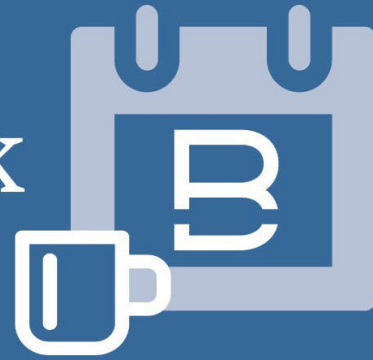


The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Independent Contractor Rule: Déjà Vu All Over Again

[Beth L. LaCanne](#)

Proper classification of a worker is important to ensure compliance with various state and federal laws. The stakes are high if a worker is misclassified, particularly if they are misclassified as an independent contractor. Classifying a worker becomes more difficult when the rules that provide critical guidance to employers change with a change in the administration. The Department of Labor (DOL), who proposes rules related to the Fair Labor Standards Act (FLSA), is once again proposing changes to the rule for assessing a worker's status. In this edition of *The Work Week*, we discuss the differences between the current rule and the proposed final rule.

The Current Rule (2024 Final Rule)

The Department of Labor's 2024 final rule adopts a six-factor "economic reality" test to determine whether a worker is an independent contractor or employee. Although there are six factors, no single factor controls. Instead, classification depends on the totality of the circumstances, including:

- Degree of control over the worker
- Opportunity for profit or loss
- Permanence of the relationship
- Skill required
- Worker investment in tools or equipment

- Whether the work is integral to the business

The current framework tends to favor employee status, increasing the risk that workers you classify as independent contractors could be reclassified. That, in turn, can trigger exposure to back wages, overtime liability, and penalties. Although enforcement has been paused, the rule still signals a stricter enforcement posture and has influenced litigation and state-level approaches.

The Proposed Rule (2026 Proposal)

The 2026 proposed final rule would restore the 2021 rule which consisted of 5 factors, with an emphasis on the first two factors. The five factors are:

- Nature and degree of control over how the work is performed
- Opportunity for profit or loss
- Amount of skill required to perform the work
- Degree of permanency of the relationship between the worker and employer
- Degree of integration of the work into a unit of production

If the first two factors align, they may largely determine the outcome. The remaining factors play a secondary role. For employers, this approach is generally more favorable, offering clearer pathways to independent contractor classification and reducing reliance on a broad, multi-factor balancing test. In addition to the emphasis on two factors, the proposed final rule defines “independent contractor” under the FLSA as well as the Family and Medical Leave Act (FMLA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The 2024 rule only applies to classification under the FLSA. The comment period for the proposed final rule closes on April 28, 2026.

Implications for Employers

The import of either the 2024 rule or the proposed 2026 final rule if adopted may be insignificant because federal courts no longer give deference to administrative agency rules. Additionally, federal courts may not give much, if any, weight to a rule that tends to change when a new administration enters office. It is also important to note that the DOL’s rule does not apply to worker classification under state statutes.

While shifting rules based on political tides can be frustrating, they serve as good reminders for employers to evaluate their policies, procedures and practices. With respect to worker classification, employers should consider:

- Auditing workers currently classified as independent contractors under the applicable state standard as well as both federal standards

- Document decision-making when determining a worker is an independent contractor
- Structure relationships carefully and abide by those structures, even if you have a contract
- Monitor regulatory developments

The Bassford Remele Labor and Employment Law Group closely monitors regulatory and legal developments at both the state and federal levels. We advise clients on the practical implications of these developments. We also defend clients before administrative agencies and in state and federal courts related to worker misclassification.

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