

Insights, News & Events

# FP SNAPSHOT FOR MANUFACTURERS: NEW INDEPENDENT CONTRACTOR RULE COULD CAUSE CHAOS IN YOUR COMPANY

Insights  
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Welcome to FP Snapshot on Manufacturing Industry, where we take a quick snapshot look at the most significant workplace law developments with an emphasis on how they impact manufacturers. In this edition, we unpack the ramifications of a forthcoming rule which will make it notably more challenging to classify your workers as independent contractors. Manufacturing employers should pay particular attention to the new rule – which is slated to take effect on March 11 – because it will have an outsized impact on your industry.

## Snapshot Look at New Rule

[We have prepared a detailed analysis comparing the new rule about to take effect with its predecessor, which you can read here.](#) Put simply, the new Department of Labor rule restores a rigorous six-factor assessment to determine whether a worker should be classified as an employee or an independent contractor. These factors will ultimately make it more challenging for you to classify workers as contractors. They include:

- The opportunity for profit or loss depending on managerial skill;

## Service Focus

Wage and Hour

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- Investments by the worker and potential employer;
- The degree of permanence of the work relationship;
- The nature and degree of control over performance of the work and working relationship;
- The extent to which the work performed is an integral part of the potential employer's business; and
- The skill and initiative of the worker.

The new rule places a heightened emphasis on how much control businesses exercise over key aspects of the work being performed by the worker in question. This will determine if they are an employee or an independent contractor under the new standard.

### **What Do Manufacturers Need to Know?**

Based on a [2017 Current Population Survey Contingent Worker Supplement](#), approximately 10.4% of independent contractors in the country worked in the manufacturing industry. That figure has likely increased since then, especially in the top 10 manufacturing states of California, Texas, Ohio, Illinois, Michigan, Pennsylvania, New York, Indiana, Wisconsin, and North Carolina. Suffice it to say, independent contractors are pivotal to the success of manufacturers.

The new standard about to take effect poses risks for many manufacturers, especially because many rely upon contractors to support plant or factory needs. These include equipment and machinery maintenance and repair, industrial cleaning, and information technology. Independent contractors often work closely on-site with internal employees. The legal exposure is even greater for manufacturers that directly train smaller, entrepreneurial businesses and pair them with supervisors to quickly familiarize them with operations.

Manufacturers may also be tempted to utilize an independent contractor classification to retain retired talent on staff as a resource or transition tool. Some

longstanding employees may even request such a classification as they transition towards retirement. Manufacturers and retirees often see value in such arrangements as they allow experienced workers to continue contributing utilizing their established expertise. Under the new rule, the Labor Department will be looking closely to see if former employees who are now independent contractors should actually be classified as employees.

## **Pending Litigation May Derail New Rule**

You should also be aware that a variety of business advocacy groups and the U.S. Chamber of Commerce are fighting in court to try to block or kill the new rule. Earlier this week, in fact, they filed an amended complaint in a Texas federal court arguing that the rule is arbitrary and capricious under the Administrative Procedure Act and also violates the Regulatory Flexibility Act. There is a chance that the rule is further delayed from its March 11 effective date – but you can't count on that happening. You should prepare as if it will take effect as scheduled.

## **Your 5-Step Plan**

Below are five steps you should consider to get ahead of the new rule:

- 1. Conduct an internal audit** of existing independent contractors to determine whether there are any workers that you may need to reclassify.
- 2. Train your managers** to ensure they are not inadvertently treating independent contractors as employees.
- 3. Reevaluate working relationships** with the following contractor groups: engineering, quality assurance, maintenance and repair, logistics and supply chain, industrial cleaning, information technology, environment and safety, material handling, packaging, and consulting contractors. You will want to determine how often they are on-site, especially

since control may be a new risk to assess. Make sure your contractors are given opportunities to negotiate their pay, accept and decline work opportunities, engage in marketing or advertising to secure more work, hire others to assist them, and purchase the necessary items to perform their work.

4. **Review existing independent contractor agreements** for any modification and/or termination terms, and any automatic renewal provisions. It may also be necessary to modify and/or terminate independent contractor agreements with workers who should now be classified as employees.
5. Be mindful of any **applicable state or local laws** imposing their own independent contractor analyses.

### **Want More?**

We will continue monitoring workplace law developments as they apply to manufacturers, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to have the most up-to-date information sent directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our [Manufacturing Industry Team](#).