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DOL Issues New Guidance on Independent Contractor Status

On January 6, 2021, the US Department of Labor (DOL) issued long sought-after clarity on the legal distinction between independent contractors and employees under the Fair Labor Standards Act (FLSA). **The rule** is scheduled to take effect on March 8, 2021.

The rule reaffirms the “economic reality” test to determine whether an individual is in business for him or herself (and therefore an independent contractor) or is economically dependent on an employer for work (and therefore an employee). The DOL lays out five factors to consider in making this determination. The list is non-exhaustive and no single factor is dispositive; however, the first two are considered to hold the most weight – such that, if the first two factors are both in favor of one status or the other (employee or independent contractor), the remaining factors will not be relevant in most cases.

1. The nature and degree of the individual’s control over the work. Does the worker exercise substantial control over key aspects of the performance of his/her work? Does the worker set his/her own schedule? Select his/her own projects? Work for others?
2. The individual’s opportunity for profit or loss. Does the worker have an opportunity to earn profits or incur losses based on his/her own exercise of initiative or management of his/her investment in or capital expenditure on helpers, equipment, or material?
3. The amount of skill required for the work. Does the worker require specialized training or skill not provided by the hiring entity?
4. The degree of permanence of the working relationship. Is the work, by design, definite in duration or sporadic?
5. Whether the work is part of an integrated unit of production. Is the work a component of the hiring entity’s integrated production process for goods or services?

Although this guidance is aimed at reducing worker misclassification, there is uncertainty over whether the Biden administration will accept, rescind or revise this rule before it goes into effect. As such, employers may wish to review independent contractor classifications in accordance with this new rule but wait until late February or the first week of March before making changes. If you have any questions about how this new rule may affect you or your workforce, contact [Nicole Gardner](#) or [Erin Ball](#).

EEOC To Re-Open EEO Data Collections In 2021

After delaying the opening of the 2019 EEO-1 Component 1 Data Collection on May 8, 2020 in light of COVID-19, the Equal Employment Opportunity Commission (EEOC) recently announced the 2019 and 2020 EEO-1 Component 1 Data Collection (EEO-1 Report) is on schedule to open in 2021.

The EEO-1 Report is a compliance survey mandated by federal statute and regulations and applies to companies that meet the following criteria: (i) subject to Title VII of the Civil Rights Act of 1964, as amended (Title VII), with 100 or more employees; or (ii) subject to Title VII with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; or (iii) federal government prime contractors or first tier subcontractors subject to Executive Order 11246, as amended, with 50 or more employees and a prime contractor first-tier subcontract amounting to \$50,000 or more. The survey requires company employment data to be categorized by race/ethnicity, gender and job category. A sample copy of the EEO-1 form and instructions are available [here](#). The EEO-1 reports are confidential, except for federal government prime contractors or first-tier subcontractors. The data is used to support civil rights enforcement and analyze employment patterns, such as the representation of women and minorities within companies, industries or regions.

The 2019 and 2020 EEO-1 Report is scheduled to open April 2021. Employers that will be required to file an EEO-1 Report are advised to begin preparing data collection. The specific opening dates and deadlines for the collections will be announced on the EEOC's home page. As in other years, the EEOC will send out notification letters to eligible filers. If you have any questions or need assistance, contact [Nicole Gardner](#) or [Erin Ball](#), or visit the [EEO-1 FAQ page](#).

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