

# Biden DOL Deals Final Blow to Trump Independent Contractor Test

On May 5, 2021, the U.S. Department of Labor (DOL) announced it is formally withdrawing a Trump administration rule regulating who qualifies as an employee and who qualifies as an independent contractor under the federal Fair Labor Standards Act (FLSA). Under the FLSA, employees are entitled to minimum wage and overtime protections, but independent contractors are not. The withdrawal became effective late last week.

The DOL had only proposed the rule in January 2021, during the last weeks of the Trump administration. Prior to that point, the DOL used the so-called “economic realities” test, which weighs several factors, including a company’s right to control the worker and whether the worker or the company is responsible for providing the tools necessary to perform the job. The Trump administration had preserved this test but placed special emphasis on who controlled whether the worker could earn a profit based on the worker’s initiative or investment in the job. Because many workers in the “gig-economy” can control when they work, use their own equipment to do so and earn a profit through individual initiative, they would have likely been classified as independent contractors under the Trump administration’s test.

After the change in administrations, however, the DOL delayed the new rule’s implementation and has now definitively rejected it for being inconsistent with the previously-used “economic realities” test. Going forward, that test once again controls classification of workers as employees or independent contractors.

Although the DOL’s decision simply reverts back to the status quo before January 2021, employers must still be wary. For years, courts in different jurisdictions have differed in their interpretation and application of the economic realities test. The formal withdrawal of the January 2021 rule will leave employers with less certain and more amorphous standards across jurisdictions for assessing how to classify their workers. The consequences for misclassifying workers includes payment of lost overtime, liquidated damages and attorney’s fees.

The Biden DOL has yet to propose a rule to replace the Trump rule. Reinhart will continue to monitor the status of any related rules that the DOL proposes in the future, as well as any further developments in case law regulating worker classification under the FLSA. If you have questions about worker classification

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