ARIZONA STATE UNIVERSITY

CORPORATE & BUSINESS LAW JOURNAL FORUM

Volume 8	September 2026	Number 2

COMMENTARY

Enforcement of Proper Worker Classification Expands with EO 2026-01

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On May 20, 2026, Governor Katie Hobbs issued EO 2026-01, "Protecting Paychecks for Hard-Working Arizonans."[1] This Order is focused on decreasing misclassification of employees as independent contractors in Arizona. While Arizona courts rely on common-law tests to determine worker compensation for many relevant Arizona employment-related statutes such as those for worker's compensation and unemployment compensation, they use the federal standards for many others, such as those for minimum wage, paid sick leave, and state civil rights.[2] The U.S. Department of Labor has changed its approach to classifying workers as employees or independent contractors multiple times in recent years, providing important practical and political context for understanding Hobbs' Order.

A Brief History of Federal Worker Classification Guidance

Until 2021, the Department of Labor had not legislated on how to determine whether a worker classified as an independent contractor should be considered an employee.[3] Instead, courts used a balancing test originating in the 1947 Supreme Court decision in *Rutherford Food Corp. v. McComb* to consider the "underlying economic realities" of the relationship when determining whether the Fair Labor Standards Act (FLSA) should apply to the worker.[4] The FLSA affords employees specific rights and protections, but not independent contractors who are in business for themselves.[5]

The Department of Labor Wage and Hour Division summarized this test in its "Administrator's Interpretation No. 2015-1" in July 2015, stating that "[u]ltimately, the goal is not

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[1] Ariz. Exec. Order No. 2026-01 (May 20, 2026), https://azgovernor.gov/office-arizona-governor/executive-order/2026-01.

[2] Eli Enger & Meghan Baka, Independent Contractors: Arizona § 4 (Practical Law Labor & Employment, Thomson Reuters, updated Apr. 21, 2026), Westlaw.

[3] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1169 (Jan. 7, 2021).

[4] *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

[5] 29 U.S.C. § 203

simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor)."[6] The Department identified six factors that courts would balance, with no single factor being determinative: (1) whether the work is an integral part of the employer's business; (2) whether the worker's managerial skills affect their opportunity for profit or loss; (3) the relative investments of the worker and employer in the work; (4) whether the work requires special skill and initiative; (5) whether the relationship is temporary or indefinite; and (6) the nature and degree of the employer's control. This was a more worker-friendly test, with Obama-era Administrator David Weil concluding that "most workers are employees under the FLSA's broad definitions."[7]

In 2021, the Department published a Final Rule on the subject which shifted the balance between the factors.[8] The two "core factors" were determined to be the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss based on initiative, investment, or both.[9] The control factor taking a more prominent role harkened back to the common law, pre-FLSA "control test" that the *Rutherford Food Corp* court distinguished, reasoning that the FLSA is concerned with remedying "economic evils…which were unknown at common law."[10] The 2021 Rule also identified three "less probative" factors: the amount of skill the work requires, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production.[11] This Rule incorporated the relative investments in the work by the employer and the work into the same factor as looking at how the worker's managerial skills, or initiative, affect their profits.[12] Combining these factors lessened the extent to which each factor on its own could impact the classification. This was a more business-friendly test, allowing employers to structure their independent contractor relationships in ways that kept the core factors out of the employee-classification territory.[13]

This Rule was subject to much political scrutiny, having been published by the first Trump Administration in the days before Biden's inauguration. The Biden-era Department quickly published rules delaying and then withdrawing this Rule, but a federal lawsuit vacated those efforts.[14] In 2024 the Department published a replacement Final Rule on the subject, proposing that "upon further consideration…the 2021 IC Rule did not fully comport with the FLSA's text and

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[6] Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation No. 2015-1, at 2 (2015), http://www.dol.gov/whd/workers/Misclassification/Al-2015_1.pdf, *archived at* https://perma.cc/U7EV-RZAR.
[7] *Id.*
[8] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).
[9] *Id.* at 1171.
[10] *Rutherford Food Corp.*, 331 U.S. at 727.
[11] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1171 (Jan. 7, 2021).
[12] *Id.*
[13] *Department of Labor Issues Final Rule on Independent Contractor Classification*, DUANE MORRIS (Jan. 16, 2024), https://www.duanemorris.com/alerts/department_labor_issues_final_rule_independent_contractor_classification_0124.html.
[14] *Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *20 (E.D. Tex. Mar. 14, 2022), *vacated as moot sub nom. Coal. for Workforce Innovation v. Su*, No. 22-40316, 2024 WL 2108472 (5th Cir. Feb. 19, 2024).

purpose."[15] The 2024 Rule eliminated the "core factors" and "return[ed] to a totality-of-the-circumstances analysis," essentially codifying the six-factor test from the 2015 Opinion Letter.[16]

Now, on February 26, 2026, under the second Trump Administration, the Department of Labor announced a Notice of Proposed Rulemaking (NPRM) that essentially reinstates the 2021 Rule.[17] Soon after the comment period for this NPRM closed, Governor Hobbs issued this Executive Order aimed at increasing protections for Arizona workers.

Effects of Arizona EO 2026-01

Rather than tightening state classification requirements to align with less business-friendly states' "ABC tests,"[18] Arizona's EO 2026-01 is instead implementing new rules for state agencies on enforcement and sharing information. The Order names the Department of Economic Security (DES), Department of Revenue (DOR), Industrial Commission of Arizona (ICA), and Registrar of Contractors (ROC) as agencies that must now collaborate to enforce Arizona labor laws and proper worker classification.

For businesses, this means that issues that arise in one context are no longer limited to that context. For a classification issue that arises due to a Worker's Compensation issue on a construction site, for instance, the ICA must now alert the ROC, which could turn into licensing issues for the business. This effectively means that businesses must consider each agency's authority when disputes arise in any one of their spheres.

Additionally, the Order directs the Arizona Department of Administration to explore ways to ensure state contractors follow all relevant federal, state, and local labor laws and potential ways to incentivize state contractors to retain their existing workforces when taking on new contracts. These measures discuss an intention to use the contracting authority of the State to award its lucrative contracts to employers who do not misclassify workers as independent contractors. Further, examining incentives for workforce retention suggests that the State may award contracts to businesses that employ mostly long-term employees rather than businesses that rely on even properly classified independent contractors.

The Order then puts further pressure on the ROC by directing it to form a "Council on Paycheck Protection," which must meet at least three times before October 1st, 2026 to further inform efforts to combat worker misclassification. Companies should be aware that this work is ongoing. This might mean increased scrutiny from the ROC while they evaluate possibilities, and it is likely to lead to further changes after the meeting in October.

Overall, the Executive Order serves to focus agencies' attention on this issue and put employers on notice to avoid misclassification of workers in their business practices.[19]

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[15] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024).

[16] *Id.*

[17] Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932, 9932 (proposed Feb. 27, 2026).

[18] John Cannon, Brian Jebb, Melisa Brower, Jai Garg, Doreen Lilienfeld & Sydney Phipps, *Recent Developments in U.S. Worker Classification Rules*, A&O SHEARMAN (Sept. 15, 2025), https://www.aoshearman.com/en/insights/recent-developments-in-us-worker-classification-rules.

[19] *See e.g.*, Daniel Kalish, *Phoenix, Arizona's May 2026 Employment & Labor Law Cases*, HKM EMP. ATT'YS LLP (June 24, 2026), https://hkm.com/phoenix-arizonas-may-2026-employment-labor-law-cases/, and Melanie Jorgensen, *Arizona Employment Law Update: Summer 2026*, TYLER ALLEN L. FIRM (July 29, 2026), https://www.allenlawaz.com/blog/arizona-employment-law-update-summer-2026.