Rule will reveal that most workers are employees under the FLSA. This means the Rule will appropriately ensure – as Congress intended – that covered workers are entitled to federal minimum wage and overtime wages.

This is a big deal. Studies have found that many workers currently classified as independent contractors make less than minimum wage. For example, a **recent survey** of app-based workers (who are classified as independent contractors) found that 14 percent make less than the federal minimum wage. Similarly, a **recent report** by PolicyLink and Rideshare Drivers United found that app-based drivers average about \$6.20 per hour in pay. If those workers are found to be improperly classified under the DOL Rule, then the DOL can bring enforcement actions to award backpay to those workers both for unpaid minimum wages and overtime.

Which workers and industries will this Rule impact?

This Rule does not target a particular industry or occupation. It targets an illegal employer practice (misclassification) when that practice results in workers earning less than the federal minimum wage or their overtime wage. However, because misclassification is especially prevalent in low-wage, labor-intensive occupations where people of color and immigrants are overrepresented, including janitorial services, trucking and delivery services, and homecare and other domestic work, the Rule may improve compliance with the FLSA for workers in these occupations. This means the Rule could help combat misclassification and restore minimum wage and overtime protections for the workers who need these protections most.

I believe I am misclassified as an independent contractor. Does this Rule mean that my employer will reclassify me as an employee?

Possibly. If you file a complaint, the DOL will determine whether you are misclassified, and whether your employer failed to pay minimum or overtime wages, and may order your employer to pay back wages and abide by minimum wage and overtime protections going forward. However, businesses may also apply the Rule themselves. If they conclude that their workers are misclassified, businesses may reclassify workers as employees rather than risk an enforcement action by the DOL.

Other businesses may decide not to reclassify their workers, waiting to see if the DOL brings an enforcement action.

Therefore, it is critical that workers file complaints with the DOL. And we (workers and worker advocates alike) must also demand that Congress increase the DOL's budget, so that the DOL has the resources to do robust and comprehensive enforcement that will make this Rule meaningful for workers.

Does this Rule impact state and local laws, like California's AB5 and Prop 22, or campaigns to broaden access to state employment protections?

This Rule *only* determines whether someone is an employee or an independent contractor under the federal Fair Labor Standards Act. It does *not* determine whether someone is an employee or an independent contractor under state and local laws that provide rights and protections for employees. Such state laws include state minimum wage laws (31 states have laws that set a higher minimum wage than the federal minimum wage), state paid leave laws (11 states establish a right to paid family or medical leave for employees), as well as state laws that provide benefits to employees, like unemployment insurance and workers' compensation. State legislatures, courts, and administrative agencies make these determinations.

However, the Rule *may* have persuasive power, meaning that state courts and state administrative agencies *could* look to the DOL's new Rule for guidance in interpreting who is an employee and who is an independent contractor under state laws.

Do states still need to pass new laws to combat misclassification or is the DOL independent contractor Rule enough?

While the DOL independent contractor Rule is an important first step, ***it is critical that workers and their representatives continue to advocate for stronger laws to combat misclassification at the state and local levels too.*** Several of the most vital employment rights and protections exist at the state and local level, including state laws that set a minimum wage higher than the federal minimum wage of \$7.25 per hour, state laws that provide a right to paid family and medical leave for employees, and state laws that require employers to provide information on pay and deductions to combat wage theft and promote pay transparency. State laws also create vital benefits programs for employees, including workers' compensation, unemployment insurance, and disability insurance. Stronger state laws that combat misclassification will ensure that all people working for someone else can access these critical state employment rights, protections and benefits.

I believe I am misclassified as an independent contractor, and my hourly wage is about \$13 per hour after accounting for my expenses. My state has a \$15 minimum wage. Can I get the DOL to bring an enforcement action for violation of my state's minimum wage law?

No. The DOL enforces the federal Fair Labor Standards Act, which sets the federal minimum wage (\$7.25) and overtime requirements of time-and-a-half pay when a covered worker works more than 40 hours per week. The DOL does not enforce state laws, such as state laws that set higher minimum wages. You should file a complaint with your state labor agency.

Does this Rule determine whether someone is an employee or an independent contractor under other federal laws, like the National Labor Relations Act (which establishes the right to join a union and collectively bargain) or Title VII (which prohibits discrimination based on race, color, religion, gender and national origin)?

No. This Rule *only* determines whether someone is an employee or an independent contractor under the Fair Labor Standards Act. It does *not* determine coverage under other federal laws.

Why isn't the DOL using the ABC test to determine who is an employee and who is an independent contractor?

The ABC test, which is an employee/independent contractor test used in many states' laws, starts with a presumption that all workers are employees. The hiring entity (potential employer) can rebut this presumption only if it shows that each of the following three conditions are met: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. The ABC test is arguably a clearer and simpler standard for determining who is an employee and who is an independent contractor than the economic realities test.

However, the DOL explained that it believes it is bound to follow Supreme Court precedent interpreting the FLSA. The Supreme Court and federal appellate courts have applied the economic realities test to determine whether a worker is an employee or an independent contractor under the FLSA. The DOL believes that Congress would need to pass legislation amending the FLSA and stating that the ABC test is the applicable standard in order for it to apply it.

I believe I have been misclassified as an independent contractor, and I earn less than the federal minimum wage after accounting for work expenses. How can I file a complaint with the DOL?

You can either file a complaint online [here](#) or call 1-866 4 US WAGE (1-866-487-9243). You should provide your name, contact information, the name of the company where you work or worked, the location and phone number for the company, a manager or owner's name at the company, the type of work you do or did, how and when you were paid and how frequently (for example, by cash or check on Fridays), and why you think federal law was violated. You should keep all records relating to

your employment, including pay stubs, personal records of hours worked, and any other information about your employer's pay practices that may be helpful to the investigation.

Complaints are confidential. It is illegal for your employer to retaliate against you for filing a complaint.

¹ 29 U.S.C. § 202.

² 29 U.S.C. § 203(g). "Employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). ² "Employee" at 29 U.S.C. section 203(e) references the other two definitions.

³ The definitions promote accountability for businesses that insert contractors in their business. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) ("FLSA was designed to defeat rather than implement contractual arrangements."). See also *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract"). The "suffer or permit" language from the child labor laws imposed liability if an employer had the opportunity to detect work being performed illegally and the ability to prevent it from occurring. See, e.g., *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29-31 (N.Y. 1918).

⁴ See, e.g., *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008).

⁵ 87 Fed. Reg. 62218, 62238-39.

⁶ 89 Fed. Reg. 1638.