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## Independent contractor rule draws 55,000-plus comments

By Patrick Thibodeau

A U.S. Department of Labor proposal to toughen its independent contractor rule is generating controversy and a lot of interest. Business groups, unions, advocacy organizations and individuals seized the opportunity to comment on the proposed rule, with more than 55,000 comments received by the deadline on Tuesday at midnight.

The rules developed by President Biden's administration will determine who is an independent contractor and an employee. If the government decides that a business is misclassifying workers as independent contractors, it may face fines and legal action.

In taking this action, Biden is reversing earlier business-friendly regulations set by former President Trump and replacing them with a more stringent test of who should be classified as an independent contractor.

The rule change is generating a backlash from business groups and support from those who advocate for low-wage workers.

Employers will have "to be very careful about misclassifying and/or classifying someone as an independent contractor," said Paul Lopez, a labor and employment attorney at Tripp Scott in Fort Lauderdale, Fla.

"If someone is spending a significant amount of time working for your organization, they may very likely be viewed as an employee versus an independent contractor," Lopez said.

The U.S. has had an independent contractor test for decades. Still, this issue is becoming more political as many Americans [turn to self-employment](#), thanks to the arrival of app-based hiring platforms, such as those used in on-demand ride services and food delivery. But self-employment, contract and [gig work](#) are found in almost every job category, including financial advisors, interpreters, truckers, healthcare professionals, etc.

The Trump administration in January 2021 narrowed the independent contractor rule to two core issues: the amount of control the employer has and whether the worker has some control over profit or loss, such as business expenses. The Biden administration has restored some factors, creating a six-factor "economic reality test," including a degree of permanence and whether the independent contractor is performing work that is an integral part of the business.

### Upend business relationships

[Freelance writers](#), among other groups, are worried that the Biden administration's independent contractor rule may upend business relationships. They argue that it could lead to decisions to terminate self-employed workers because employers don't want to take on full-time workers.

The American Society of Journalists and Authors, which wrote in opposition to the rule change, cited government data that put the number of self-employed writers at more than 60% of the total.

"Freelance journalism is not a new arrangement," said Laura Laing, president of the New York-based writers group, in a written comment to the government. "Benjamin Franklin wrote *Poor Richard's Almanac*, among other works, as an independent writer."

The U.S. Chamber of Commerce said that many independent workers "believe they are more financially secure as independent contractors than as employees," said Marc Freedman, vice president of workplace policy at the chamber, in his written comment.

But Terry Fromson, managing attorney of the Women's Law Project in Philadelphia, said the Biden rule would especially help women, people of color and immigrants. These are people who "often must accept low-wage, unsafe and insecure work" in industries where misclassification of workers is common, such as delivery services, janitorial services, home care and app-dispatched work, she wrote in a comment.

The independent contractor rule change planned by the Biden administration is considered a done deal. [Seeking comments](#) is something the government has to do before imposing a new regulation. But the administration has made clear that the new rules are needed to end industry abuses of independent contractors. Outside experts estimate that the Labor Department may implement the new rules sometime in the first half of 2023.

An employer's core business model determines the risk of a government audit, said Chris Braham, an employment attorney at McDermott Will & Emery in Los Angeles. If the business model of a firm isn't in software, but it is using independent contractors to create software, the firm may have less to worry about than a company with a software development business model, he said.

In response to the pending rule, Braham said businesses should look at their workforces and ask, "Is there a material percentage of my workforce that would classify as an independent contractor?" He said that employers should audit their workforce, determine risk points, and identify what changes they can make now to ensure the best protection from the independent contractor rule change.

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