

New Labor Department regulation will harm hotels and independent contractors

Dear AHLA Member,

Today, the Department of Labor's (DOL) Wage and Hour Division (WHD) released its final rule modifying the test used to determine if a worker is an employee or an independent contractor. The final rule, which is set to take effect in March, makes it harder for a worker to qualify as an independent contractor and introduces significant ambiguity into the analysis.

Background:

DOL's newly adopted independent contractor regulation sets forth the standard the agency will use to determine whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA). The FLSA requires employers pay hourly employees at least a minimum hourly wage and a premium rate for overtime (any work over 40 hours in one week). The FLSA requirements do not apply to independent contractors. Independent contractors do, however, enjoy flexibility and autonomy over their work. The new regulation sets forth a six-factor test that DOL will use in determining whether to classify a worker as an employee or independent contractor.

The Final Rule:

The final rule invites confusion and litigation by establishing a test where any of six different factors could be determinative of employee status. That's a significant departure from current policy where two core factors primarily guide classification determinations. The final rule's six factors are as follows:

- opportunity for profit or loss depending on managerial skill,
- investments by the worker and the potential employer,
- the degree of permanence of the work relationship,
- the nature and degree of control,
- the extent to which the work performed is an integral part of the potential employer's business, and
- the worker's skill and initiative.

Notably, under the final rule any particular factor – including undefined “additional factors” – could be determinative.

The Impact:

The new standard will result in significant confusion in worker classification determinations. Without a clearer focus on what aspects of a relationship are more significant when determining a worker's classification, the classification will be entirely dependent on who is conducting the analysis; what factors are most relevant will change from person to person and court to court.

This uncertainty will result in many in the hospitality industry being forced to reevaluate their business relationships with smaller entities. You may face unexpected liabilities with various individuals and entities that currently perform specialized services for your hotels.

Meanwhile, millions of independent contractors will lose business opportunities or be forced back into traditional employment roles that they do not want.

AHLA's Actions:

AHLA filed [comments](#) on the agency's proposed rulemaking in December 2022, where we echoed many of the concerns above. AHLA is considering potential next steps, including possible litigation challenging the rule.

Sincerely,

A handwritten signature in black ink that reads "Chip Rogers". The signature is written in a cursive, flowing style.

Chip Rogers