



USDOL's 2024 Independent Contractor Rule

Presentation to House Labor Committee
USDOL's Independent Contractor Rule
February 2024

Independent Contractor v. Employee



Business owner:
Has power to set
prices, make
investments and
marketing
decisions,
earn profits or
losses.



Fair Labor Standards Act

- Combats conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” 29 U.S.C. § 202(a).
- National minimum wage and maximum hours.
- Expansively defines “**employ**” to include “**to suffer or permit to work**,” 29 U.S.C. § 203(g). Drew from state child labor laws.
- **Intentionally broader** than common law “right to control” analysis.
- *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) (“FLSA was designed **to defeat rather than implement contractual arrangements**.”). See also *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to “**upset the freedom of contract**”).

Independent Contractors ≠ Employees

Question: who can be fairly said to be running their own business such that they are outside the scope of the FLSA?

Is this person in business for themselves, or dependent on working in the business of another?

FLSA does not define “Independent Contractor”

Analysis developed through case law: “Economic Realities”

USDOL's 2024 IC Rule

Considers “circumstances of the whole activity.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), including 6 factors:

Opportunities for profit or loss based on *managerial* skill;

Investments in business;

Permanence of relationship;

Nature/degree of control over the work;

Skill/initiative required; and

Degree to which work is integral to hiring business

The January 2021 IC Rule

Elevated two “core” factors → narrower than the common law

- ❑ substantial control by the *individual worker*, as opposed to *right to control* by an *employer*
 - ❑ Looked to primacy of actual practice → contracts can evidence substantial control
 - ❑ opportunity for profit and loss → focused on things like ability to set his own schedule, which many courts have said is not particularly relevant
- 2024 rule is a course correction, not a sea change

ABC Test = Presumption of EE Status

- ABC test
 - Several wage and hour laws, including:
 - Vermont
 - Washington
 - Massachusetts
 - New Jersey
 - California
 - Connecticut
 - DC (construction only)
 - Maryland (landscaping and construction only)
 - NY (construction only)
 - 21 states' unemployment insurance laws → originally developed in UI context. Well-established, easy to apply.

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