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## *Department of Labor announces final rule on independent contractor status under the FLSA*

By Jim Coleman  
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On January 7, 2021, the U.S. Department of Labor Wage and Hour Division will publish its final rule concerning the criteria used to determine an individual's independent contractor status under the Fair Labor Standards Act, completing the rulemaking process it began in September 2020. (A preview copy of the final rule can be found [here](#).) Unfortunately for those employers that might have benefitted from these regulations, the DOL's actions are almost certainly too late. The Biden Administration has already announced its intent to issue an Executive Order on the first day of the administration that will freeze all final regulations issued by the Trump Administration that have not yet become effective by Inauguration Day. The projected effective date of this final rule is March 8, 2021, thus, it – along with many other so-called “midnight regulations” published late in the outgoing Trump Administration – is likely never going to take effect.

The final regulations concerning independent contractors are quite similar to what the DOL proposed in September and reaffirm an economic reality test to determine “whether a worker is in business for himself or herself (independent contractor) or is instead economically dependent on an employer for work (employee).” Two core factors are cited in making this determination – the nature and degree of control over the work performed and the worker's opportunity for profit or loss based on initiative and investment. Three other factors are also mentioned:

- The amount of skill required for the work,
- The degree of permanence of the working relationship, and
- Whether the work is part of an integrated unit of production.

The final regulations also provide six examples of how to apply these factors. However, as previously stated, these regulations will almost surely be halted on the first day of the Biden Administration before they take effect.



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