

TYPES NOT MAPPED YET May 05, 2025 | TTR not mapped yet | Howard S. Lavin

What's Old is New Again: Employee vs. Independent Contractor Under the FLSA

On May 1, 2025, in a *Field Assistance Bulletin* (2025 FAB), the U.S. Department of Labor Wage and Hour Division (DOL) advised that it will stop enforcing the Biden-era rule defining the term "independent contractor" under the Fair Labor Standards Act (FLSA) and instead rely on criteria set forth in a DOL 2008 Fact Sheet.

The Biden-era rule (the 2024 Rule) codified the economic realities test and included six non-exhaustive factors:

1. the worker's opportunity for profit or loss;
2. investments by the worker and the potential employer;
3. the degree of permanence of the work relationship;
4. the nature and degree of control the potential employer has over the individual's work;
5. the extent to which the work performed is an integral part of the potential employer's business; and
6. the worker's skill and initiative.

The 2024 Rule replaced a 2021 Trump DOL standard that placed particular emphasis on the workers' control over their work and their opportunity for profit or loss.

Under the 2008 Fact Sheet, the DOL will examine:

1. the extent to which the services rendered are an integral part of the potential employer's business;
2. the permanency of the relationship;
3. the amount of the worker's investment in facilities and equipment;
4. the nature and degree of control by the potential employer;
5. the worker's opportunities for profit and loss;
6. the amount of initiative, judgment, or foresight in open market competition with others required for the success of the worker; and
7. the degree of independent business organization and operation.

The DOL explained that it is reviewing and developing the appropriate standard for determining employee versus independent contractor status under the FLSA. Although the DOL will stop enforcing the 2024 Rule, until further action is taken, the 2024 Rule remains in effect for purposes of private litigation and nothing in the 2025 FAB changes the rights of employees or responsibilities of employers under the FLSA. Stay tuned!

[Read the 2025 FAB here.](#)



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