



**Loudon-Monroe HR Association Employment
Law Seminar:
Joint Employment and Independent Contractor
Status**

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Introduction



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Joint Employment

Under what condition does it exist?



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Joint Employment

- **2020 NLRB rule under Trump administration requires the actual exercise of control over essential terms and conditions of employment.**



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Joint Employment

- **2023 NLRB proposed rule says joint employment exists when the employer has the authority to exercise control, directly or indirectly.**



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Joint Employment

2023 proposed rule defines the following as essential terms and conditions of employment.

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;



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Joint Employment

6. The tenure of employment, including hiring and discharge; and
7. Working conditions relate to the safety and health of employees.



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Joint Employment

- March 8, 2023, federal district court in Texas struck down the new rule, which was to go into effect days later.
- Decision to overturn previous rule was arbitrary and capricious.
- New rule was too vague and overly broad.
- For now, 2020 rule is in place.



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Joint Employment

- House voted to block the new rule in January.
- Senate voted to do so last week.
- Not enough votes to defeat a veto, which Biden has promised.



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Joint Employment

- Why such attention?
- Bargaining duties.
- Application to franchises.



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Independent Contractor

Consistent with judicial precedent and the Department's interpretive guidance prior to 2021, the [2024] final rule applies the following six factors to analyze employee or independent contractor status under the FLSA:

- 1) opportunity for profit or loss depending on managerial skill;
- 2) investments by the worker and the potential employer;
- 3) degree of permanence of the work relationship;
- 4) nature and degree of control;



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Independent Contractor

- 5) extent to which the work performed is an integral part of the potential employer's business; and
- 6) Skill and initiative.



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Independent Contractor

IRS Analysis

Common law rules

Facts that provide evidence of the degree of control and independence fall into three categories:

1. [Behavioral](#): Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. [Financial](#): Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. [Type of relationship](#): Are there written contracts or employee type benefits (that is, pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?



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Independent Contractor

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.



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Independent Contractor

The keys are to look at the entire relationship and consider the extent of the right to direct and control the worker. Finally, document each of the factors used in coming up with the determination.

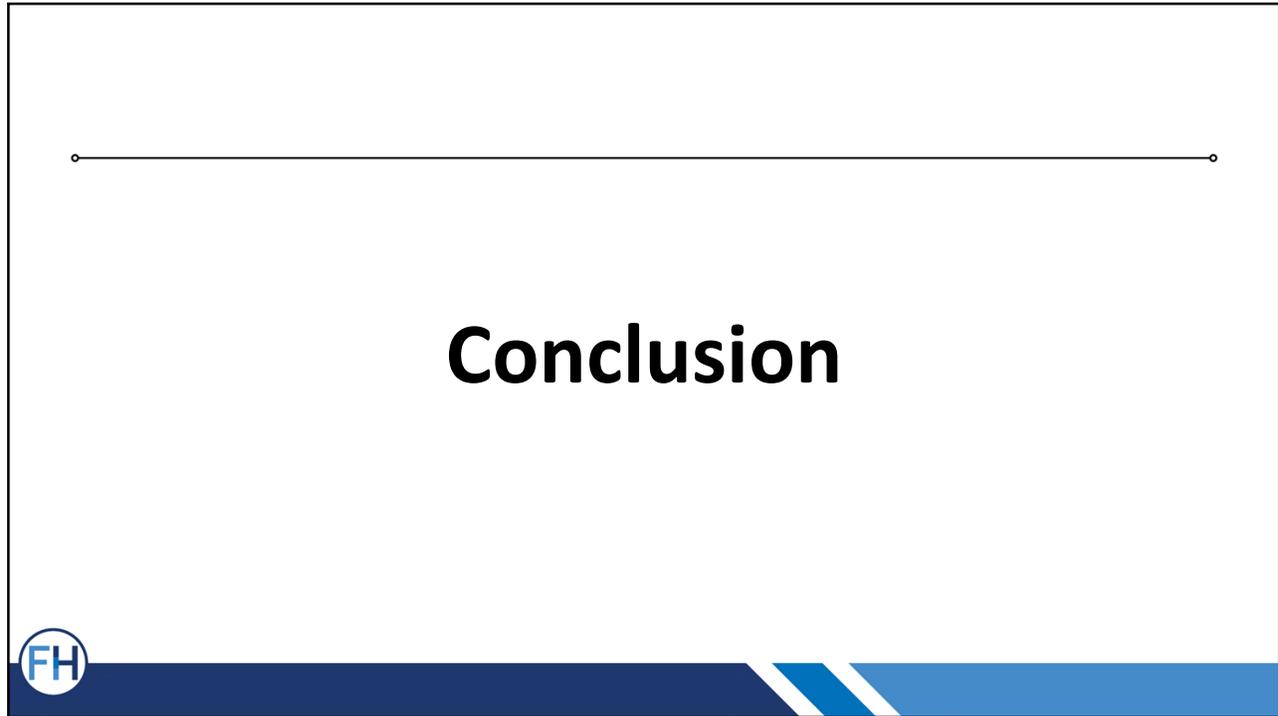


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Questions & Answers



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