DOL Issues Final Rule Restoring Streamlined Independent Contractor Test Under the FLSA, FMLA, and MSPA

By: Mark Opara

On November 19, 2026, the U.S. Department of Labor (DOL) announced a final rule (RIN 1235-AA46) revising how employers determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). The final rule rescinds the DOL's 2024 independent contractor rule and replaces it with a streamlined "economic reality" analysis substantially similar to the framework the DOL adopted in 2021. For the first time, the same analysis will also govern worker status under the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

The rule follows a February 27, 2026, proposed rule that drew approximately 16,500 comments. It has been submitted to the Office of the Federal Register and takes effect 60 days after it is published in the Federal Register. The rule does not change classification under the Internal Revenue Code or other federal laws, and it does not preempt state or local law.

Businesses that engage independent contractors, freelancers, consultants, gig and platform workers, owner-operators, or farm labor contractors should begin reviewing those relationships now. Key provisions include:

Two Core Factors Carry the Most Weight

The ultimate question remains whether the worker is, as a matter of economic reality, in business for him- or herself (an independent contractor) or economically dependent on the business for work (an employee). The rule identifies two "core" factors that typically carry greater weight:

- **Nature and degree of control over the work.** Whether the worker, rather than the business, controls key aspects of the work, such as setting the schedule, selecting projects, and working for others, including competitors. Directly or indirectly requiring a worker to work exclusively for the business weighs toward employee status.
- **Opportunity for profit or loss.** Whether the worker can earn profits or incur losses through his or her own initiative (such as managerial skill or business judgment) or management of investments in helpers, equipment, or materials, rather than simply by working more hours.

If both core factors point toward the same classification, the DOL states there is a "substantial likelihood" that the classification is correct. This is not a conclusive presumption: no single factor is determinative, and the remaining factors must still be considered. The DOL rejected an alternative "control-first" test it had floated in the proposed rule, as well as commenter requests for a rebuttable presumption.

Three Additional Factors

The rule also considers (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship, and (3) whether the work is part of an integrated unit of production. These factors

are less probative and are “highly unlikely,” individually or collectively, to outweigh the core factors when those factors align. The rule replaces the 2024 rule’s broader inquiry into whether work is “integral” to the business with the narrower integrated-unit test, and it eliminates the 2024 rule’s comparison of the worker’s investments to the business’s overall investments.

Compliance, Safety, and Quality Requirements

Requiring a worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, or meet contractually agreed deadlines or quality control standards generally does not indicate employer control. The DOL clarified that “legal obligations” include specific state and local requirements and that the health and safety language covers voluntary standards that are not legally required. However, the final rule adds a caution: the nature of a requirement turns on its substance and practical operation, not its label. Detailed instructions governing how, when, or where the work must be performed may indicate employment even if described as promoting safety or quality.

Actual Practice Controls, with 14 Examples

The actual practice of the parties is more relevant than what is contractually or theoretically possible. Contractual disclaimers of control and illusory entrepreneurial opportunities will not prevail over how the relationship actually operates. The rule includes 14 fact-specific examples, including new examples addressing digital platform workers, farm labor contractors, and truck drivers. For example, a delivery app that lets drivers decline work without penalty and work for competitors points toward contractor status, while one that pressures drivers to accept orders with limited pay information and penalizes them for declining points toward employee status. Similarly, a driver leasing a truck who can negotiate rates and has a realistic path to ownership points toward contractor status, while one paid non-negotiable rates under a lease that effectively prevents ownership points toward employee status.

What the Rule Does Not Change

- **Other federal tests.** Classification under federal tax law (including the IRS common-law test) and the National Labor Relations Act is unaffected.
- **State law.** States remain free to apply stricter standards, including the “ABC” tests used in California and other jurisdictions. A worker can be a contractor under the FLSA and an employee under state law.
- The regulation binds DOL investigators, not courts, although the DOL expects courts to find it persuasive. Some courts have used a five- or six-point test for determining whether a worker is an employee or independent contractor, and they may continue to follow that precedent since they are not bound to follow DOL regulations that change from one Administration to the next. However, the Portal-to-Portal Act does provide a good-faith reliance defense for employers that act in good faith and in conformity with and in reliance on written DOL regulations.

Practical Steps

Employers should consider: (1) inventorying current independent contractor relationships, particularly those that are long-term or exclusive; (2) evaluating whether workers actually control their schedules, assignments, and ability to work for others; (3) confirming that contractors have real opportunities to affect their earnings through initiative or investment; (4) reviewing safety, quality, and technology requirements for detailed “how, when, or where” directives that could indicate control; (5) updating independent contractor agreements so they reflect actual practice; (6) separately confirming compliance with applicable state classification tests and tax rules; and (7) documenting the basis for each classification decision.

The rule takes effect 60 days after Federal Register publication. We are available to help you evaluate your contractor relationships under the new framework and applicable state law.

This article is general in nature and does not constitute legal advice. Readers with questions should contact Mark Opara (mopara@sb-kc.com) or their regular Seigfreid Bingham contact at 816-421-4460.