Stay Current

PAUL HASTINGS

February 2026

Follow us on LinkedIn

Regulatory Update

DOL Proposes to Rescind Biden-Era Independent Contractor Rule and Restore 'Core Factor' Analysis

By Raymond W. Bertrand and Brian A. Featherstun

On Feb. 26, the U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) titled "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act." The NPRM would rescind the Biden administration's 2024 independent contractor rule and replace it with a modified version of the rule adopted during President Donald Trump's first term in January 2021.

The NPRM would restore the "core factor" analysis from the 2021 rule, which identifies two factors as the most probative indicators of whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Those factors are (1) the nature and degree of control over the work and (2) the individual's opportunity for profit or loss. Significantly, the DOL also proposes to extend this framework to the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), creating a uniform federal classification standard across all three statutes.

Background

The classification of workers as employees or independent contractors under the FLSA has been the subject of three successive rulemakings. In January 2021, the DOL published a final rule (the 2021 Rule) that organized the longstanding "economic reality" test into a framework identifying two "core" factors (control and opportunity for profit or loss) as carrying greater weight in the classification analysis. The 2021 Rule was delayed and then withdrawn by the Biden administration, but a federal district court in Texas vacated those actions and reinstated the 2021 Rule.

In January 2024, the DOL published a replacement rule (the 2024 Rule) that rescinded the 2021 Rule and adopted a six-factor, totality-of-the-circumstances analysis with no predetermined weighting of factors. Five lawsuits were filed challenging the 2024 Rule, all of which remain pending but stayed. On May 1, 2025, the DOL announced it would no longer enforce the 2024 Rule in its own investigations and instead would apply prior subregulatory guidance pending this rulemaking.

Key Provisions of the Proposed Rule

The proposed rule would readopt the 2021 Rule's classification framework with a few modifications. The core elements include:

- **Restoration of the 'Core Factor' Framework:** The NPRM would reinstate two "core" economic reality factors that carry greater weight than other factors: (1) the nature and degree of control over the work and (2) the individual's opportunity for profit or loss. If both core factors point toward the same classification (i.e., whether employee or independent contractor), there is a "substantial likelihood" that classification is correct. Three additional factors — (3) the amount of skill required, (4) the degree of permanence and (5) whether the work is part of an integrated unit of production — would serve as "additional guideposts" but carry less probative weight.

- **Control Factor:** This factor weighs toward independent contractor status when the individual exercises substantial control over key aspects of the work, such as setting a schedule, selecting projects and working for others (including competitors). It weighs toward employee status when the potential employer controls the schedule and workload, or directly or indirectly requires exclusive engagement. Importantly, the proposed rule restores guidance that requiring compliance with legal obligations, health and safety standards, insurance, contractual deadlines or quality control standards does not constitute control indicative of an employment relationship.

- **Opportunity for Profit or Loss:** This factor considers whether the individual can earn profits or incur losses based on initiative (such as managerial skill or business acumen) or management of investments (such as in helpers, equipment or materials). Critically, the proposed rule would consider the individual's investment only, not the relative investments of the worker and potential employer, as the 2024 Rule required. The DOL explained that comparing investments between worker and employer is not probative because a corporate client's overall business investments will almost invariably dwarf those of an independent contractor.

- **Skill Factor Refocused on Training and Skill:** Unlike the 2024 Rule's "skill and initiative" factor, the proposed rule would consider only whether the work requires specialized training or skill that the potential employer does not provide.

- **Permanence:** This factor focuses on whether the work relationship is by design definite in duration or sporadic (favoring independent contractor status) versus indefinite or continuous (favoring employee status). The proposed rule removes the 2024 Rule's incorporation of exclusivity and initiative into the permanence analysis.

- **'Integrated Unit of Production' Replaces 'Integral Part':** The proposed rule would return to the 2021 Rule's "integrated unit of production" formulation, which asks whether a worker's work is segregable from the potential employer's production process. The DOL rejected the 2024 Rule's inquiry into whether work is "critical, necessary or central" to the employer's principal business, reasoning that virtually all work is in some sense necessary to the business.

- **Primacy of Actual Practice:** The proposed rule would restore the principle that the actual practice of the parties is more relevant than what may be contractually or theoretically possible. The DOL noted that theoretical abilities, such as the ability to negotiate prices or work for competitors, are less meaningful if the individual is prevented from exercising those rights in practice. Similarly, a contractual right to supervise or discipline may be of little relevance if never exercised.

- **Uniform Standard Across FLSA, FMLA and MSPA:** For the first time, the DOL proposes to apply the same classification analysis to the FMLA and MSPA by adding cross-references to the FLSA's classification framework. The DOL noted that all three statutes share the same statutory definition of "employ" and that maintaining separate analyses risks confusion.

Further Streamlining Under Consideration

The NPRM also seeks comment on an even more streamlined alternative in which the control factor would be considered first: If the potential employer controls the worker, the worker would be classified as an employee without further analysis. Only if the control factor indicates independent contractor status or is neutral would the analysis proceed to the opportunity for profit or loss factor and the remaining factors. The DOL suggests this approach could be responsive to the Supreme Court's recognition that the FLSA extends the scope of employment beyond the common law control test.

Key Takeaways for Employers

- **Monitor the rulemaking process and consider submitting comments.** The NPRM is scheduled for publication in the Federal Register on Feb. 27. The 60-day public comment period closes April 28. The 2024 Rule technically remains in effect for private litigation until formally rescinded. However, the DOL ceased enforcing the 2024 Rule in May 2025 and is applying pre-2021 guidance in its own investigations. Employers should be mindful of this dual landscape when evaluating classification risk.

- **Review existing independent contractor arrangements.** If finalized, employers should evaluate their independent contractor relationships, considering these core factors.

- **Consider the FMLA and MSPA implications.** The proposed extension of the FLSA classification analysis to the FMLA and MSPA would, for the first time, create regulatory uniformity across these three statutes. Employers in agriculture and those with workers who may seek FMLA leave should pay close attention to these provisions.

- **Remember that state law requirements remain.** The proposed rule addresses only classification under federal law. Employers must continue to comply with applicable state classification standards, many of which, such as California's ABC test, impose stricter requirements than the federal economic reality test.

Consult experienced employment counsel. Given the evolving regulatory landscape and the potential for further changes, employers should work with counsel to assess their classification practices and develop strategies to minimize risk. Please reach out to Paul Hastings to discuss strategies specific to your needs.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Elena R. Baca
+1-213-683-6306
elenabaca@paulhastings.com

Felicia A. Davis
+1-213-683-6120
feliciadavis@paulhastings.com

Ryan D. Derry
+1-415-856-7092
ryanderry@paulhastings.com

San Francisco

Chris A. Jalian
+1-213-683-6143
chrisjalian@paulhastings.com