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Proposed DOL Rule Could Simplify Contractor Classification

By **Brian Patterson, Leslie Selig Byrd and Deryck Van Alstyne** (March 9, 2026, 5:47 PM EDT)

On Feb. 26, the U.S. Department of Labor published its highly anticipated notice of proposed rulemaking that would rescind the current rule governing employee versus independent contractor classification under the Fair Labor Standards Act.

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The DOL's proposed rule would replace the 2024 rule that was issued by President Joe Biden's administration. The 2024 rule slightly modified the 2021 rule that was issued by President Donald Trump's first administration, which prioritized two core factors in evaluating the worker's classification: control over work, and opportunity for profit or loss.

If finalized, the proposed rule will permit employers in the energy sector — an industry with one of the highest concentrations of independent contractor relationships in the economy, spanning oil field services, pipeline construction, drilling operations, utility maintenance and renewable energy development — and other industries that rely heavily on independent contractor workforces to evaluate the nature of the working relationship with a more straightforward and predictable analysis.

The Regulatory Ping Pong: A Brief History

Worker classification under the FLSA has experienced substantial regulatory volatility over the past five years. The DOL's 2021 rule adopted a structured economic realities test, placing the most emphasis on its two core factors.

However, that rule was delayed, withdrawn, judicially reinstated in 2022 by the U.S. District Court for the Eastern District of Texas in Coalition for Workforce Innovation v. Walsh, and ultimately replaced in 2024 by the Biden administration's rule.[1]

The 2024 rule abandoned the reliance on the core factor hierarchy in favor of the following six factors to be used as "tools or guides to conduct a totality-of-the-circumstances analysis":

> [O]pportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative.

Adding to the absence of clarity and predictability, the DOL failed to prioritize or weight any of these factors. It further noted that these factors were not exhaustive, and that additional unidentified factors may be relevant in analyzing the employee versus independent contractor classification. Challenges to the 2024 rule remain pending nationwide, but are stayed while the DOL reconsiders the issue.[2]

In the interim, the DOL announced in a May 2025 bulletin to its Wage and Hour Division field staff that it will no longer apply the 2024 rule in its enforcement investigations, and instead will follow the modified economic realities framework set forth in a 2008 fact sheet and an opinion letter last year.[3] The 2024 rule technically remains in effect for purposes of private litigation.

Key Differences Between the Current and Proposed Rules

The most consequential difference between the proposed rule and the current rule is the reintroduction of a two-tier factor hierarchy. Under the current 2024 rule, six economic factors are treated as equally weighted, with no clear guidance on applying them to reach a conclusion on employee versus independent contractor status.

The five-factor proposed rule designates the nature and degree of control over the work, and the individual's opportunity for profit or loss as core factors that are the most probative of a worker's classification and "typically carry greater weight in the analysis than any other factor." Significantly, the proposed rule provides that when both core factors point toward the same classification, "there is a substantial likelihood that is the individual's accurate classification."

The remaining three factors — skill required, permanence and whether the work is part of an integrated unit of production — are characterized as less probative and "highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."

The DOL's proposed rule follows a common-sense approach by focusing on the core factors that presumably will favor more predictable classification outcomes.

In evaluating the control factor, the DOL rejects the previous guidance that a business's imposition of quality standards, and health, safety and insurance requirements upon the worker is the type of control that is indicative of an employment relationship.

In considering the opportunity for profit or loss factor, the DOL retreats from past reliance on the "relative investments" of the business and the worker.

The DOL now acknowledges that this comparative approach, while adopted by some circuits, has no basis in U.S. Supreme Court precedent and inherently tilts the analysis toward employee status because an individual worker's capital expenditures will almost invariably be smaller than a business's investment in its overall operations.

The proposed rule places greater emphasis on whether the worker can realize profits or incur losses through managerial skills, business acumen or managing investments.

To the extent that the remaining three factors are probative, the DOL returns to interpretations prior to the current 2024 rule. In evaluating the permanence factor, the current rule conditions a finding of independent contractor status on the worker "being in business for themself and marketing their

services or labor to multiple entities," and discounts impermanence that is merely "intrinsic to particular businesses or industries."

This carveout is particularly problematic for the energy sector, where project-based and seasonal work arrangements are endemic to the industry's operational structure; under the current rule, the inherently transient nature of drilling programs, turnaround projects and pipeline construction could be treated as irrelevant to the permanence analysis simply because impermanence is a characteristic of the industry itself.

The proposed rule removes these additional gating requirements and evaluates permanence on its own terms, a change that should benefit energy companies with contractor relationships that are defined by discrete projects and variable demand cycles.

Under the current rule, the skill factor requires the worker to demonstrate business-like initiative, in addition to specialized skills, for this factor to weigh in favor of contractor classification. The proposed rule returns to a more straightforward assessment of whether the work requires specialized skill.

Finally, the integral part factor is reframed. The current rule asks whether the work is "critical, necessary, or central to the potential employer's principal business," a formulation that the DOL now recognizes could encompass virtually all work that a company pays to have performed.

The proposed rule returns to the narrower integrated unit of production standard from the Supreme Court's 1947 decision in Rutherford Food Corp. v. McComb, which examines whether the worker is embedded within the business's production process, rather than providing an outside service.

The proposed rule also restores illustrative examples and a regulatory provision confirming that the actual practice of the parties is more relevant than what may be contractually or theoretically possible.

Extension to Other Employment Laws

A notable addition to the proposed rule is its extension of the economic realities test to the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act through regulatory cross-references.

While both statutes incorporate the FLSA's definition of "employ," their analysis of the economic realities test in the context of the independent contractor analysis was minimal or absent. The proposed rule addresses this inconsistency by adding cross-references to the DOL's proposed FLSA regulation in both the FMLA and MSPA regulations, establishing a single uniform standard across all three statutes.

For energy sector employers, this means that a contractor classification that withstands scrutiny under the proposed rule's FLSA framework will also hold under the FMLA and the MSPA, eliminating the risk that a plaintiff could challenge a classification under a different or less defined standard, depending on which statute is invoked.

Impact on Energy Sector Employers

For companies in the oil and gas, pipeline, utility, and renewable energy industries, the proposed rule would provide significantly greater clarity and predictability in classifying independent contractors, as the energy sector depends heavily on independent contractors across a wide range of functions.

The current rule's unweighted totality-of-the-circumstances analysis, combined with its expansive formulation of the integral part factor, created meaningful exposure for energy companies because virtually all contractor work in the sector is, in some sense, critical or necessary to the principal business.

Under the proposed rule, if a company can demonstrate that it does not control the manner and means of how work is performed, as opposed to specifying what work needs to be done, and that the worker has a genuine opportunity for profit or loss based on the exercise of initiative, investment or managerial skill, those two core factors should carry the day in most cases.

The remaining factors would need to present truly extraordinary circumstances to overcome both core factors pointing toward independent contractor status. This is a materially different analytical posture than the current rule, where factors like integrality, relative investment and permanence could combine to support a finding of employment, even where control and opportunity for profit clearly favored contractor classification.

The elimination of the relative investment comparison is particularly significant for energy companies. When an oil field services contractor's investment in trucks and specialized equipment is measured against a major operator's or utility's multibillion-dollar capital base, the comparison will almost always favor employee status regardless of whether the contractor's investment is substantial in its own right. The proposed rule's return to evaluating the worker's investment on its own terms removes this structural disadvantage for employers.

From a litigation perspective, the core factor framework should provide a clearer path to summary judgment in FLSA misclassification cases and impose a greater obstacle for conditional certification in collective actions, as the structured analytical hierarchy is less amenable to across the board commonality findings.

The extension to the FMLA also closes a gap that plaintiffs could exploit by arguing that a worker who was properly classified as a contractor under the FLSA should nonetheless be treated as an employee for FMLA purposes.

Next Steps

Interested companies may submit comments to the proposed rule that address the practical realities of independent contractor arrangements in the industry, the advantages of the core factor framework, and the importance of the investment factor, focusing on the worker's own capital commitment rather than a relative comparison. The comment period will end on April 28, absent an extension.

Companies should also review their existing contractor classifications in light of the proposed framework to identify any arrangements that may benefit from, or require adjustment under, the modified analysis. Additionally, businesses should be mindful of any applicable state laws providing distinct or different criteria for establishing an independent contractor relationship.

While the proposed rule is not final, energy sector employers and other industries that substantially rely on independent contractor workforces should be aware that the analytical approach described in the proposed rule is already being applied by the Wage and Hour Division in its enforcement of classification issues.

For the energy sector, the practical significance is clear: The proposed rule's structured, predictable framework — anchored by the two factors that are most naturally aligned with how independent contracting operates in the industry — would replace an open-ended analysis that created unnecessary classification risk for arrangements that have long been standard practice across the sector.

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[1] Coalition for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

[2] E.g., Frisard's Transportation, L.L.C. v. Dep't of Labor, No. 2:24-cv-00347 (E.D. La. Mar. 8, 2024); Coalition for Workforce Innovation v. Walsh, No. 1:21-CV-130 (E.D. Tex. Mar. 5, 2024); Colt & Joe Trucking, LLC v. Dep't of Labor, No. 24-cv-00391 (D.N.M. Jan. 9, 2025); Warren v. Dep't of Labor, No. 2:24-CV-7-RWS (N.D. Ga. Oct. 7, 2024); Littman v. Dep't of Labor, No. 3:24-cv-00194 (M.D. Tenn. Mar. 11, 2025).

[3] Fact Sheet #13, July 2008; Opinion Letter FLSA2025-2.