



New Fair Labor Standards Rules for 2021 May Impact Architectural Employers

The faculty of the OSU School of Architecture deeply appreciate state architecture firms' willingness to offer employment to our graduates as well as to those seeking summer employment, and never more so than in such uncertain times. In such times, architects may be understandably motivated to limit their financial commitments by engaging some people as independent contractors, but this motive should be exercised in full understanding of revised Fair Labor Standards Act rules coming into effect March 8, 2021. With these rules, the Department of Labor (DOL) has attempted to clarify who can be legitimately classified as an independent contractor and who cannot.

In regards to determining who is and who is not legitimately classified as an independent contractor, the DOL holds that "The ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)."

This is called the economic realities test. A finding of economic dependence will, under the new rules, largely hinge on two factors: "(1) The nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss."

Regarding the economic dependence test the Department of Labor advises that:

"At bottom, the phrase "economic dependence" may mean many different things. But in the context of the economic reality test, "economic dependence" is best understood in terms of what it is not. The phrase excludes individuals who, as a matter of economic reality, are in business for themselves. Such individuals work for themselves rather than at the sufferance or permission of a potential employer, see [29 U.S.C. 203\(g\)](#), and thus are not dependent on that potential employer for work. Section 795.105(b) therefore recognizes the principle that, as a matter of economic reality, workers who are in business for themselves with respect to work being performed are independent contractors for that work."

The second important factor examines the nature and degree of the control over the work.

This test "weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors."

The advice from the DOL goes on to remind that voluntarily agreeing to independent contractor status is not sufficient: "The Supreme Court, however, held in *Tony & Susan Alamo*, 471 U.S. at 302, that the FLSA must be 'applied even to those who would decline its protections.'"

This alert to the new rules in no way substitutes for employers' need to consult with their attorneys but is intended only to call attention to the fact that new rules will soon be in place that may impact firms' decisions regarding how they classify people who help them produce their work.

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Source: <https://www.federalregister.gov/d/2020-29274/> see especially pages 116, 129 and 243.