

# 2024 Updated Independent Contractor Test: better or worse?

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The Department of Labor (DOL) has issued new regulations for determining employee/independent contractor classification under the Fair Labor Standards Act (FLSA). The new regulations took effect on March 11, 2024. So, this ends the confusion. If you are a masochist, you can read the entire law and documentation in the federal register [here](#).

Well, not really but it does return us to the confusion that existed (and we somehow learned to live with) prior to 2021.

As every HR professional knows, the classification of a worker as an employee or independent contractor is critical to the organization. Generally, the FLSA protections, recordkeeping, and reporting requirements apply to non-exempt employees. The requirements of the FLSA do not apply to independent contractors.

In today's healthcare environment, almost every healthcare organization utilizes both. There is a lot of liability for an organization misclassifying these workers.

## How we got here

Since the 1940s, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA.

The main issue is whether, as a **matter of economic reality**, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor).

Historically, a totality-of-the-circumstances approach was used by the DOL and courts. This approach considered multiple factors to determine whether a worker is an employee or an independent contractor, with no factor or factors having predetermined weight.

## 2021 changes

In January 2021, the Department published a rule titled “Independent Contractor Status Under the Fair Labor Standards Act” (2021 IC Rule).

In short, this rule identified five factors in determining worker status. Two of the five carried the greatest weight and designated as core factors (nature and degree of control over the work, and worker opportunity for profit and loss).

The 2021 IC Rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the worker’s accurate classification.

The 2021 IC Rule also identified three non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production. The 2021 IC Rule stated that it was “highly unlikely” that these three non-core factors could outweigh the combined probative value of the two core factors.

Because of widespread confusion, the DOL attempted to revise and then withdraw the 2021 rule during that year. However, a court challenge vacated the order to withdraw. So, the rule has been in effect until now.

## **The New (old) ruling**

The new ruling returns the analysis of worker status to an economic realities test-similar to what was in effect prior to the 2021 ruling. This economic realities analysis consider the impact of six factors. It considers a “totality of the circumstances” in making the determination with no one factor carrying more weight than any other.

## **The Six Factors**

### **1. Opportunity for Profit or Loss Depending on Managerial Skill**

Does the worker exercise managerial skill that affects his/her success or failure in performing the work?

Considerations include: ability to negotiate the charge or pay for the work provided, accept or decline jobs or choose the order and/or time in which the jobs are performed, engages in marketing, advertising, or other efforts to expand their business or secure more work, make decisions to hire others, purchase materials and equipment, and/or rent space.

## **2. Investments by the Worker and the Potential Employer**

Are any investments by a worker capital or entrepreneurial in nature?

Factors considered include investments entrepreneurial in nature such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach." The Department also proposed that "the worker's investments should be considered on a relative basis with the employer's investments in its overall business."

## **3. Degree of Permanence of the Work Relationship**

Is the work permanent/indefinite or defined/sporadic?

Considerations include: duration and permanence of work relationship, exclusivity, project based, sporadic, ability to market to multiple entities

## **4. Nature and Degree of Control**

How much control does the worker have of key aspects of performance of the work?

Considerations include: setting schedules, selecting projects, controlling workloads, setting prices, and affecting the worker's ability to work for others.

## **5. Extent to Which the Work Performed Is an Integral Part**

## **of the Potential Employer's Business**

Is the work performed an integral part of the employer's business?

Considerations include: whether the work is "critical, necessary, or central to the employer's principal business"

### **6. Skill and Initiative**

Does the worker use specialized skill to perform the work and do those skills contribute to business-like initiative?

Considerations include: whether the worker brings independent specialized skills in performing the work or whether the worker is dependent upon training from the employer to perform work. Specialized skills need to be evident in connections with business-like initiative to determine worker is independent contractor.

## **Almost full circle**

There you have. We are almost back to where we started with a few minor modifications. The good news is that we return to an economic realities model with a totality of circumstances approach. The bad news is there is still a lot of wiggle room for subjective determinations when someone wants a certain outcome. These factors need to be objectively applied (as much as possible) as there are legal and costly ramifications for misclassifications.