



# **HR Edge**

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Presented by StoneTapert Insurance Services



# Understanding the DOL's New Independent Contractor Rule

The U.S. Department of Labor (DOL) recently released a final rule revising its guidance on analyzing workers' employee or independent contractor status under the Fair Labor Standards Act (FLSA). Effective March 11, 2024, this final rule rescinds the current independent contractor rule published on Jan. 7, 2021. If this rule becomes effective, it may result in classifying a greater number of workers as employees — not independent contractors. This change would be significant, particularly in the gig economy, as it would afford more individuals rights and protections under the FLSA.

Under the FLSA, employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to these protections and benefits. Misclassifying workers as independent contractors can have serious financial and legal consequences for employers, including costly litigation, penalties and attorney fees. It's critical that employers understand the new rule and its potential impacts on their businesses, as the final independent contractor rule could significantly affect employers' operational and compliance costs and increase their litigation risks.

## Business Implications of the New Rule

The 2021 Independent Contractor Rule made it easier for employers to classify workers as independent contractors under the FLSA. This rule focused on two core factors: the nature and degree of the worker's control over the work and the worker's opportunity for profit and loss based on initiative or investment. These factors carried more weight in determining the status of independent contractors than the three other ERT factors (the amount of skill required for the work, the degree of permanence of the working relationship and whether the work is part of an integrated unit of production). However, the DOL's new rule will likely make it more difficult for employers to classify workers as independent contractors by reinstating the complex multifactor and totality-of-the-circumstances analysis, which is generally viewed as more employee-friendly. As a result, the new rule will likely lead to more employees being classified as employees.

The DOL's final rule will likely significantly increase the risk of employee misclassification for employers. Consequently, employers may face increased liability risks, such as class-action lawsuits or administrative actions, for not providing FLSA-required benefits and protections to workers. This will likely impact small businesses more than larger organizations because they generally do not have the resources or necessary staffing to address complex compliance issues, such as employee classification under the FLSA.

## The DOL's New Independent Contractor Rule

The final rule rescinds the 2021 Independent Contractor Rule and returns to the pre-2021 rule precedent. In doing so, the final rule restores the multifactor, totality-of-the-circumstances analysis to assess whether a worker is an employee or an independent contractor under the FLSA.

The final rule ensures that all economic realities test (ERT) factors are analyzed equally without assigning a predetermined weight to a particular factor or set of factors. These six factors include:

1. The opportunity for profit or loss, depending on managerial skill
2. Investments by the worker and the potential employer
3. The degree of permanence of the work relationship
4. The nature and degree of control
5. The extent to which the work performed is an integral part of the potential employer's business
6. The worker's skill and initiative

# Understanding the DOL's New Independent Contractor Rule (cont.)

## Preparing for the New Rule

Although the DOL's final rule does not impose any new requirements on employers until it becomes effective, employers should become familiar with the final rule and evaluate what changes they may need to adopt if it becomes effective. Employers can prepare for the DOL's new independent contractor rule by ensuring they comply with all employee classification requirements under the FLSA. This is especially important for organizations that rely on independent contractors.

Employers can better ensure compliance with the DOL's final rule by taking the following actions:

- Audit existing working relationships with gig workers, freelancers, independent contractors and employees.
- Determine whether any workers' classifications must be changed in light of the final rule.
- Review any agreements with gig workers, freelancers, independent contractors and employees to ensure they comply with the final rule.
- Update employment policies and procedures to align with the DOL's final rule.
- Train managers on the FLSA's worker classification requirements.

While the DOL's final rule only applies to the FLSA, many states have rules for determining worker classification. To avoid potential violations and penalties, employers need to be familiar with all laws that apply to their organizations. Employers are encouraged to seek legal counsel to discuss specific issues and concerns.

## Employer Takeaway

If the DOL's final rule becomes effective, it will significantly impact most employers. Savvy employers will take the time to revisit their worker classifications and understand the final rule's potential impact on their organizations. By taking a proactive approach and reassessing worker classifications, employers can help ensure they meet compliance requirements and mitigate potential legal risks.





# Increased Adoption of Reproductive Health and Family-building Benefits in 2024



Maven's State of Fertility & Family Benefits in 2023 report revealed that **63% of surveyed HR professionals** plan to increase family health benefits within the next few years. Moreover, 87% recognized family benefits are "extremely important" to current and prospective employees.

Employers play a crucial part in ensuring employees have access to the health care they need and want. The importance of an employer's role in helping employees make essential health care decisions has become even more pronounced in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which ended federal protections for abortion rights and permitted states to implement their own regulations. As a result of this ruling, reproductive health care became a key issue for employers in 2023. Some employers began offering separate reproductive health benefits, including covering related travel expenses with a relief fund or one-time bonus. Others enhanced abortion coverage under their group health plans to ensure employees have access to reproductive health care. This trend is likely to continue into 2024 as employers continue to navigate the complex legal environment surrounding women's reproductive health.

The *Dobbs v. Jackson* decision has also placed heightened importance on the issue of access to contraceptive services. On Jan. 30, 2023, the U.S. Department of Health and Human Services proposed a rule to strengthen access to birth control coverage under the Affordable Care Act (ACA). If finalized, this rule would allow women enrolled in ACA plans to obtain birth control regardless of employer exemptions. The proposed rule would eliminate the moral exemption put in place in 2018 that allows employers to opt out of providing contraceptive services due to their moral convictions. Employers should continue to monitor this rule in 2024 and consider that

providing employees with access to reproductive health care and contraception, even when not required by law, can help their organizations stay ahead in a tight labor market.

Since experts expect employers' labor challenges to continue in 2024, many employers are also expanding fertility and family-building benefits to attract and retain talented individuals. Family-building benefits are valued by employees regardless of their gender identity or relationship status. These benefits can provide services for single and LGBTQI+ employees, as well as heterosexual and same-sex couples who depend on fertility treatment for their family-building journey. Family-building benefits can also include menopause support and treatment for testosterone deficiency. Savvy employers recognize fertility and family-building benefits as a crucial aspect of diversity, equity and inclusion (DEI) programs and ensure all employees have access to the resources and support they need to start a family.

## Employer Takeaway

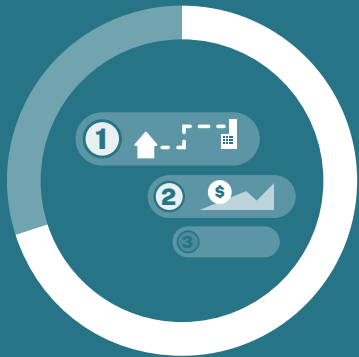
Providing access to reproductive health care and family-building benefits is part of a growing trend of employers offering employees benefits that support their financial, mental and emotional well-being. Since work and family are two of the most important components of an individual's life, employers who support employees' family needs and expectations can show employees they're valued as human beings. Moreover, while family-

building and reproductive health benefits often improve the attraction and retention of young generations of workers looking to start or grow their families, the impact of these benefits extends well beyond affected individuals; many employees want their employers to support women's health and DEI initiatives.

Comprehensive family-building and reproductive health benefits demonstrate that the organization cares about all its employees. In turn, when employees feel welcomed and supported in the workplace, employee engagement, productivity, satisfaction and retention are likely to increase. This can also help boost the organization's employer brand to current and prospective employees and the public, as well as improve its bottom line.

# Responding to Employees' Remote Work Desires

In a transformative shift in workplace dynamics, a recent survey by employment website FlexJobs revealed a groundbreaking trend: Remote work now takes precedence over salary for most employees. The traditional notion that financial compensation is the ultimate driving force behind job satisfaction is challenged by a growing desire for flexibility and work-life balance. This shift carries significant implications for employers who wish to attract and retain top talent in the ever-evolving work landscape.



The most significant finding of the FlexJobs survey was that **63% of respondents** voted remote work as the most important factor in a job, narrowly beating out salary. In fact, two-thirds of respondents are willing to **take a pay cut of up to 20% or more** to work remotely.

## Remote Work Considerations for Employers

During the COVID-19 pandemic, many individuals reprioritized work as a part of their lives instead of the main focus. Additionally, many employees were permitted to work from home at the height of the pandemic and experienced the benefits of working from home. Workers now prefer these flexible work arrangements because they feel they can remain productive at work but have more resources and personal time for families and hobbies by not having to commute. This has allowed employees to improve their work-life balance and general well-being.

Therefore, although organizations may contemplate return-to-work mandates during 2024, many employers have struggled with return-to-work orders. Even threats of termination haven't fully persuaded employees to comply with mandates. To remain attractive and keep employees happy and productive amid varying work arrangements, employers can consider the following strategies for navigating the demand for remote work opportunities:

- **Establish flexible policies.** Employers can prioritize the development of flexible remote work policies that cater to the diverse needs of their workforce. Offering options for fully remote, hybrid or flexible schedules can accommodate various preferences and business needs.
- **Invest in technology.** Providing the necessary technological infrastructure ensures seamless communication and collaboration in a remote or hybrid work setting. Employers should invest in reliable

virtual communication tools and platforms to facilitate efficient remote teamwork.

- **Adopt a work mindset about outcomes.** Employers can shift the organizational focus from traditional measures of productivity based on hours worked to outcome-oriented assessments. It should be about the results, not the hours. Trusting employees to deliver results increases autonomy and fosters a healthy and results-driven company culture.
- **Promote well-being initiatives.** Employers can implement programs prioritizing employee well-being (e.g., mental health resources and virtual wellness activities) among remote team members. It's important to foster a sense of connection among a dispersed workforce.
- **Communicate and solicit feedback regularly.** Establish open lines of communication and provide regular feedback. Clear communication channels and constructive feedback are crucial for maintaining a strong connection between remote or hybrid employees and their managers.
- **Offer benefits that support hybrid workers' return to the workplace.** If an employer is implementing a hybrid work policy, the following benefits may make a hybrid arrangement attractive:
  - » **Commuter benefits** (e.g., subsidized transportation, shuttle services or flexible commuting hours)
  - » **Family-friendly benefits** (e.g., on-site child care facility, child care stipends or flexible parental leave)

