

NEW DEPARTMENT OF LABOR FINAL RULE REQUIRES REASSESSMENT OF INDEPENDENT CONTRACTORS

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Physical therapy practices need to be aware of new legal standards that make it harder for employers to classify workers as independent contractors (as opposed to employees). This distinction is important because, if an employment relationship exists, employment laws provide certain legal protections to employees and obligate employers to meet specific legal obligations.¹ The penalties for misclassifying employees as independent contractors can be quite significant, so physical therapy practices must understand these recent changes.

On January 10, 2024, the U.S. Department of Labor (“DOL”) published a final rule entitled Employee or Independent Contractor Classification under the Fair Labor

¹ Employment laws require businesses to do things for employees that they do not have to do for non-employees (such as withhold employment taxes, pay a portion of certain payroll taxes, abide by employment discrimination laws, provide access to established employee benefit plans/programs, comply with overtime, minimum wage and other wage-and-hour laws, include in workers’ compensation coverage, etc.). As such, it is critical for businesses to know who is an employee and who isn’t (a so-called independent contractor).

Answering this question is more complicated than it seems. Many businesses believe that someone is an independent contractor if the business says so, if the parties agree that the individual isn’t an employee, or if the business takes a certain action (like report payments made on an IRS Form 1099). But this is NOT how the law works.

Whether an individual who performs services for a business is an employee or an independent contractor is a *legal conclusion*, not an election of the business and/or the individual. In other words, an individual isn’t an independent contractor simply because the employer says so or even if both parties agree.

Standards Act² (“[Final Rule](#)”) which provides new guidance on how to properly classify a worker³. The Final Rule rescinds a rule that was published in 2021 and is intended to make certain that workers who should be treated as employees are paid appropriate minimum wage and any overtime to which they may be entitled. The Final Rule moves away from the prior rescinded rule which placed a priority on the control of the company over the workers and the level of “entrepreneurial opportunity” that the work provided. As noted by the U.S. Department of Labor in a blog post on the Final Rule, the Final Rule also seeks to assure employers that comply with the law are not put at a competitive disadvantage when competing against employers who do not properly classify employees.

The Final Rule has an effective date of March 11, 2024⁴, leaving a short window of time for physical therapy practices and others to assess the classification of their workforce members. This workforce analysis will require the application of the multifactor, totality of the circumstances analysis set forth in the Final Rule to assess whether, under the Fair Labor Standards Act, the worker is an employee or independent contractor.⁵

² The Fair Labor Standards Act of 1938 is a New-Deal-Era federal law that requires employers to pay overtime and minimum wage rates to non-exempt employees and also regulates child labor. 29 U.S.C. § 203.

³ This follows on the heels of the June 13, 2023 decision of the National Labor Relations Board (“NLRB”) in The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE case. Case 10– RC–276292. In that case, the NLRB found (1) these workers have a realistic opportunity to work for other employers and/or exert control over their work and certain business decisions; or (2) if they do not have these entrepreneurial opportunities, the workers have duties that would qualify them as independent contractors under the “common law” factors.

⁴ Legal challenges to the Final Rule have already been filed in the Northern District of Georgia and the Fifth Circuit Court of Appeals and additional suits may be filed. Accordingly, this effective date may be delayed.

⁵ It is important to note that this is just one federal law and that practices must still consider independent contractor classification under other federal and state laws.

The Final Rule applies an “economic reality test” which consists of six factors. These six factors are not intended to be an all-inclusive list and additional factors may be considered. Additionally, these factors are not weighted under the Final Rule.

The first factor is the opportunity for profit or loss depending on managerial skill. This factor considers whether a worker has the opportunity to affect their economic success or failure through the performance of work. Relevant facts include whether the worker engages in marketing or other efforts to expand their business and whether the worker makes decisions to purchase materials or equipment, rent space, and/or hire others. If there is no opportunity for profit or loss, then this factor suggests that the worker is an employee.

The second factor is investments by the worker and the potential employer. This factor considers whether the worker’s investments are capital or entrepreneurial. The focus of this factor is on comparing the investments of the worker and the employer to determine whether they are similar, even if on a smaller scale, to suggest that the worker is operating independently. Investments that are capital or entrepreneurial such as expenses that would increase the worker’s ability to reduce costs or extend market reach tend to support an independent contractor relationship.

The third factor is the degree of permanence of the work relationship. This factor favors a worker being classified as an employee when the relationship is indefinite in duration, continuous or exclusive to work for others. This factor weighs in favor of a worker being a contractor when the relationship is definite, nonexclusive, project-based, or sporadic based on the worker providing services to multiple entities.

The fourth factor is nature and degree of control. This factor considers the potential employer's control of the performance of the work and economic aspects of the relationship. This factor considers whether the potential employer sets the work schedule, supervises performance, or limits the ability to work for others. This factor also considers whether the employer controls the economic aspects of the working relationship including controlling prices or rates for services and marketing.

The fifth factor is the extent to which the work performed is an integral part of the potential employer's business. This factor weighs in favor of the worker being an employee when the work they perform is necessary, critical, or central to the employer's principal business.

The sixth factor is skill and initiative and considers whether the worker uses specialized skills to perform the work. This factor leans toward employee status where the worker does not use specialized skills or where the worker is dependent on training from the employer to perform the work. The Final Rule notes that bringing specialized skills to the relationship is not itself indicative of independent contractor status, noting that both employees and independent contractors may be skilled workers.

The Final Rule notes that there may be additional factors in determining independent contractor status if the factors in some way indicate whether the worker is in business for himself as opposed to being economically dependent on the employer for work.

The classification of a worker as an independent contractor or an employee is a complicated process that, as of March 11, 2024, adds the additional element of the Final

Rule. Given the risks of misclassifying an employee as an independent contractor practices should take this opportunity to reconsider any workers they currently classify as independent contractors to confirm that they are comfortable with that classification on a going forward basis and to involve legal counsel or appropriate human resources support as needed in the analysis.

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