Association of
BI-STATE
MOTOR CARRIERS
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Employee or Independent Contractor Classification Under the Fair Labor Standards Act: AN OVERVIEW

On March 11, 2024, a new version of the U.S. Department of Labor's ("DOL") Rule regarding when employers can classify workers as independent contractors under the Fair Labor Standards Act ("FLSA") will take effect (the "New Rule"). The New Rule, titled "**Employee or Independent Contractor Classification Under the Fair Labor Standards Act**," establishes a six-factor test for determining whether someone is an employee or independent contractor. This rule will rescind the Independent Contractor Status Under the Fair Labor Standards Act rule (the "**2021 Rule**") from January 7, 2021.

BACKGROUND: The 2021 Rule

Traditionally, federal courts nationwide relied on a 5-factor economic reality test in determining whether a worker is an independent contractor or employee under the FLSA. Unfortunately, this test was increasingly being administered in a subjective manner, causing confusion and inconsistency with how the factors were being applied.

In an effort to provide clarity, the USDOL published the 2021 Rule just prior to the end of President Trump's term, which designated two of the five economic reality test factors as "core factors." These two factors included the nature and degree of control over the work, and the worker's opportunity for profit or loss. The other three factors, which were considered less probative, included the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production.

This streamlined approach was widely-supported by Independent Contractors, who praised the 2021 rule for offering long-overdue clarity to the ongoing debate over how to classify modern-day workers who are increasingly choosing a more flexible business model over traditional employment. The DOL took the additional step of publishing opinion papers that clearly spelled out scenarios under which an owner-operator trucker would be determined to be an independent contractor vs. an employee under the 2021 rule.

Within hours of President Biden taking office, however, his DOL announced they would delay implementation of the 2021 rule, eventually revoking it altogether and scrubbing the opinion papers from their website. A Federal judge later ruled that the administration's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," and reinstated the 2021 rule. After that censure, the DOL followed the proper procedures, publishing a Notice of Proposed Rulemaking and announcing their intention to replace the 2021 rule with yet another new set of factors.

Despite overwhelming objections expressed by Independent Contractors during the Public Comment period, the USDOL announced on January 9, 2024 that a new FLSA rule would take effect on March 11th, replacing the 2021 rule, even though the department has been successfully using the 2021 rule to file multiple misclassification cases over the past 3 years.

The New 6-Factor Rule

The New Rule, unlike the 2021 Rule, does not have "core factors," but instead lists 6 factors, stating that no one factor is to be given greater weight than another. According to the DOL, the New Rule is "consistent with a **totality-of-the-circumstances** analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular relationship."
The New Rule's factors are summarized as follows:

1. **Opportunity for profit or loss depending on managerial skill.** The DOL suggests the following may be relevant considerations for this factor: "whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space."

2. **Investments by the worker and the potential employer.** The DOL suggests that for this factor, the focus "should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer . . . to suggest that the worker is operating independently, which would indicate independent contractor status." The DOL also clarified that 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.

3. **Degree of permanence of the work relationship.** The DOL suggests that this factor weighs in favor of status as an employee when "the work relationship is indefinite in duration, continuous, or exclusive of work for other employers." Contracts that are routinely or automatically renewed indicate employee status. In contrast, the DOL suggests that this factor weighs in favor of status as independent contractor when "the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities."

4. **Nature and degree of control.** The DOL suggests that this factor considers the employer's control over a worker's performance as well as the economic aspects of the working relationship, and that facts to be considered include "whether the potential employer sets the worker's schedule, supervises the performance of the work, explicitly limits the worker's ability to work for others," "whether the potential employer uses technological means to supervise the performance of the work . . .reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose," and facts regarding an employer's control over the economic aspects of the working relationship, such as "control over prices or rates for services and the marketing of the services or products provided by the worker.

5. **The extent to which the work is "integral" to the potential employer's business.** The DOL suggests that this factor weighs in favor of a worker's status as an employee when "the work they perform is critical, necessary, or central to the potential employer's principal business."

   This is the most problematic factor for independent contractors: it is the job-killing B prong of the ABC test in California's AB5 legislation repackaged and paraphrased. This factor prohibits independent contractors from being able to perform work that is of the same nature as the company they're contracting with. An owner-operator trucker who works with a trucking company; a freelance writer who writes for a magazine, newspaper or media outlet; a teacher who works for an online-teaching site; a per diem nurse who works in a healthcare setting; in all of these scenarios, the worker would be determined an employee under this factor.

6. **<u>The worker's skill or initiative.</u>** The DOL suggests that this factor weighs in favor of status as an employee when "the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work." The DOL emphasized, however, that just because a worker brings specialized skills to a working relationship, is not "itself indicative of independent contractor status."

Additional Factors Beyond the 6 Listed Above
Notwithstanding the first six factors listed, the DOL also stated that "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 themself, 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.

Why We Object To This New Rule
The new rule makes it impossible for independent contractors in thousands of professions--including Owner Operator truckers—to meet all of the factors set forth, and as such, it is unclear how the USDOL will determine "the totality of the circumstances" when enforcing the rule. They state no single factor will weigh more heavily than another, but they also say "additional factors" will be considered above and beyond the ones listed, making it impossible to determine exactly how the rule be enforced, and how classification determinations will be made. The new rule casts a wide net, with what is basically an unlimited number of factors that can be considered, resulting in a confusing, overly-subjective set of criteria for determining employee status.

This new rule will greatly increase the risk for motor carrier companies who continue leasing with owner-operator drivers, who currently comprise approximately 74% of the driver workforce at the Port of NY-NJ.

The confusion and uncertainty surrounding how the new FLSA rule will be applied to the trucking community will adversely impact capacity and supply chains nationwide, as risk-averse motor carrier companies scale back their relationships with owner-operators.

The Bi-State's position on this is that the new FLSA rule is unnecessary, and we must stop this type of ping-pong policy change that has threatened millions of Independent Contractors working in thousands of industries. The 2021 rule WORKS—the USDOL has successfully used the current rule to bring multiple misclassification cases over the last few years, and there is no need to for the overly-restrictive, confusing overhaul being put forth. We urge Congress to stop the enactment of the new FLSA rule through the Congressional Review Act, and keep the 2021 rule in place. Senator Bill Cassidy and Representative Kevin Kiley are the prime sponsors of these CRA bills, and the Bi-State has been contacting NJ's Congressional representatives, asking them to sign on as co-sponsors and support these measures. Bi-State members are encouraged to contact their reps as well.

The BiState has a Call to Action posted on our website with a full list of NJ Congressional Representatives and their contact information: https://bistatemotorcarriers.com/flsa/

What Others Are Saying About the New Rule
*"The trucking industry has used independent contractors since the inception of interstate trucking, and court decisions over the last 90 years have continually reaffirmed the legitimate role ICs play in the economy. It's unfortunate that the Administration has chosen to replace a clear and straightforward standard with a tangled mess that **weakens our supply chain** and undermines the livelihoods of hundreds of thousands of truckers across the country."*

--American Trucking Associations President and CEO Chris Spear

"The administration is repealing common-sense rules that clearly articulate the difference between employees and independent contractors. NRF vehemently opposes a change in this important area of law, which is both

***unwarranted and unnecessary**. This decision will only foster confusion, endless litigation, and reduced innovation."* --National Retail Federation SVP of Government Relations, David French

"For decades, the independent contractor business model has been widely favored by intermodal motor carriers and drivers. Although employee-driver positions are readily available, these owner-operator drivers explicitly chose the freedom, flexibility, and independence that comes with small business ownership. The DOL's final rule would eliminate a worker's ability to determine their own preferred career path and instead force them to either become an employee or leave their chosen profession – a profession in which they have already heavily invested. ***The rule will have detrimental impacts on the intermodal freight industry; reducing service efficiency and reliability, exacerbating existing workforce shortages, and increasing consumer costs**. Already, the trucking industry is experiencing a shortage of qualified drivers. This shortage stands to worsen with the implementation of this rulemaking.*

IANA is concerned about the forthcoming changes that risk the livelihood of our industry's drivers and the owner-operator business model, which could ***adversely impact the supply chain*** *and the greater economy. We urge Congress to act swiftly to overturn this ill-conceived rulemaking."*

Joni Casey, President & CEO, Intermodal Association of North America,

"The Department of Labor's new regulation redefining when someone is an employee or an independent contractor is ***clearly biased*** *towards declaring most independent contractors as employees, a move that will decrease flexibility and opportunity and result in lost earning opportunities for millions of Americans. It threatens the flexibility of individuals to work when and how they want and could have significant negative impacts on our economy. Making matters worse, the rule is completely unnecessary, as the Department continues to report success in cracking down on bad actors that are misclassifying workers. The U.S. Chamber will carefully evaluate our options going forward, including litigation."*

--U.S. Chamber of Commerce Vice President of Workplace Policy Mark Freedman

"Truckers are tired of the endless parade of classification rules that do not listen to their concerns. This constantly changing landscape has created uncertainty that makes it more difficult for them to operate their businesses. --Owner-Operator Independent Drivers Association President Todd Spencer

"Independent contractors play a pivotal role within our nation's supply chain, serving as essential cogs in its seamless operation. Logistics companies depend significantly on their contributions to the supply chain and workforce. The notion of reclassifying these vital independent contractors as employees and creating a confusing and conflicting system to determine employment status poses a grave threat to the well-being of the supply chain, small businesses, and the American economy. " --Transportation Intermediaries Association

<u>Read more about the anticipated impact of the new FLSA rule:</u>
An Independent Contractor from California had to uproot her family and move out -of-state to keep working. Her story sums up everything that is wrong about this policy: https://thehill.com/opinion/white-house/4473229-watch-out-californias-damaging-gig-workers-law-is-going-nationwide/?fbclid=IwAR1JKSvXhk1PXb_q_G0cIaBV96Mj2nvXk0AmvSFBRRMx3-9_SLPQYgFXopY

Lawsuit filed on behalf of a family-owned trucking company to block implementation of the new rule: https://libertyjusticecenter.org/pressrelease/the-liberty-justice-center-and-the-pelican-institute-challenge-biden-administration-rule-that-could-put-independent-workers-out-of-business/

The Association of Bi-State Motor Carriers is a 501c non-profit membership organization representing the intermodal trucking community at the Port of NY & NJ. We provide a strong, unified voice for motor carriers who transport the majority share of freight at one of the largest & busiest ports in the U.S.