



Week in Regulation

\$2 Billion in Savings to Ring in the New Year

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The opening week of 2021 was a relatively active one in the pages of the Federal Register. There were 18 rulemakings with some quantifiable economic impact. The most significant rule of the week – and the one that drove most of the week’s cost reductions – was the Department of Labor’s (DOL) rule regarding the status of independent contractors. Across all rulemakings, agencies published \$1.9 billion in total net cost savings but added 3.2 million hours of annual paperwork.

REGULATORY TOPLINES

- Proposed Rules: 24
- Final Rules: 52
- 2021 Total Pages: 1,733
- 2021 Final Rule Costs: \$1.9 billion
- 2021 Proposed Rule Costs: \$13.6 million

TRACKING THE REGULATORY BUDGET

The most notable rulemaking of the week with regards to the fiscal year (FY) 2021 regulatory budget was DOL’s [rule](#) on “Independent Contractor Status Under the Fair Labor Standards Act.” The full implications of the rule are further explored below in “This Week’s Regulatory Picture.” DOL contends that this updated standard will provide savings due to “legal clarity” of certain workers’ official status. The estimated savings – largely from reduced litigation – are \$315.5 million per year (or \$4.5 billion in present value).

The most significant *regulatory* action of the week (for regulatory budget purposes) is a measure out of the Department of Agriculture (USDA). This [rule](#), involving “Employment and Training Opportunities in the Supplemental Nutrition Assistance Program [SNAP],” directs the states to establish additional work requirements into their SNAP system. USDA estimates that the additional costs to states in implementing this order and to current or potential recipients would be roughly \$20.3 million per year (or \$290 million in present value).

While the administration’s FY 2021 regulatory budget caps are still forthcoming, so far into FY 2021 agencies have officially published 68 deregulatory actions and 27 regulatory actions (as defined by Executive Order (EO) 13,771), totaling \$31.9 billion in quantified total net costs. It is worth noting at this point, however, that regardless of whether or not the current administration releases said caps, the Biden Administration assumes power in January 2021. It is highly unlikely that EO 13,771 will remain operative (at least in anything resembling its current form) beyond then, and thus the FY 2021 regulatory budget “window” will be a truncated

one. Nevertheless, the American Action Forum (AAF) will continue to track EO 13,771 activity through the end of the administration to provide a record of the regulatory budget initiative's historical legacy and implications. AAF's review of the administration's FY 2020 regulatory budget progress can be found [here](#).

THIS WEEK'S REGULATORY PICTURE

This week, the DOL finalizes a rule clarifying independent contractor status.



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Independent Contractor Status Under the Fair Labor Standards Act

A Rule by the Wage and Hour Division on 01/07/2021



On January 7, DOL published a [final rule](#) in the Federal Register on “Independent Contractor Status under the Fair Labor Standards Act (FLSA).” The FLSA requires employers to comply with regulations for treatment of employees such as paying overtime and a minimum wage. Employers are not required to meet the same responsibilities to independent contractors. The rule is noteworthy because it marks the first time DOL has defined the term “independent contractor” in the regulatory code since the FLSA’s enactment over 80 years ago and aims to clarify an employer’s obligations.

The final rule sticks largely to the [proposed rule](#). The crux of the rule is a test to determine the “economic reality” of a worker’s situation. There are two core factors of this test, which are the nature and degree of an employer’s control over the work being performed and the worker’s opportunity for profit or loss based on initiative and investment. DOL also sets out three other factors that it will consider in its analysis of the core factors: the amount of skill the work requires, the degree of the working relationship’s permanence, and whether the work done as an integrated part of the employer’s production alongside permanent staff.

The rule should help standardize how DOL treats the employer-independent contractor relationship. Previously, DOL approached investigations on a case-by-case basis with little written framework for how it would determine economic reality, which contributed to uncertainty for employers, workers, and independent contractors alike.

DOL was able to turn around the final rule exceptionally fast – the comment period for the proposed rule ended October 26, 2020. Some may argue that DOL could not have given adequate consideration to public comments if it was able to finalize the rule so soon, which could be raised in litigation contending the rule violated the Administrative Procedure Act.

The rule may also be a target of the [Congressional Review Act](#) since it has drawn the ire of many Democrats, who will control both houses of Congress and the presidency in less than two weeks.

TOTAL BURDENS

Since January 1, the federal government has published \$1.9 billion in total net cost savings (with \$1.9 billion from finalized rules) and 3.2 million hours of net annual paperwork burden increases (with 3.2 million hours due to final rules).

