



Compliance Overview

Highlights

Worker Classification

Worker classification is the process of determining whether an employment relationship exists. Several tests exist to determine whether a worker is an employee or independent contractor. The DOL favors the economic reality test to classify workers.

Impact on Employers

In general, employment, labor and related tax laws apply only to employees and do not apply to independent contractors. Misclassified employees often are denied benefits and protections they are entitled to by law. Employers that misclassify employees can be liable for expensive fines and litigation.

DOL's Questions and Answers on Proposed Independent Contractor Rule

On Feb. 27, 2026, the U.S. Department of Labor (DOL) published a proposed rule that would rescind the department's 2024 final independent contractor rule and replace it with analysis for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

To help employers better understand the proposed rule, the DOL's Wage and Hour Division (WHD) has issued a set of questions and answers addressing frequently asked questions about the DOL's Notice of Proposed Rulemaking (NPRM).

This Compliance Overview provides the WHD's questions and answers about the DOL's proposed independent contractor rule.

Links and Resources

- WHD's Questions and Answers [website](#)
- DOL's [proposed independent contractor rule](#)

General Questions

Q1. What is this rulemaking about?

On Feb. 26, 2026, the DOL published an NPRM proposing to revise the department's guidance on how to analyze who is an employee or independent contractor under the FLSA, FMLA and MSPA. The NPRM proposes to: (1) rescind the [2024 Independent Contractor Rule](#) that was published on Jan. 10, 2024; (2) replace it with a streamlined analysis to distinguish between independent contractors and FLSA-covered employees that comports with federal courts' application of the law; and (3) clarify that the analysis used to determine independent contractor status under the FLSA should be applied to determine independent contractor status under the FMLA and MSPA, which both incorporate the FLSA's relevant statutory definitions.

Q2. Why is the DOL proposing to rescind its 2024 Independent Contractor Rule?

As explained in the NPRM, the DOL is concerned that the 2024 Independent Contractor Rule fails to provide an analysis for distinguishing between independent contractors and employees under the FLSA that is sufficiently clear and leads to predictable outcomes. The department is separately concerned that the 2024 Rule's description of several "economic reality" factors could be viewed as setting a higher bar to find independent contractor status than required under the law. Among other harms, an analysis that is ambiguous or perceived as too restrictive of independent contracting can deter businesses from engaging with bona fide independent contractors.

Q3. Why is the DOL proposing a new analysis for distinguishing between FLSA employees and independent contractors?

The DOL believes that, by offering a streamlined analysis that is grounded in federal court precedent, the department can provide helpful clarity to workers and businesses alike so they can more faithfully arrange their business relationships in ways that align with the federal courts' application of the law. In particular, the DOL believes that this proposal's elevation of control and opportunity for profit or loss as "core" economic reality factors better aligns with the Supreme Court's original application of the economic reality test, as well as the ordinary understanding of being in business for oneself. At the same time, this proposal offers an analysis that the department believes will be more effective in preventing the misclassification of employees, which will, in turn, prevent harm to FLSA employees, legitimate independent contractors and employers alike.

Q4. Why is the DOL proposing to amend language addressing independent contractor status in its current FMLA and MSPA regulations?

The FMLA and MSPA both incorporate the FLSA's broad definition of the term "employ." See 29 U.S.C. 2611(3) (FMLA); 29 U.S.C. 1802(5) (MSPA). Thus, it has been the DOL's longstanding position that the analysis for determining whether a worker is an employee or an independent contractor should be the same under all three statutes, i.e., the analysis that applies under the FLSA. However, the department's regulations do not currently reflect a single standard for the three statutes. Workers and businesses alike would benefit from the simplicity and certainty of having a single uniform standard for determining employee or independent contractor status under all three laws that use the same relevant statutory definitions.

Q5. Would the NPRM affect the analysis used to determine worker classification under other laws?

No. This rulemaking proposes only to revise the DOL's analysis for determining employee or independent contractor status under the FLSA, FMLA and MSPA. It has no effect on other laws—federal, state or local—that use different standards for employee classification. For example, the Internal Revenue Code and the National Labor Relations Act have different statutory language and judicial precedent governing the distinction between employees and independent contractors, and those laws are interpreted and enforced by different federal agencies. Similarly, this rule has no effect on those state

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wage-and-hour laws that use a more restrictive test, such as the “ABC” test applied in California and New Jersey. Employers must comply with all federal, state and local laws that apply and ensure they meet whichever standard provides workers with the greatest protection. *See* 29 U.S.C. 218.

Q6. Can a worker voluntarily waive employee status and choose to be classified as an independent contractor?

No. While businesses are certainly able to organize their businesses as they prefer, consistent with applicable laws, and workers are free to choose which work opportunities are most suitable for them, if a worker is an employee under the FLSA, the worker cannot waive FLSA-protected rights (such as minimum wage or overtime pay). The Supreme Court has explained that permitting employees to waive their FLSA rights would harm other employees and undermine the FLSA’s goal of eliminating unfair methods of competition in commerce.

Q7. How can the public submit comments in response to the NPRM?

The DOL encourages interested parties to submit comments on this proposal at www.regulations.gov/docket/WHD-2026-0001. The NPRM’s 60-day comment period closes at 11:59 pm ET on April 28, 2026.

Q8. I have questions about this rulemaking and/or worker classification. Who should I contact?

For questions about this NPRM, you may call the WHD’s Division of Regulations, Legislation and Interpretation (DRLI) at (202) 693-0406. For questions about the employment classification of a particular worker or group of workers, please contact your nearest WHD District Office, as displayed at <https://www.dol.gov/agencies/whd/contact/local-offices>.

Questions About the NPRM

Q1. What analysis does the NPRM propose to determine whether a worker is an employee or independent contractor?

The NPRM proposes applying an “economic reality test” to determine a worker’s status as an FLSA-covered employee or an independent contractor. Under that test, a worker is an employee if, as a matter of economic reality, the worker is economically dependent on the employer for work. A worker is an independent contractor if, as a matter of economic reality, the individual is in business for themselves.

The DOL’s proposed economic reality test consists of five nonexhaustive factors:

1. The nature and degree of control over the work;
2. The individual’s opportunity for profit or loss;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship between the individual and the potential employer; and
5. Whether the work is part of an integrated unit of production.

The NPRM proposes detailed interpretive guidance about these five factors and identifies the first two—the nature and degree of control over the work and the individual’s opportunity for profit or loss—as “core” factors, which have greater probative value than the remaining three. The NPRM advises that if both of the core factors point toward the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual’s accurate classification.

Finally, the NPRM includes a provision advising that “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible,” and includes eight examples showing how the economic reality factors would apply in real-world factual situations.

Q2. In what ways is the NPRM similar to the 2024 Independent Contractor Rule?

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The NPRM has several similarities to the 2024 Independent Contractor Rule. For example, both rules advise that independent contractors are workers who are, as a matter of economic reality, in business for themselves, whereas FLSA-covered employees are workers who are, as a matter of economic reality, economically dependent on their employer for work. Both rules identify economic dependence as the “ultimate inquiry” of the analysis; both rules provide a nonexhaustive list of factors to assess economic dependence; and both rules caution that no single factor is determinative. Both rules also clarify that economic dependence does not focus on the amount of income the worker earns or whether the worker has other sources of income.

Q3. In what ways is this NPRM different from the 2024 Independent Contractor Rule?

The NPRM’s proposed analysis differs from the guidance provided in the 2024 Independent Contractor Rule in several important ways. The NPRM proposes to:

- **Identify “control” and “opportunity for profit or loss” as core factors**, as these two factors are commonly given greater weight by federal courts considering FLSA classification matters;
- **Consolidate “investment” within the “opportunity for profit or loss” factor**, resulting in a less redundant and more streamlined analysis;
- **Disregard the potential employer’s investments**, in part because independent contractors routinely have smaller investments than their clients;
- **Reject the relevance of an exclusive or nonexclusive relationship to the “permanence” factor**, in part because it is redundant to whether the individual has the “ability to work for others” under the “nature and degree of control” factor;
- **Examine whether the work performed is “integrated” into the potential employer’s business rather than “integral” to the business**, in part because almost anything a business does could be characterized as “integral”;
- **Emphasize the primacy of actual practice over contractual or theoretical possibilities**, consistent with courts’ focus on the economic “reality” of the work arrangement;
- **Include examples illustrating how to apply the economic reality test to specific factual scenarios**, similar to prior iterations of the rule; and
- **Revise the regulations addressing employee or independent contractor status under the FMLA and MSPA** to clarify that the DOL’s FLSA analysis applies to determine employee or independent contractor status under those statutes as well.

Q4. Are there any differences between the NPRM’s proposed analysis and the analysis from the 2021 Independent Contractor Rule?

There are several differences between the NPRM and the DOL’s earlier 2021 Final Rule on the same topic. First, this NPRM proposes to revise the regulations addressing employee or independent contractor status under the FMLA and MSPA so that the department’s FLSA analysis would apply when determining employee or independent contractor status under those statutes as well. Second, the NPRM proposes to provide additional context on the meaning of “economic dependence,” explaining that although both employees and independent contractors are dependent on others in some sense, economic dependence in this context means the dependence that a typical employee has on an employer for work, as opposed to an individual who has more of the nature and character of a business owner with their own separate business. Further, economic dependence does not focus on the amount of income the worker earns or whether the worker has other sources of income. Finally, the NPRM proposes two new examples addressing the “amount of skill required for the work” factor (the 2021 Independent Contractor Rule did not include examples for that factor) and includes edits to an example from the 2021 Independent Contractor Rule involving an owner-operator truck driver who is subject to certain safety requirements.

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Q5. Why does the NPRM propose to identify control and opportunity as “core” factors in the economic reality test?

An independent contractor is an independent business owner, i.e., someone who directs the manner and means of their own work, and whose compensation depends on profit or loss rather than on wages. Thus, when assessing whether a worker is an independent contractor under the FLSA—consistent to the analysis routinely applied by federal courts across the country—facts germane to the worker’s control and opportunity to affect their profit or loss matter more than factors such as the worker’s skill, the duration of the relationship with a particular business or whether the work performed is integrated into that business. Those other factors may be relevant, but they are less directly tied to the ordinary understanding of independent business status and the central inquiry of whether workers are truly in business for themselves.

Q6. How does the NPRM propose to explain “the nature and degree of control over the work”?

As described in the NPRM, this factor weighs toward the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting their own schedule, by selecting their projects, and/or through the ability to work for others, which might include the potential employer’s competitors. In contrast, this factor weighs in favor of the individual being an employee to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual’s schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee.

Q7. How does the NPRM propose to explain “the individual’s opportunity for profit or loss”?

As described in the NPRM, this factor weighs toward the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on their exercise of initiative (such as managerial skill or business acumen or judgment) or management of their investment in or capital expenditure on, for example, helpers or equipment or material to further their work. While the effects of the individual’s exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh toward the individual being an independent contractor. This factor weighs toward the individual being an employee to the extent that the individual is unable to affect their earnings or can do so only by working more hours or faster.

Q8. How does the NPRM propose to explain “the degree of permanence of the working relationship between the individual and the potential employer”?

As described in the NPRM, this factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent that the work relationship is instead, by design, indefinite in duration or continuous.

Q9. How does the NPRM propose to explain “whether the work is part of an integrated unit of production”?

As described in the NPRM, this factor weighs in favor of an individual being an independent contractor to the extent their work is segregable from the potential employer’s production process. This factor weighs in favor of the individual being an employee to the extent their work is a component of the purported employer’s integrated production process for a

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good or service. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

Q10. How does the NPRM propose to explain "skill and initiative"?

As described in the NPRM, this factor weighs in favor of the individual being an independent contractor to the extent that the work at issue requires specialized training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent that the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip the individual with any skills or training necessary to perform the job.

Q11. Under the NPRM, would a worker have to satisfy all the economic reality factors to qualify as an independent contractor?

No. Under the economic reality test, no single factor (or set of factors) automatically determines a worker's status as either an employee or an independent contractor. Instead, the economic reality factors are all weighed to assess whether a worker is economically dependent on a potential employer for work, although the "core" factors are the most probative.

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