Independent Contractor Classification Under the FLSA: An Ever-Evolving Concept

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The current administration is signaling that familiar changes are coming to worker classification rules under federal wage and hour laws. With these changes, Community Action Agencies (CAAs) may find that more workers may be treated under federal law as independent contractors instead of employees. This shift is the most recent development in a 75+-year back and forth between presidential administrations over how to determine whether workers are independent contractors (ICs).

FLSA and Worker Classification

The Fair Labor Standards Act (FLSA) is the federal statute that establishes minimum wage, overtime pay, exemption status, and other wage and hour standards for most employers. The FLSA requirements only apply to "employees," which the law defines as "any individual employed by an employer."[1] To facilitate compliance with the FLSA, employers need to understand who in their workforce is an employee and who is an IC—but the FLSA does not define "independent contractor." Failure to properly classify a worker as an employee can result in a myriad of issues, including the need to provide backpay and fines from state and federal regulators.

The U.S. Department of Labor (DOL) Wage and Hour Division (WHD) is the federal agency responsible for interpreting the FLSA via opinion letters, regulations, and other guidance. To enforce the provisions of the FLSA, either the WHD or an individual worker can file a lawsuit against an employer. Since the mid-1900s, the WHD has applied different versions of a multifactor test used by the courts to determine whether a worker is an employee under the FLSA or an IC. This test is typically called the "economic reality/realities test." The WHD under different administrations has repeatedly attempted to clarify the economic realities test by adding or removing factors, emphasizing specific elements, or framing the overarching question in a particular manner.

Regulatory Back and Forth

At the end of the first Trump administration, the WHD promulgated a rule (the "2021 Rule")[2] that formally implemented regulations on employee versus IC classification under the FLSA.[3] The 2021 Rule included a non-exhaustive 5-factor test. Within the 5-factor test, two "core" factors weighed more heavily than the other three. Prior to the issuance of the 2021 Rule, IC determinations under the FLSA were based on case law and interpretations by the WHD in the form of fact sheets, opinion letters, and other guidance.

The next administration rescinded the 2021 Rule and replaced it with a new regulation (the "2024 Rule").[4] It includes a 6-factor test with no single factor weighing more heavily than any other. For

additional details regarding the elements of the 2021 Rule and 2024 Rule, see CAPLAW's article *Upcoming Federal Changes to Employee Classification and Potential Impacts on Community Action Agencies* (February 2024).

2025 WHD Approach and Rule?

When the current administration took office it indicated an intent to return to the 2021 Rule. In May 2025, the WHD released a Field Assistance Bulletin (FAB 2025-1) to staff conducting investigations and enforcement actions which stated it would no longer apply the 2024 Rule. Instead, the WHD is currently relying on pre-2021 Rule guidance for IC classification analysis reflected in Fact Sheet #13 (July 2008) and Opinion Letter FLSA2019-6.[5]

In September 2025, the WHD announced plans to rescind the 2024 Rule, however, it has yet to formally issue new rulemaking to do so.[6] If and when that occurs, it remains unclear what will replace the 2024 Rule. The WHD could develop a new rule (or reinstate the 2021 Rule) or rely on sub-regulatory guidance such as the FAB, fact sheets, and opinion letters instead. In the meantime, CAAs and other employers are left in a confusing space where the 2024 Rule is still technically in effect and courts continue to apply versions of it in litigation, but the WHD is not enforcing it.

Key Takeaways for CAAs

- For now, the 2024 Rule remains in effect and courts continue to apply it. Although the WHD is not enforcing the 2024 Rule, an individual could still bring litigation to enforce it against an employer.
- If and when the current administration issues a new rule, it will likely include a test that is favorable to employers such as CAAs, resulting in more workers being classified as ICs under the FLSA.
- Most states have wage and hour laws of their own. If your state laws are more employee-favorable than the FLSA, know that you need to be compliant with your state's law as well as federal law.
- IC tests used by federal agencies other than the WHD are not impacted by these developments. Other IC tests exist under federal law for reasons other than FLSA classification, such as the Internal Revenue Service test for determining if a worker is an employee for tax purposes.
- CAAs should continue to work with experienced employment counsel with knowledge of applicable state laws when evaluating compliance with the FLSA or engaging with the WHD.

CAPLAW will continue to monitor developments in this area and inform the Network if new rules or guidance are released.

END NOTES

[1] 29 U.S.C. § 203(d), (e), (g)

[2] Independent Contractor Status Under the Fair Labor Standards Act, 86 FR 1168 (January 7, 2021)

[3] 29 CFR Part 795

[4] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 FR 1638 (January 10, 2024)

[5] Redesignated by the WHD as FLSA2025-2

[6] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA46: "The Department intends to rescind the 2024 IC rule and is considering how it will proceed with respect to independent contractor classification under the FLSA employee or under the FLSA." [sic]

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