

# CLIENT ALERTS

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## Department of Labor Issues New Rule on Independent Contractors

### Client Alert

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On January 10, 2024, the U.S. Department of Labor published a final rule, effective March 11, 2024, revising the Departmental guidance on how to analyze who is an employee or who is an independent contractor under the Fair Labor Standard Act ("FLSA"). The final rule rescinds the definition of the Independent Contractor status under the Fair Labor Standard Act rule (2021 (c) Rule) that was issued on January 7, 2021. The rule adopts a six-factor "economic realities" test which focuses on whether the worker depends on the potential employer or is operating an independent business. This new rule is generally considered to be less business friendly than the prior rule it replaces. Any change in the definition of independent contractor is significant as the classification as an employee or independent contractor has implications for both the worker and the employer. Workers classified as employees are entitled to protections under the FLSA such as the right to overtime for hourly employees. Classification as independent contractor or employee also has significant tax implications. Misclassification of employees as independent contractors can lead to significant monetary liability for businesses for unpaid employment taxes and unpaid overtime or minimum wages.

The new rule sets forth six (6) factors to be considered in a "totality of the circumstances" analysis to determine whether, as a matter of economic reality, the workers are either dependent on the potential for work or in business for themselves. Those factors listed in the new rule are as follows:

1. Opportunities for profit or loss depending on managerial skill
2. Investment by the worker and the potential employee
3. Degree of permanence of the work relationship
4. Nature and degree and control

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5. Extent to which the work performed is an integral part of the employee's business
6. Skill and initiative

The rule also provides examples and explanations of these factors. The Department of Labor has conceded that the courts will ultimately decide whether the particular individual or group of individuals are employees or independent contractors. There are currently two (2) cases before the Supreme Court that may have an impact on the rule. It is expected that this rule will be subject to challenges in the courts for years to come for many reasons, not the least of which is the fact that it replaces a rule that was just issued in 2021 and it was based on years of litigation.

Please feel free to contact the authors of this Client Alert or your Butzel attorney for more information.

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