

# News Brief

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## Biden Administration Announces Proposal of Independent Contractor Rule

On Oct. 11, 2022, the U.S. Department of Labor (DOL) [announced](#) its rule proposal for classifying independent contractors. The proposed rule would implement a test that the DOL will use to determine whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA). The proposed rule would formally rescind the current standard created by the Trump administration and would assist with employee classification. This is the Biden administration's second attempt to reverse the current standard, which it believes leaves workers vulnerable to misclassification.

### What Will the Proposed Rule Address?

The DOL's current rule employs factors that must be considered when classifying workers. These factors are known as the economic realities test. Two of the factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—are considered "core factors," having more probative value and carrying greater weight than the other factors. To answer the ultimate question of whether a worker is economically dependent on their employer, the proposed rule would return the test to a multifactor totality-of-the-circumstances analysis. This means no factor would have a predetermined weight.

According to the DOL, the proposed rule aligns the department's analysis for determining worker classification with current judicial precedent and the FLSA's text and purpose. When determining a worker's status, the proposed rule would have the following factors weighed equally:

- The amount of control a worker has over how they perform their job
- The worker's opportunity to increase their earnings by offering new services
- The amount of skill required for the work
- The degree of permanence of the working relationship
- The worker's investment in equipment or tools
- The extent to which the work performed is integral to the employer's business

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**“While independent contractors have an important role in our economy, we have seen in many cases that employers misclassify their employees as independent contractors. Misclassification deprives workers of their federal labor protections, including their right to be paid their full, legally earned wages.”**

**-Labor Secretary Marty Walsh**

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Workers determined to be economically dependent on an employer would most likely be considered employees. Employees are entitled to certain benefits and protections that employers are not required to provide independent contractors, such as minimum wage, overtime, workers' compensation and unemployment benefits.

The proposed rule applies only to laws the DOL enforces, such as the FLSA. Other federal agencies, like the IRS, and states can set their own criteria for determining worker classification. However, many employers, regulators and judges will likely consider the DOL's rule when making decisions regarding worker classification. This proposed rule is generally considered worker-friendly and, as such, may greatly impact gig companies and related service providers, which classify the majority of their workers as independent contractors.

## **What's Next?**

The DOL will formally publish the proposed rule in the Federal Register on Oct. 13, 2022; 45 days are provided for public comment. Subsequently, the department will review comments and determine whether to move forward with a final rule.

Even after the DOL completes the notice and comment period, it will likely be some time before this proposed rule becomes final, as the department's rule is likely to be legally challenged—similar to the administration's prior efforts. Employers are not obligated to change how they classify employees until the DOL's proposed rule becomes final. However, employers who may potentially be impacted will want to follow the DOL's rule-making process closely.

Employers should stay tuned for updates from Hebert Insurance Group, Inc. but otherwise operate as usual. We will keep you apprised of any notable changes.

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