

Blog Post

# Déjà Vu for Employers: DOL Moves to Reinstate Prior Independent Contractor Test

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By [Ten Stallings](#)

The U.S. Department of Labor (DOL) has once again proposed a significant change to the federal standard for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA), as well as the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). On February 27, 2026, the DOL published a Notice of Proposed Rulemaking that would rescind the 2024 rule and readopt the 2021 rule’s analysis with a few modifications, including clarifications on “economic dependence,” new illustrative examples, and harmonization across the FLSA, FMLA, and MSPA. This move is intended to provide greater clarity and predictability for employers and workers navigating the increasingly complex landscape of worker classification.

## Return to the “Core Factors” Approach

The proposed rule marks a return to the “core factors” approach that was a hallmark of the 2021 rule. Notably, the proposed rule not only returns to the “core factors” approach but also clarifies that “economic dependence” means dependence for work (not income), and that the relevant inquiry is whether the worker is in business for themselves in the line of work at issue, not in some other business.

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Under this framework, two factors — the nature and degree of control over the work and the worker’s opportunity for profit or loss — are considered the most probative in determining whether a worker is an employee or an independent contractor. If both of these core factors point toward the same classification, that outcome is likely to be correct. The rule also retains three additional factors: skill required, permanence of the relationship, and whether the work is part of an integrated unit of production. However, these are considered less likely to outweigh the core factors unless the facts of a particular case demand it.

### Clarifications on Investment and Initiative

A key clarification in the proposed rule is that the worker’s investment is considered as part of the “opportunity for profit or loss” factor, rather than as a separate factor, and that “initiative” is also considered within this core factor. The DOL emphasizes that economic dependence means reliance on an employer for work, not simply for income, and that the relevant question is whether the worker is truly in business for themselves. The rule also stresses that the actual practice of the parties is more relevant than what may be contractually or theoretically possible. Thus, reserved contractual rights that are never exercised are less important than what happens in practice.

### Alignment Across Federal Labor Laws

The proposed rule would also harmonize the independent contractor analysis across the FLSA, FMLA, and MSPA by cross-referencing the same economic reality test in all three sets of regulations. This is intended to reduce confusion and ensure consistent outcomes for employers subject to multiple federal labor laws.

### How the Proposed Rule Differs from the 2024 Standard

For employers, the implications of this proposed rule are significant. The DOL's stated goal is to provide a clearer, more predictable standard that will reduce ambiguity and litigation risk. The agency is concerned that the 2024 rule's open-ended balancing of six factors, without clear guidance on how to weigh them, created uncertainty and may have discouraged legitimate independent contractor relationships. The 2024 rule also required comparison of the worker's investment to the employer's, included "business-like initiative" as a requirement for the skill factor to weigh in favor of independent contractor status, and did not prioritize any factor over another. By returning to a more structured analysis, the DOL hopes to facilitate accurate and predictable classification decisions, which could make it easier for businesses to engage bona fide independent contractors without fear of misclassification.

### Practical Impact for Employers

Since May 2025, the DOL's Wage and Hour Division has not been enforcing the 2024 rule, but instead has been using pre-2021 guidance and updated Opinion Letter FLSA2025-2 in investigations, as we reported [earlier](#). However, the 2024 rule remains in effect for private litigation.

Employers should take this opportunity to review their current worker classifications, particularly those relationships that may be considered close calls under the FLSA. The proposed rule's emphasis on control and opportunity for profit or loss means that employers should carefully document the actual working relationship, not just the terms of the contract. It is also important to remember that state law may impose stricter standards, such as the "ABC" test used in California and other states, as compliance with federal law does not guarantee compliance at the state level. The proposed federal rule does not preempt stricter state standards, and employers must continue to comply with both federal and applicable state law.

## Public Comment and Next Steps

The DOL's proposal is not yet final, and the agency is seeking public comment on the rule and its potential impact. The DOL is specifically seeking comments on whether any aspects of the 2024 rule should be retained, the impact of the 2021 rule when it was in effect, and the proposal to provide a uniform standard across the FLSA, FMLA, and MSPA. Employers should monitor developments closely and consider submitting comments or consulting with counsel to assess how the proposed changes may affect their operations. Until a final rule is issued, employers should continue to follow the current legal framework, recognizing that while the DOL is not currently enforcing the 2024 rule in investigations, it remains in effect for private litigation. In the meantime, a proactive review of independent contractor arrangements, with a focus on the actual day-to-day realities of the relationship, will help position businesses for compliance regardless of the final outcome of this rulemaking.

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