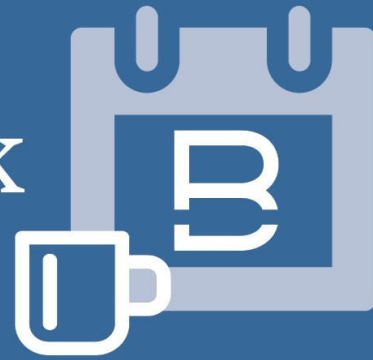


# The Work Week

Bassford Remele Employment Practice Group



**February 5, 2024**

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## **Department of Labor Issues Final Rule on Determining Independent Contractor Status**

[Bryce D. Riddle](#)

On January 9, 2024, the United States Department of Labor (“DOL”) unveiled details about its final rule on the classification of independent contractors under the Fair Labor Standards Act (“FLSA”). Subsequently, on January 10, 2024, the DOL published the rule itself. The purpose of this new regulation is to align the regulatory framework with the FLSA and judicial precedent interpreting the law.

The determination of whether an individual should be categorized as an independent contractor or an employee is a complex process that has been the focus of prolonged debate by courts and administrative agencies, with standards evolving over time. The outcome of this classification has significant implications for an employer’s workforce management. For example, independent contractors lack protection under the FLSA, which governs minimum wage, overtime obligations, and recordkeeping requirements. Additionally, employers are not obligated to withhold taxes on payments to independent contractors, and such contractors typically do not receive the same benefits as employees, including health-care coverage. Thus, misclassification poses a substantial liability risk for employers, including statutory penalties under federal and state law.

Before 2021, the DOL addressed the independent contractor/employee distinction through informal guidance, outlining seven factors for consideration. The 2021 rule, implemented during the Trump administration, established the “economic realities test,” a multi-factor assessment focusing on the worker’s economic dependence on the employer. When the Biden administration took office, it initially delayed and later attempted to withdraw the 2021 rule, but a court ruling in March 2022 reinstated it retroactively to March 2021. The ruling was appealed, but the appeal was halted when the DOL issued a new proposed rule in October 2022.

The new rule reverts to a totality-of-the-circumstances analysis with six identified factors, none carrying greater weight than another. The six factors are as follows:

1. The worker's opportunity for profit or loss. In analyzing this factor, the regulation identifies that the following facts may be relevant:
  - a. Whether the worker has the authority to establish or meaningfully negotiate the fee or compensation for the services rendered;
  - b. Whether the worker has discretion to accept or reject assignments and can determine the sequence and timing of job tasks;
  - c. Whether the worker engages in marketing, advertising, or other initiatives to grow their business or obtain additional work; and
  - d. Whether the worker makes hiring decisions, procuring materials and equipment, and/or renting workspace.

If a worker has no opportunity for profit or loss, this factor suggests that the worker is an employee.

2. The financial stake and nature of any resources the worker and employer has invested in the work, with particular attention paid to whether investments by a worker are capital or entrepreneurial in nature. Investments that "generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work reducing costs, or extending market reach" favor an independent contractor classification.
3. The degree of permanence of the relationship. Indefinite, continuous, or exclusive work for others favors an employee classification, while definite, non-exclusive, project-based, or sporadic work favors an independent contractor classification. The fact that a worker may be in business for themselves and market their services/labor to multiple entities also favors an independent contractor classification.
4. The degree of control an employer has over the person's work. Factors considered here include whether a potential employer:
  - a. Sets the worker's schedule;
  - b. Supervises the performance of work;
  - c. Retains the authority to oversee or take corrective action with respect to workers;
  - d. Uses technological means to supervise the performance of the work;
  - e. Explicitly limits the worker's ability to work for others; and
  - f. Imposes requirements or limitations on workers that hinder them from engaging in alternate employment or selecting their preferred work hours.
5. The extent to which the work is "integral" to the employer's business. If a worker provides services crucial, essential, or central to the primary business of the potential employer, this factor leans towards an employment relationship. Conversely, if the services rendered are not critical, necessary, or central to the potential employer's principal business, this factor favors an independent contractor relationship.
6. The worker's skill or initiative. If a worker does not use specialized skills in performance of the work, this factor favors an employee classification.

The regulation also states that additional factors may be pertinent to determining whether the worker qualifies as an employee or an independent contractor under the FLSA, particularly where such factors go to the overall question of economic dependence.

The impact of the new rule on pending litigation related to the 2021 rule remains unclear. Employers should carefully review the new rule, anticipating its effective date of March 11, 2024, and assess if any changes are necessary in the classification of workers for FLSA purposes before this date.

At Bassford Remele, we have extensive experience advising employers on new and changing laws, regulations, and ordinances from the federal level to the local level. Please reach out to the [Employment Law](#) practice group for guidance, questions, or further assistance. We are here to help.

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