



*Attorneys say the proposed rules effectively restore the old six-factor test. (Photo collage by utah788, courtesy of iStock)*

# Experts: Worker Classification Proposal Would Scrap DOL's Core-Factors Test

*By Landon Stamper*

What's old is new again, at least for worker classification.

The Labor Department's Wage and Hour Division wants to rescind the current standard — introduced under the Trump Administration — and return to the prior standard: a totality-of-circumstances test.

“Under the Trump rule, the idea was ... that it was going to be a bit more of a relaxed standard, that would be less of a presumption, less factors, maybe more clarity,” explained Leslie Stout-Tabackman, a Washington-based attorney with BDO. “I think what this signals [is that the rule] is going to be pretty much returned” to the old Labor Department rule, she explained.

Under the current standard, two factors were given additional weight and labeled as core factors: the level of control an employer exerts over the work and the worker's opportunity for profit or loss.

The attorney said the Labor Department's course

correction is probably out of concern that the two core-factors test led “to more findings of independent contractors rather than employees.”

Daniel Turinsky, a New York-based partner with DLA Piper, said the planned return of the old way makes it more likely that “people who are [currently] classified as independent contractors would fall within the rubric of employees.”

## **Employee Or Contractor?**

Turinsky said it's going to be important for employers to “really take a look” at the relationships they have with people currently classified as independent contractors to ensure there isn't a misclassification.

He noted that unlike the Trump-era rule, with its two core factors, there's now four other factors to evaluate.

Under the proposal issued Oct. 13, the six factors to

consider are:

1. Opportunity for profit or loss
2. Investments by the worker and the employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. Extent to which the work performed is an integral part of the employer's business
6. Skill and initiative

Take, for example, that last factor.

Turinsky said it focuses on whether workers have special skills or if the company has to train them. Having the necessary skills when hired could tip the scales toward an independent contractor classification. But if the workers need training, that may point toward them being an employee.

Turinsky also gave an example using the degree-of-permanence factor. If a contractor has been working with a company for years, that could be an indicator of an employer-employee relationship.

Companies should also consider how integral the work is to their business. For this factor, the proposed rule states that it doesn't matter how long the worker spends on critical workflows, only whether the work itself is vital to the company.

"That could be problematic, obviously, for a lot of businesses where these contractors are performing work that is integral to their business," Turinsky said.

### Other Factors

Patrick Dalin, a Philadelphia-based attorney of counsel to Fisher Phillips, said that factors pointing in the direction of control could indicate an employer-employee relationship.

For example, when asked whether an ELD-equipped truck tracking a driver's movements could indicate control, Dalin said that's possible.

"In general terms, [the] company exercising control for purposes of legal obligations, safety standards or customer service would be a factor that points towards control consistent with an employer-employee relationship," Dalin said, while noting that it would be considered within the body of facts alongside other factors.

For those worried about these changes, Dalin said that they should "want to shape the playing field in their favor as much as possible" before the rule is finalized.

He added that they should make sure as many factors as possible are pointing "in the direction that you want to go."

In the same vein, Turinsky noted that the proposed system is less clear-cut, given that no one factor is weightier than another.

This can sometimes lead to multiple factors pointing one direction and others going the opposite route.

Just because one factor points in the direction of an employee, that doesn't make that worker one, he emphasized.

The proposed rule itself states that "it is to be expected that not every factor will align with the ultimate result."

However, with the scope being expanded beyond the Trump-era's core factors, "there's a greater argument that these individuals are employees because you're looking at other things beyond two check-the-box factors," Turinsky explained.

By "broadening the scope of what you're looking at in terms of the totality of the circumstances, there's more opportunities for individuals to claim that [they're] employees looking at these other factors," he said.



*Leslie Stout-Tabackman  
(Photo courtesy of BDO)*



*Daniel Turinsky (Photo  
courtesy of DLA Piper)*



*Patrick Dalin (Photo  
courtesy of Fisher Phillips)*