

# Employee or Independent Contractor Classification Under the Fair Labor Standards Act

An Overview of the Final Rule  
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U.S. Department of Labor – Wage & Hour Division



Presented by the Association of Bi-State Motor Carriers

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# Fast Facts

- On January 10th, 2024 the U.S. Department of Labor published a new set of rules to evaluate whether or not a worker is an Employee or an Independent Contractor under the Fair Labor Standards Act.
- This new Federal standard will be applied nationwide starting on March 11<sup>th</sup>.
- The new rule replaces the 2021 Independent Contractor rule, a modernized standard which has been used to successfully root out misclassification and does not need to be replaced.
- Each of the 6 new factors will hold equal weight; determinations will be made based on the “totality of the circumstances.”
- The DOL may consider additional factors above and beyond the six factors listed in the new rule.
- Independent Contractors nationwide have objected strongly to the rule change. The new factors are very broad in scope and likely to be applied in a subjective manner. The confusion and lack of clarity over how the rules will be applied make it very risky (and less desirable) for companies to have a business relationship with independent contractors.
- Approximately 70% of truckers at the Port of NY-NJ are IOOs.

## The Six Factors of the new FLSA rule

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the potential employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. The extent to which the work is “integral” to the potential employer’s business
6. The worker’s skill or initiative

# FACTOR #1: Opportunity for profit or loss depending on managerial skill

- Does the worker have the power to determine or meaningfully negotiate the charge or pay for the work provided?
- Does the worker accept or decline jobs or choose the order and/or time in which the jobs are performed?
- Does the worker engage in marketing, advertising, or other efforts to expand their business or secure more work?
- Does the worker make decisions to hire others, purchase materials and equipment, and/or rent space?



# How might FACTOR #1 be applied to Owner-Operators?

Does the driver have the ability to choose which loads they take, and can they refuse work without experiencing negative consequences?

Does the driver negotiate their own rates and contracts?

Does the driver have the ability to choose when and where work is performed?

Does the trucker make themselves available to other companies in a manner that would allow them to expand their business and get more work? (Advertising & Marketing, Business cards, Resume posted on job sites, LinkedIn account marked as Open to Work)



**TRUCK DRIVER  
INDEPENDENT CONTRACTOR AGREEMENT**

This Independent Contractor Agreement ("Agreement") is made between \_\_\_\_\_ with a mailing address of \_\_\_\_\_, City of \_\_\_\_\_, State of \_\_\_\_\_ ("Client")

AND \_\_\_\_\_ with a principal place of business at \_\_\_\_\_, City of \_\_\_\_\_, State of \_\_\_\_\_ ("Contractor"). The Client and Contractor shall be known collectively as the "Parties".

WHEREAS this Agreement shall be made effective on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

THE PARTIES AGREE AS FOLLOWS:

**1. Services to Be Performed**

Contractor agrees to perform the following services: \_\_\_\_\_



## FACTOR #2:

### Investments by the worker & potential employer

- Is the worker making investments in their business that are similar to the types of investments made by the potential employer? If so, that would suggest that the worker is operating independently.
- The actual dollar amount invested by the worker does not need to be the same as the potential employer, but it needs to be relatively similar in terms of the scope and impact of the investment.
- The DOL specified in their comments that vehicle ownership is *not enough by itself* to indicate independent owner-operator status.

# How might FACTOR #2 be applied to Owner-Operators?

- What type of business-related expenses is the driver paying for as an entrepreneurial investment? e.g. purchasing and maintaining a vehicle used exclusively for their business, a cell phone designated for business use only, promotional materials & advertising, hiring an assistant to run the business.
- How does the driver's level of investment compare to the employer's investment?
- Does the driver pay for their own insurance, and if so, did they freely and independently choose the policy based on the price and coverage? If it is a policy purchased through the motor carrier company, was it optional, or were they given no choice?





## FACTOR #3: Degree of Permanence of the Work Relationship

- What is the duration of the work relationship, and what is the level of permanence?
- Is the work performed project-based, with a clear start and end date (indicating independent contractor), or is it an open-ended contract of indefinite duration, continuous or exclusive of work for other employers (indicating employee status)?
- Does the employer demand exclusivity, or can the contractor perform the same work freely with other companies?
- The DOL acknowledged that an Independent Contractor can “rely on repeat business and long-term clients or customers in order for their business to remain economically viable or successful”.
- It *is* possible to determine independent contractor status for a worker who has a long-lasting relationship with some clients, as long as they meet enough of the other factors associated with IC work, such as controlling the conditions of their employment, setting their own fees, hiring helpers, and marketing their own business.

## Questions to consider for Factor #3

- How long has the driver worked with your company? Is the business relationship ongoing with a degree of regularity/predictability, or is it sporadic?
- Does the leasing contract renew automatically or have an unspecified start and end date?
- Does the driver follow a schedule set by the company, or do they choose what days and times they work?
- Is the driver free to work for other companies if they choose?

Contracts that are routinely or automatically renewed are indicative of employee status.

Work relationships that are “definite in duration, non-exclusive, project-based, or sporadic based upon the worker being in business for themselves and marketing their services to multiple entities” is indicative of independent contractor status.

# FACTOR #4: Nature and Degree of Control

- How much control does the potential employer exert on the way in which the worker performs the duties for which they are hired? Does the employer reserve the right to supervise and/or discipline the worker?
- Does the potential employer explicitly limit the worker's ability to work for others? Does the company impose demands or restrictions on workers that prevent them from working for others?
- An employer requiring a worker to “comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy similar terms...does not constitute control that makes the worker more or less likely to be an employee.”
- The DOL stated that using technology to monitor and/or supervise a worker's job performance is indicative of employee status. Using technology to maintain quality control standards may not be indicative of employee status.

Employee's Name: Dylan Smith      Employee's Days Off: Tuesday and Friday

### Employee Work Schedule

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
SHIFT 8am - 12pm	SHIFT 8am - 4pm	DAY OFF X	SHIFT 8am - 4pm	SHIFT 8am - 4pm
SATURDAY	SUNDAY	NOTES 1. One Day Off to Arr.		
SHIFT 8am - 4pm	DAY OFF X			



# How might FACTOR #4 be applied to Owner-Operators?

## Examples of Control that could indicate employee status:

- Requiring drivers to wear a uniform with company branding on it.
- Mandatory driver meetings held on a regularly scheduled basis.
- Additional Training required by the company that goes beyond what is mandated by law.
- Punishing drivers who refuse to haul certain loads or go to certain locations.
- Using technology to directly supervise or routinely monitor and control the driver's performance.

## Examples of Control that don't necessarily indicate employee status:

- Mandatory Drug & Alcohol Testing as required by the FMCSA.
- Compliance with DOT regulations such as posting the company's name & DOT number on the vehicle or carrying bobtail insurance.
- Maintaining up-to-date TWIC credentials
- Meeting contractually agreed upon deadlines or quality control standards
- Using technology for reasons other than control/supervision

## FACTOR #5: The Extent to Which the Work is Integral to the Potential Employer's Business



**This is the job-killing factor under which millions of Independent Contractors in thousands of industries nationwide will be deemed employees.**

If the work performed is integral to the employer's business—such as a trucker working for a trucking company, a reporter writing a newspaper story, a nurse working in healthcare, a teacher working for an online education site—that indicates employee status.

The recommendation for dealing with this factor is to do everything possible to comply with the other factors and ensure that the worker meets the criteria for Independent Contractor status based on the totality of the circumstances.

## FACTOR #6: Worker's Skill or Initiative

“The Department [of Labor]...recognizes the distinctive nature of CDLs and further recognizes that drivers performing work requiring such licenses **are likely using specialized skills** as compared to drivers generally.”



However, they also point out that simply having a CDL is not a free pass to Independent Contractor status:

“As with any worker, consideration of whether a driver with a CDL uses that specialized skill in connection with business like initiative determines whether this factor indicates employee or independent contractor status.”

# ????? “Additional Factors” ?????

Even if a worker is able to meet the threshold for Independent Contractor status with the first six indicated factors, it *still* might not be enough for the Department of Labor to determine that they are an IC and not an employee.

“Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.”

Translation: the DOL will consider the 6 factors listed *and* any other factors they deem relevant for making a determination.




Unfortunately, no one knows exactly how the USDOL will apply and enforce the new FLSA rules. The factors seem intentionally vague and overly-broad, leaving them open to subjective application at the will of the DOL.

# What's Next?

Members of Congress are attempting to overturn the rule via the Congressional Review Act. Several lawsuits have also been filed to stop the rule from taking effect.

Representative Kevin Kiley (R-CA) Chairman of the House Education and the Workforce Subcommittee on Workforce Protections, is leading the CRA effort in the House. Senator Bill Cassidy (R-LA) is filing legislation for a CRA in the Senate and urging action on the ill-conceived renomination of Acting Secretary Julie Su.

 **Rep. Kevin Kiley** @RepKiley · Feb 15  
Wage and Hour Administrator Jessica Looman could not explain how the new Independent Contractor rule would apply to millions of Americans. It will cost workers, like Barbara, their livelihoods. My CRA will block this rule and protect independent contractors. #FightForFreelancers



## Ranking Member Cassidy Urges HELP Committee Chair to Hold Hearing on Renomination of Julie Su

WASHINGTON — U.S. Senator Bill Cassidy, M.D. (R-LA), ranking member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, urged HELP Committee Chair Bernie Sanders (I-VT) to hold a hearing to consider the renomination of Julie Su for Secretary of the Department of Labor (DOL). Ms. Su's previous nomination failed to secure a Senate vote before her nomination was returned to the White House at the conclusion of the first session of the 118th Congress.

Follow Rep Kiley, Sen Cassidy & the BiState on X and amplify our efforts on Social Media:

@RepKiley

@SenBillCassidy

@BiStateMC



# How You Can Help

- Contact your Congressional representatives and urge them to support the CRA bill put forth by Senator Bill Cassidy and Representative Kevin Kiley to stop the new FLSA rule.
- Urge your Congressional reps NOT to support Julie Su's nomination for USDOL Secretary, and call for her immediate removal as Acting Secretary.

The following NJ Congressmembers have not yet declared their support for the CRA effort:

Rep. Donald Norcross, 202-225-6501

Rep. Jeff Van Drew, 202-225-6572

Rep. Andy Kim, 202-225-4765

Rep. Rob Menendez Jr., 202-225-7919

Rep. Josh Gottheimer, 202-225-4465

Rep. Frank Pallone, Jr., 202-225-4671

Rep. Chris Smith, 202-225-3765

Rep. Bill Pascrell Jr., 202-225-5751

Rep. Donald Payne, 202-225-3436

Rep. Mikie Sherrill, 202-225-5034

Rep. Bonnie Watson Coleman, 202-225-5801

Senator Cory Booker, 202-224-3224

Senator Bob Menendez, 202-224-4744

Once you've called the members listed above, be sure to thank Rep. Tom Kean, Jr. 202-225-5361 for being the first NJ Congressmember to support the CRA bill to rescind the rule!

Encourage your friends, family and co-workers to call, too!



A Call to Action with  
additional details is posted  
on our website

[www.bistatemotorcarriers.com/FLSA](http://www.bistatemotorcarriers.com/FLSA)

Thank you for your participation in this webinar.  
Your support of the Bi-State and our advocacy efforts on behalf  
of the intermodal trucking industry is greatly appreciated.