



What You Need To Know About
the DOL's New Independent
Contractor Rule

Ohio Healthcare Association Webinar
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Brian J. Moore
Esha S. Simon
Dinsmore & Shohl LLP
Brian.Moore@dinsmore.com
Esha.Simon@dinsmore.com

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RESPONSIBLE ATTORNEY: Brian J. Moore 02/07/2024



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OVERVIEW OF PRESENTATION

- Overview of Employees vs. Independent Contractors + Joint Employer Relationships (including discussion of recently revised joint employer rule under the NLRA)
- Review of DOL's Final Rule on Independent Contractors
- DOL's Stated Goals vs. Practical Effects
- Challenges to the DOL's Rule
- Implications on Healthcare Providers
- Other Independent Contractor Tests
- Takeaways & Best Practices

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Types of Relationships Generally

- Employees
- Independent Contractors
- Joint Employers
- Various Definitions and Tests Under Various Laws Makes It Confusing
- Cheat Sheet Tips / Executive Summary

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Presentation Title

Executive Summary

According to the DOL: "As used in this rule, the term 'independent contractor' refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. This rule is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves."

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DOL'S Final Rule on Employee or Independent Contractor Classification



- On January 9, 2024, the DOL announced the final rule regarding when employers can classify workers as independent contractors under federal labor law.
- **The rule will take effect on March 11, 2024.**

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DOL'S Final Rule on Employee or Independent Contractor Classification

- The DOL first proposed the rule in October of 2022.
- For the full announcement regarding the rule, please visit:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>.

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Context of the Rule: Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") establishes minimum wage, overtime pay, and record-keeping standards affecting employees in the private sector and in Federal, State, and local governments. Covered non-exempt workers are entitled to a minimum wage and overtime at a rate of one and one-half times the regular rate of pay for hours over 40 in a workweek.



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Defined Terms Under the Fair Labor Standards Act

- The FLSA does not define the term "independent contractor."
- The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."
- "Employee" is defined as "any individual employed by an employer."
- "Employ" means "to suffer or permit to work."
- The Department of Labor and Courts have interpreted the "suffer or permit" standard to require an evaluation of the extent of the worker's economic dependence on the potential employer.

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The 2021 Rule

- On January 7, 2021, the DOL published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act."
- The 2021 rule departed from the consistent, longstanding adoption and application of the economic reality test to determine whether a worker is an employee or independent contractor under the FLSA.
- The DOL explained the purpose was to establish a streamlined economic reality test.
- Under the 2021 rule, there were five economic reality factors to guide the inquiry.

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The Five Factors of the 2021 Rule

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the worker and the potential employer;
- Whether the work is part of an integrated unit of production;
- Nature and degree of control over the work
- Worker's opportunity for profit or loss:



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The Core Factors of the 2021 Rule

- Two of the five factors were identified as "core factors."
 - Nature and degree of control over the work
 - Worker's opportunity for profit or loss
- The 2021 rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the accurate classification.
- The rule indicated that it was highly unlikely that the three non-core factors could outweigh the combined probative value of the two core factors.

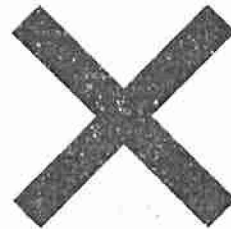


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The 2021 Rule Continued

- The rule never went into effect.
- The DOL explained that it believed retaining the 2021 rule would have a confusing and disruptive effect on workers and businesses due to the departure from case law and application of the multifactor economic reality test.
- The DOL feared that because of the departure from legal precedent, it was unclear whether courts would adopt the analysis which would result in more uncertainty, ultimately negatively affecting workers and businesses.



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The DOL's Final Rule

- This rule is a return to a totality-of-the-circumstances analysis.
- Economic reality factors are not assigned a predetermined weight.
- Each factor is given full consideration.



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The Rule's Six Factor Test

1. Worker's opportunity for profit or loss;
2. Investments made by the worker and the potential employer;
3. The degree of permanence of the work relationship;
4. The degree of control an employer has over the work;
5. The extent to which work performed is integral to the employer's business; and
6. The use of a worker's skill and initiative.



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DOL's intended goals (according to the DOL)

- Consistency with FLSA.
- Reduces risk of misclassification.
- Provides consistent approach for businesses that engage with individuals who are in business for themselves.

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Commentary and the DOL's Response

- Comments regarding the 2021 rule being better suited to the modern economy.
- The DOL believes that modern work arrangements utilizing technology are best addressed under the totality-of-the-circumstances test by offering a flexible, comprehensive, and appropriately nuanced approach.
- The DOL indicates that the Final rule accounts for continued social changes by not presuming which aspects of the working relationship are most probative.

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Practical Effects of the New Rule

- The DOL rule is generally more favorable to employees.
- The DOL's Rule makes it more difficult for businesses to classify workers as independent contractors by emphasizing whether a worker is economically dependent on the potential employer for work or in business for him or herself.
- Employers who misclassify workers can be liable for lost wage damages, unpaid leave, attorneys' fees and costs, and other damages.
- The DOL rule has no impact on federal, state, or local laws that have distinct criteria for worker classification.

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Challenges to the DOL's Rule



- *Coalition for Workforce Innovation, et al. v. Walsh, et al.*, No. 1:21-cv-00130 (E.D. Tex. Mar. 26, 2021), No. 22-40316 (5th Cir. May 16, 2022).
 - Originally filed in 2021 challenging the Biden administration's promulgated rule that withdrew a Trump administration rule. TX federal court temporarily reinstated the Trump Rule. That ruling was stayed pending the DOL's appeal to the Fifth Circuit. Now, the coalition has tried to lift the stay rather than initiating a new challenge.

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Challenges to the DOL's Rule

- *Warren, et al. v. U.S. Dep't of Labor, et al.*, No. 2:24-cv-00007 (N.D. Ga. Jan. 16, 2024).



- Freelance writers allege that the new rule forces them to alter their business practices and incur more costs to remain independent. They claim it could cause them to lose business because of uncertainty and risk of liability for would-be employers.

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Implications on Healthcare

- Many healthcare providers such as nurses and home health aides work part time for multiple staffing agencies.
- Staffing agencies historically have argued that such providers were independent contractors because they could decide to accept short-term jobs or not and the staffing company did not control details of their work.
- Businesses will now need to look at the economic reality and focus on whether the worker is dependent on the business.



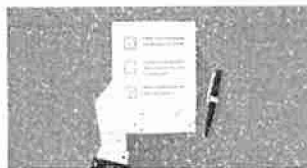
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Other Independent Contractor Tests

Just because you satisfy the DOL test does not get you off the hook under other laws.

- ABC Test
- IRS Test
- Ohio Unemployment / Workers' Compensation Test



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ABC Test Factors

- (1) The extent of the employer's control over the work;
- (2) Whether the work performed is outside of the usual course of the employer's business; and
- (3) Whether the worker customarily engages in this type of work.



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IRS Considerations

According to the IRS, "it is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors." Why does this matter? Generally, you must withhold and deposit income taxes, social security taxes, and Medicare taxes from the wages paid to an employee. Additionally, you must also pay the matching employer portion of social security and Medicare taxes as well as pay unemployment tax on wages paid to an employee. Generally, you do not have to withhold or pay any taxes on payments to independent contractors.

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IRS Independent Contractor Test

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.



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IRS Independent Contractor Test Cont'd.

- (1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- (2) Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- (3) Type of relationships: Are there written contracts or employee type benefits (that is, pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

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IRS Independent Contractor Test Cont'd.

Businesses must weigh all these factors when determining whether a worker is an employee or an independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another. ***The keys are to look at the entire relationship and consider the extent of the right to direct and control the worker.*** [Document the way you made the determination.]

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Ohio Unemployment / Workers' Compensation IC Test

20 Factor Test! Is your head spinning yet?



If 10 are met the worker is an employee.

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Ohio Unemployment / Workers' Compensation IC Test

- (1) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;
- (2) The person is required by the other contracting party to have particular training;
- (3) The person's services are integrated into the regular functioning of the other contracting party;
- (4) The person is required to perform the work personally;

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Ohio Unemployment / Workers' Compensation IC Test

- (5) The person is hired, supervised, or paid by the other contracting party;
- (6) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;
- (7) The person's hours of work are established by the other contracting party;
- (8) The person is required to devote full time to the business of the other contracting party;
- (9) The person is required to perform the work on the premises of the other contracting party;

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Ohio Unemployment / Workers' Compensation IC Test

- (10) The person is required to follow the order of work set by the other contracting party;
- (11) The person is required to make oral or written reports of progress to the other contracting party;
- (12) The person is paid for services on a regular basis such as hourly, weekly, or monthly;
- (13) The person's expenses are paid by the other contracting party;
- (14) The person's tools and materials are furnished by the other contracting party;

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Ohio Unemployment / Workers' Compensation IC Test

- (15) The person is provided with the facilities used to perform services;
- (16) The person does not realize a profit or suffer a loss as a result of the services provided;
- (17) The person is not performing services for a number of employers at the same time;
- (18) The person does not make the same services available to the general public;
- (19) The other contracting party has a right to discharge the person;
- (20) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

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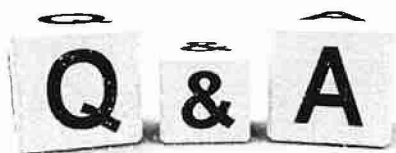
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Best Practices

- Contractor has a business license and is in business for themselves;
- A “business” is the contractor, not an individual (e.g., “Friendly Nursing, LLC”);
- Degree of control;
- Opportunity for individual to make profit or loss;
- Contractor holds their services out to the public;
- Contractor is not beholden to one employer;
- You are not just calling an employee an “independent contractor” in name only.

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Brian J. Moore
Esha S. Simon
Dinsmore & Shohl LLP
Brian.Moore@dinsmore.com
Esha.Simon@dinsmore.com

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