



Independent Contractor Regulatory Final Rule January 2021

SUMMARY: On January 7, 2021, the US Department of Labor’s Wage and Hour Division (WHD) will publish a [final rule](#) to clarify how to determine whether a worker is an employee or an independent contractor (IC) under the Fair Labor Standards Act (FLSA). Absent additional legislative or regulatory action, the rule will become effective in early March 2021 and includes **a specific example regarding safety requirements in the trucking industry (see below).**

Policy Benefits to Motor Carriers and Owner-Operators: The final rule provides working Americans the freedom to pick the occupation and flexibility they desire and gives businesses clarity on the characteristics of a *bona fide* independent contractor so they can more easily comply and avoid litigation. Many Americans choose the independent contractor model — including hundreds of thousands of owner-operators in trucking — because of the opportunity it provides and empowerment to choose the conditions (e.g., hours and routes) that suit their lifestyle. More specifically,

- The final rule puts the most weight on control and profit and loss factors and avoids the greater subjectivity of many factor balancing tests where outcomes are more uncertain and often depend on the skill of advocates and the preconceptions of adjudicators. If control and profit/loss factors favor independence, then a company will likely prevail in validating the independent contractor relationship with the opposite outcome when the facts do not support such status. If evidence under two core factors conflicts or does not strongly favor one outcome, then the three guidepost factors — skill, permanency and integral nature of the work -- would be considered.
- The final rule creates clarity on certain aspects of control. For example, safety mandates in a contract would definitively not be counted as an indicator of control.
- It adds clarity on profit and loss — lessening the weight put on the amount of a worker’s investment and more on their ability to use their abilities and assets to benefit economically.
- It includes guidance when it comes to skill, permanence, and integration. The guidance is applicable in a general sense to all American businesses but trucking is discussed in certain aspects of the preamble.

Legal Specifics:

- Clarifies that US DOL will use the Supreme Court’s “economic reality” test to determine whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer (employee);
- Identifies two “core factors” — specifically the nature and degree of control over the work and the worker’s opportunity for profit or loss based on initiative and/or investment;
- Identifies three other “guideposts” if the two core factors conflict — the amount of skill required, the permanency of the working relationship between the parties, and whether the work is part of an integrated unit of production;
- Specifies that actual practice is more relevant than written contractual rights and duties in determining whether a worker is an employee or an independent contractor; and

- States that contractual provisions ensuring compliance with legal responsibilities, like safety, should not be considered evidence of control, and includes a specific example regarding safety requirements in the trucking industry.

Changes from the Proposal: As anticipated given the very tight timeframe, the US DOL made only a few minor changes from the proposal and adopted a general industry test without attempting to address the nuances of various industries like trucking. The Department did clarify in the preamble the final rule the following issues identified by ATA in its comments:

- The Department acknowledged in the preamble that long term relationships between parties do not necessarily imply control. This is important to ATA Members because many ICs choose to provide driving services and a truck to a single motor carrier and take every opportunity offered because that is convenient and profitable for them.
- The final rule preamble also discusses the intent to carve out compliance with safety and non-safety mandates (e.g., the Department of Transportation’s Truth-In-Leasing regulations) and various quality assurance requirements from analysis of the worker’s control or ability to earn a profit or suffer a loss.
- The Department also clarified its view that piece rates (e.g., pay by load or mile) are not dispositive of IC status.

Caveats: The incoming Biden Administration has announced plans to freeze and reverse or alter these regulations, and a number of entities are expected to file legal challenges in the interim. As such, ATA anticipates that the rule may not go into effect in March. Furthermore, the final rule does not preempt state wage and hour laws, though many states follow federal guidance and rules in construing employment classification and may adopt provisions in the final rule for purposes of applying state law (even if the rule never goes into effect federally). The final rule also does not directly impact workers compensation, unemployment taxes, state or federal payroll taxes, or other employment laws like Title VII.

The specific text for the example in the final rule related to trucking follows on the next page. Please contact ATA VP of Workforce Development Nick Geale (ngeale@trucking.org) if you would like additional information.

Regulatory Example Related to Trucking

§ 795.115 Examples of analyzing economic reality factors.

(b)(1)(i) Example. An individual is the owner and operator of a tractor-trailer and performs transportation services for a logistics company. The owner-operator substantially controls the key aspects of the work. However, the logistics company has installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS. The company limits the owner-operator's speed in order to comply with federally mandated motor carrier safety regulations and to ensure that she complies with local traffic laws. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and her contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

(ii) Application. The owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status. The fact that the company has installed a device that limits and monitors the speed of the owner-operator's vehicle does not change the above conclusion. This measure is implemented in order to comply with specific legal obligations and to ensure safety, and thus under § 795.105(d)(1)(i) would not constitute control that makes the owner-operator more or less likely to be an employee under the Act. The contractually agreed upon delivery deadlines, incentives, and penalties are typical of contractual relationships between businesses and likewise would not constitute control that makes the owner-operator more or less likely to be an employee under the Act.