

THE SPARK PLUG

Virginia Automotive Association's Twice Monthly Member Update

DOL Issues Final Rule on Independent Contractors

The U.S. Department of Labor (DOL) has issued a final rule to clarify who is an independent contractor under the Fair Labor Standards Act (FLSA).

The final rule also rescinds a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. The 2021 rule, which is still in effect, made it easier for employers to classify workers as independent contractors, rather than as employees.

The final rule took effect on March 11, 2024.

The final rule returns to a more employee-friendly standard. Under the final rule, employers would use a totality-of-the-circumstances analysis, in which all of the factors do not have a predetermined weight. The six factors the DOL would look at are:

- **Opportunity for profit or loss.** If a worker can set or negotiate his pay, accept or decline jobs, choose the order or time of performance, engage in marketing to expand the business, and hire others, purchase materials or otherwise invest in the business, the worker is more likely to be an independent contractor. However, deciding to do more work or accept more jobs is not indicative of contractor status. It is unclear how the ability to "accept or decline jobs" indicates contractor status, while the decision to "take more jobs" does not.
- **Investments by the worker and the employer.** Investments that are "capital or entrepreneurial" in nature, such as those increasing the worker's ability to do different types or more work, reducing costs or extending market reach are indicative of contractor status. However, investing in tools to do the job indicates employee status. It is not clear how this factor would be applied in jobs that do not require any significant investment beyond a computer and internet connection. This factor also embraces the idea that the worker's level of investment should be compared to the business' investments. The utility of the relative-comparison factor is at best unclear and at worst illogical, as nearly every business will have invested more overall than any individual worker, and it would change the nature of the employment relationship based not on the worker's activities or the work done, but simply on the size of the business engaging the worker.
- **Degree of permanence of the work relationship.** When the working relationship is indefinite or continuous, it indicates employee status. When the work is definite in duration, nonexclusive, project-based, or sporadic "based on" the worker providing services to other businesses, it is indicative of contractor status. When the work is project-based or sporadic for some other reason (such as the nature of the business), then it does not indicate contractor status.
- **Nature and degree of control.** This factor looks at various indicia of control over the work and the economic aspects of the relationship. Importantly, control that is merely reserved, but not exercised, still counts as "control." Also notable is the DOL's statement that control exercised to ensure compliance with "legal obligations, safety standards, or contractual or customer service standards may be indicative of control." Prohibiting a subcontractor from engaging in unlawful discrimination, requiring it to follow safety rules or

flowing down compliance clauses, would therefore appear to undermine contractor status.

- **Extent to which the work performed is an integral part of the employer's business.** This factor weighs in favor of employee status when the work is "critical, necessary, or central to the employer's principal business." It is unclear what role a contractor could play that would not be "critical, necessary, or central to the employer's business." For instance, external accounting and marketing functions, both historically areas for independent contractors, would seem to be both "critical" and "necessary."
- **Skill and initiative.** This factor looks at whether the worker uses "specialized skills" in performing the work, and whether those skills "contribute to business-like initiative." Being highly skilled in the substance of a particular field (such as engineering, journalism, or hospitality) does not seem to be the kind of "skill" contemplated. Rather, skill in running an independent business is what matters.

The DOL then includes a catch-all provision stating that additional factors may be relevant "if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work."

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