

The U.S. Department of Labor (DOL) issued a [notice of proposed rulemaking](#) revising its interpretation of independent contractor status under the *Fair Labor Standards Act* (FLSA) with a streamlined economic reality test. This “employer friendly” interpretation was issued in an effort to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.

Background & Rule Highlights:

- The proposed rule adopted the “economic reality” test, which is more narrow in determining whether a worker is an employee. This is compared to a previous interpretation issued under the Obama Administration that was broader, and weighed against classifying workers as independent contractors.
- **In determining a worker’s status as an employee or independent contractor, the proposed rule examines a workers’ economic independence based on:**
 - **The nature and degree of workers’ control over the work** (i.e. setting your own schedule; selecting your own projects; ability to work for others.) and,
 - **The workers’ opportunity for profit and losses based on workers’ investment** (i.e. individual management of investment or capital expenditure on material to further work).
- Should additional analysis be needed, DOL proposed three additional guideposts for deciding a worker’s status based on: (1) the amount of skill required for work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and, (3) whether the work is part of an integrated unit of production.
- **Requiring an individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, or satisfy other similar terms that are typical of contractual relationships between businesses does not constitute control** making an individual more or less likely to be an employee.
- In evaluating the individual’s economic dependence on the potential employer, **the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.**
 - For example, a business’ contractual authority to supervise or discipline an individual may be of little relevance if in practice, the business never exercises such authority.

Impact on REALTORS®:

Worker classification is governed by state and federal law. While real estate professionals continue to enjoy the statutory carve-out in the Internal Revenue Code (26 U.S.C. §3508) to be qualified as independent contractors, courts are issuing decisions and states are increasingly passing legislation threatening more broadly the ability to be classified in this way. Authoritative federal guidance on this matter may help mitigate these attacks while also making sense of the fragmented judicial landscape in this area.

Improper classification of a worker could result in penalties or legal action at the federal or state level, including for violations of unpaid employer taxes, making clarity on this issue critical. Under the FLSA, employers are responsible for following minimum wage, overtime pay, and other recordkeeping requirements for employees, and in addition to penalties for non-

compliance, may face a private right of action by workers seeking unpaid minimum wage or overtime benefits.

Fortunately, state associations, along with NAR, are also actively involved in defending the ability to be classified as an independent contractor, achieving significant state statutory exemptions for real estate professionals. ([See CA for example.](#))

What's next:

Once published in the Federal Register, there will be a 30-day comment period, which NAR is likely to provide feedback and encourages state associations to do the same.

Given the timing of this proposed rule and how long it could take to finalize, the rule may be ripe for repeal under the *Congressional Review Act*. With a potential flip in the administration and the Senate, it is possible the updated interpretation is never implemented. Additionally, the House has already passed a labor bill (H.R. 2474) adopting the broader ABC test for determining workers classification for federal collective bargaining agreements and could take up similar FLSA legislation in the future.

Additional Resources:

- [Rule Summary](#)
- [DOL Press Release](#)
- [NAR FAQ's on IC Status](#)
- [FLSA Background](#)