IOIA Statement on Independent Contractor Classification Following Department of Labor Rulemaking

***Disclaimer: This Statement is not, and is not intended to be, a substitute for legal advice. Certifiers and inspectors should consult with their own qualified legal counsel with regard to any specific independent contractor classification issues.***

The Fair Labor Standards Act (FLSA) was enacted by the [75th Congress](https://en.wikipedia.org/wiki/75th_United_States_Congress) and signed into law by President [Franklin D. Roosevelt](https://en.wikipedia.org/wiki/Franklin_D._Roosevelt) in 1938. The legislation created laws governing minimum wage, the 40-hour work week, and child labor protections. The resulting change gave raises to 700,000 employees, and US President [Franklin Roosevelt](https://en.wikipedia.org/wiki/Franklin_Roosevelt) called it the most important piece of [New Deal](https://en.wikipedia.org/wiki/New_Deal) legislation since the [Social Security Act of 1935](https://en.wikipedia.org/wiki/Social_Security_Act_of_1935). Congress has amended the FLSA several times since 1938 to further improve working conditions for employees. Notably, however, the FLSA’s protections do not apply to independent contractors.

The United States Department of Labor (DOL) is responsible for administering the FLSA. On January 10, 2024 the DOL published a Final Rule on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (EICC Final Rule). This EICC Final Rule took effect on March 11, 2024.

The EICC Final Rule rescinded a Final Rule that the DOL issued on the topic of worker classification in 2021 (the 2021 Final Rule). In issuing the 2021 Final Rule, the DOL stated that the multifactor economic reality test developed by the courts and applied in various iterations by the DOL over the years had proven to be “unclear and unwieldy.” Thus, the 2021 Rule identified five factors to guide the inquiry, but designated two factors - the nature and degree of the individual’s control over the work and the individual’s opportunity for profit and loss - as “core factors.” According to the 2021 Final Rule, if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the worker’s accurate classification and it was “highly unlikely” that the three other factors could outweigh the combined probative value of the two core factors. The 2021 Final Rule also implemented a number of significant changes in the way the two core factors were to be examined and interpreted.

Following its issuance, opponents of the 2021 Final Rule criticized it for a number of reasons. For example, as reflected in the preamble to the EICC Final Rule, opponents of the 2021 Final Rule stated that the focus on “core factors” was in tension with an analysis that has historically been grounded in the “totality of the circumstances.” They also believed the 2021 Final Rule placed oversized focus on control and altered several of the factors to minimize or exclude key factors, such as the extent of the hiring party/employer’s investments, the importance or centrality of the worker’s work to the hiring party/employer’s business, and the hiring party/employer’s reserved (even if unexercised) right to control the worker.

Against this backdrop, the DOL states in the preamble to the EICC Final Rule that *“upon further consideration, the [DOL] believed that the [2021 Final Rule] did not fully comport with the FLSA’s text and purpose as interpreted by courts and deported from decades of case law applying the economic reality test*” in a way that would be “*confusing and disruptive*” for workers and businesses alike. Accordingly, the EICC Final Rule is intended to “return[ ] to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.” (EICC Final Rule, Preamble)

IOIA commends the DOL for its efforts to improve working conditions for Americans, especially those in low wage jobs. Basic rights as workers and employees are a foundational tenet of Human Rights.

The EICC Final Rule is leading to questions among the organic certification community, especially in regards to the role and classification of independent organic inspectors for purposes of the FLSA. From the inception of organic certification, the work of organic inspection has been performed by both employees and independent contractors. How best to classify organic inspectors continues to be an ongoing discussion in our industry, starting even before the passage of the Organic Foods Production Act (OFPA) in 1990. The topic was highlighted more recently when California legislation redefined the criteria for classification of a worker as an independent contractor under the state’s Labor Code, and it continued to be a focus issue in Human Capital Resource management in the organic regulatory industry. The publication of Strengthening Organic Enforcement implemented regulations surrounding inspector qualifications that has also highlighted the relationship between independent contract inspectors and certifiers. Inspector classification is now at the forefront again with the EICC Final Rule.

In some ways the publication of this Final Rule is similar to the publication of the Strengthening Organic Enforcement (SOE) Rule. Both the National Organic Program (NOP) and the DOL regulations are founded on Acts passed in Congress and are intended to implement those Acts, not change them (something which may not be done without further Congressional action). Both the EICC final rule and SOE Final Rule codify many existing standards, or court precedent in the case of EICC Final Rule, while addressing significant changes resulting from rapidly evolving technology and commerce to effectively administer regulations and ensure that the intent of the legislation is upheld.

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But, just as SOE does not fundamentally change what ‘organic’ means, the EICC Final Rule does not fundamentally change the criteria defining an independent contractor, nor does it foreclose the potential for legitimate classification of inspectors as independent contractors. Indeed, the preamble of the Final EICC Rule states:

*“Having considered the comments, the Department continues to believe that this rulemaking will not jeopardize legitimate independent contracting arrangements. Fears to the contrary are not realistic given that the Department is adopting guidance derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect. There is no evidence that the status quo prior to the 2021 IC Rule was hindering the use of independent contractors. Because the FLSA’s economic reality test is broad and fact-specific, the Department cannot categorically declare that individual workers in particular occupations or industries will always qualify as independent contractors applying the guidance provided in this rule. However, keeping in mind that the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, the Department agrees with those commenters who stated that workers properly classified as independent contractors prior to the 2021 IC Rule will likely continue to be properly classified as independent contractors under this rule… and disagrees with other commenter assertions that this rule will ‘‘cause workers who have long been properly classified as independent contractors. . . to improperly lose their independent status.’’*

*“As used in this rule, the term ‘‘independent contractor’’ refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. This rule is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.”* (EICC Final Rule, Preamble)

The regulations and legal precedent distinguish an employee from an independent contractor based on economic dependency. The Final Rule, according to the DOL, aims to better define and clarify the economic reality test The test focuses on 6 factors, all of which are required to be considered, but none of which solely determines the worker’s status. The preamble of the Final Rule notes:

“*The Supreme Court has further explained that the existence of employment relationships under the FLSA does not depend on ‘‘isolated factors but rather upon the circumstances of the whole activity,’’ and that ‘‘no one factor is controlling nor is the list complete.”*

*“The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor). In assessing economic dependence, courts and the Department have historically conducted a totality-of-the circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor, with no factor or factors having predetermined weight.”* (EICC Final Rule, Preamble)

Thus, the economic reality test uses multiple factors to determine whether an employment relationship exists or if a worker is in business for themselves and may legally be considered an independent contractor. The following six factors, each discussed in turn below, should guide the assessment of how a worker should be classified.

1. ***§ 795.110(b)(1) Opportunity for profit or loss*** *depending on managerial skill. This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.*

The earning capacity of organic inspectors varies significantly. IOIA conducted a survey in 2021 in which full time inspector earnings varied from under $25,000/year to over $75,000 per year. An inspector’s ability to negotiate fees, manage costs, choose inspections, plan travel, and directly determine day to day operations of their business directly impacts their earnings potential.

Negotiating pay - The ability to negotiate pay fluctuates wildly in the industry. Some agencies ask for a fee schedule while others ask for bids to be submitted. Some agencies have strict policies on how work can be charged and dictate what inspectors will be paid. Many agencies simply pay an hourly rate. These facts are critical in assessing opportunity for profit or loss based on managerial skill, as under the EICC Final Rule earning potential must be management-based. Simply working more (i.e., devoting time to more inspections) to increase earnings does not support classification as an independent contractor.

Accepting or declining work - In general, most inspectors have the ability to accept or decline work based on their own business choices and capacity. They are also typically free to schedule when it works for them. These facts may, depending on the specific circumstances, support independent contractor classification.

Marketing - Currently the most common way for inspectors to advertise is on the IOIA member list. Many inspectors also network at industry events. Some inspectors have websites that showcase their knowledge and skill of the organic regulations. These kinds of independent efforts to promote one’s business presence and skills may support independent contractor classification.

Expenses and Investments - Expenses are a part of business. Management of those expenses play a significant role in profitability (or the lack thereof). The extent of an inspector’s expenses, and his or her investments that are entrepreneurial in nature (as discussed in more detail below), bear on classification as an employee or independent contractor under the Final Rule.

Examples provided in the preamble of the EICC Final Rule:

*A worker for a landscaping company performs assignments only as determined by the company for its corporate clients. The worker does not independently choose assignments, solicit additional work from other clients, advertise the landscaping services, or endeavor to reduce costs. The worker regularly agrees to work additional hours in order to earn more. In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more. Because of this lack of managerial skill affecting opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.*

*In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. Thus, these facts indicate independent contractor status under the opportunity for profit or loss factor.*

1. ***§ 795.110(b*(2) *Investments by the worker and the potential employer.*** *This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.*

Investments into one’s business is a consideration in determining employment status. Purchasing equipment needed to do specific jobs and labor are not necessarily sufficient in and of themselves. However, capital or entrepreneurial investments may indicate independent contractor status. Common investments for organic inspectors may include the following:

* Technology or equipment that impact economic independence such as allowing for better quality and/or more efficient work, especially when the inspector negotiates fees or obtains additional work based on those factors. This may be a computer, tablet, phone, or software that allows for better quality work. Investments into efficient means of travel (transport and lodging) may also be considered capital investments.
* Training and continuing education that improves skills, expands scopes, and areas of expertise (residue testing, forensic accounting, ISO 9001, etc.) are common expenditures for independent contractors. As noted in the preamble to the Final Rule, “*As a general matter and as opposed to costs that a potential employer unilaterally imposes on a worker, a worker's efforts to obtain specialized education, training, and certification that are required by an industry can be capital or entrepreneurial in nature if (for example and as explained in the regulatory text) they increase the worker's ability to do different types of or more work or extend market reach.”*

It is important to clarify that the DOL does not consider an employer pushing an expense onto a worker as an investment. An example of a capital investment may be an inspector investing in a vehicle that is economical on fuel and/or a camper for travel and incorporating travel into their fee schedule to affect profit and loss as opposed to a certifier expecting an inspector to pay for necessary travel and lodging out of pocket without the ability to negotiate travel in the fee schedule.

Examples provided in the preamble to the EICC Final Rule:

*A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. Thus, these facts indicate employee status under the investment factor.*

*A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature ( e.g., they allow the worker to do more work and extend their market reach). Thus, these facts indicate independent contractor status under the investment factor.*

1. ***§ 795.110(b)*(3) Degree of permanence of the work relationship** *This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.*

Like most of the six factors that the DOL identifies as creating economic dependence, the degree of permanence for an individual inspector can vary widely for independent organic inspectors.

* Definitive in duration: The DOL made it clear in the Final Rule that long term business relationships are a common practice in sustainable enterprises and repeat business does not necessarily mean a worker is an employee. It is also important to note that the DOL emphasized that seasonal or industry specific elements that lead to inconsistent work are not considered a lack of permanence unless the worker is exercising their own business decisions. Inspecting tends to be seasonal work, with high demand during the growing season and little to low demand in the winter months. This ebb and flow does not constitute “definitive” evidence of contractor status unless the inspector chooses on their own accord not to work.
* Non-exclusive: Many, though not all independent inspectors, work for a variety of other clients. In addition to conducting inspections for multiple certifiers and/or schemas, many consult, perform file reviews, or offer other services within the organic or food industries. More important than an inspector actually working for multiple clients is if the inspector is allowed to and chooses to work for multiple clients.
* Project Based: Many independent inspectors operate on a project basis. This tends to be in the form of “inspection trips”, and/or on an individual inspection basis. Investigations and supply chain audits are also project type work.
* Sporadic: Many independent inspectors work on a very sporadic basis for their clients that can vary drastically from week to week, month to month, or even year to year. Other inspectors work quite consistently for a certifier.

*Example provided in the preamble to the EICC Final Rule:*

*A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. These facts indicate employee status under the permanence factor.*

*A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.*

1. ***§ 795.110(b)****(****4) Nature and degree of control****. This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the potential employer's control over the worker include whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose. Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control. Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. More indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status.*

The DOL addressed several areas of importance in determining whether the employer controls meaningful economic aspects of the work relationship. The more control a hiring party has over these areas, the more likely the worker is an employee and not an independent contractor.

* Scheduling - Flexibility in scheduling and when work is conducted is considered when assessing control. Most inspectors accept or reject assignments and schedule those inspections on their own. Implementing deadlines is unlikely, standing alone, to preclude contractor classification as long as the certifier is not dictating exactly when the inspection is done.
* Supervision - The degree of oversight while working is considered a factor when assessing control. It is important to note that oversight on quality of work and deadlines is not the same as direct oversight of the worker. In general, the DOL deemed it reasonable for a party hiring a contractor to have quality and timeliness expectations.
* Setting a rate or price for goods or services - The worker’s ability to set their own rates and negotiate is another indicator of control. It also plays a major role in the ability for profit and loss as is explained in connection with the first factor above.
* Ability to work for others - The degree to which limitations are put on the worker's ability to work for others or which demands on the worker’s time do not allow them to work for others are considered factors in assessing control.

It is also important to note that since organic regulations are federal regulations, a requirement for inspectors to meet the SOE training requirements does not automatically require classification as an employee. However, being too prescriptive in how the worker meets the requirements may tilt the scale more towards employee status.

*Example provided in the preamble of the EICC Final Rule:*

*A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with Alpha House in order to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.*

*Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse simultaneously provides therapy sessions to residents at Beta House as well as other nursing homes in the community. The facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule-indicate independent contractor status under the control factor.*

1. ***§ 795.110(b)*(5) Extent to which the work performed is an integral part of the potential employer’s business**. *This factor considers whether the work performed is an integral part of the potential employer's business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part of the business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.*

It is inarguable that the role of an inspector is integral to the certification agency’s work. However, it is important to understand that classification as employee or contractor is determined by the totality of the whole and no one factor is solely determinative.

Consider Internal Audits, also a mandated and thus integral part of a certification agency's requirement to maintain accreditation. Many agencies hire independent contractors to perform that function. Few in the industry have questioned whether the business that performs the internal audit is required to be an employee. Besides the actual task being conducted, there appear to be few differences in business practices between an internal auditor and an independent inspectors and the certifiers with whom they work. Thus, while this is an important factor to be considered, it should not, standing alone, require classification as an employee in all circumstances.

*Example provided in the preamble to the EICC Final Rule:*

A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.

Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

1. ***§ 795.110(b)(6) Skill and initiative.*** *This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.*

Experienced, skilled inspectors who can conduct complex and high-risk inspections are in demand, especially after SOE. Some of these inspectors have chosen the route of a staff position and are grateful for what that offers. Others have chosen to use that skill to grow and improve their business opportunities, capitalizing on their ability to perform high-risk or complex inspections, investigations, or supply chain audits. The key element that determines whether that inspector is an employee or an independent contractor is if the skill is leveraged as part of a business initiative.

At the other end of the spectrum, SOE has codified a minimum level of experience, training, and skill. Even inspectors for the most basic operations must have experience, training, and expertise that most all can agree is a specialized skill. This, too, is handled in multiple ways. Many agencies are bringing onto their staff new “unskilled” inspectors and offering in house mentoring and support in order to build the skill needed to be an inspector. This is an example of where an unskilled worker is relying on an employer for the training they need to succeed. Another common route within the industry, especially for independent contractors, is to pay for their own training and mentorship to develop the expertise needed to be successful at inspections.

*Example provided in the preamble of the EICC Final Rule:*

*A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.*

*A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.*

The six factors described above are the foundation to determine whether a worker is economically dependent on the potential employer for work or if he or she is in business for him or herself. The DOL’s regulations do, however, leave an opening for additional factors to be considered, if such other factors “in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”

Accordingly, under the EICC Final Rule, determining a worker’s classification is, by necessity, an analysis that considers the totality of the circumstances, but the Final Rule does not, as many have worried, foreclose the possibility that organic inspectors can qualify as independent contractors. Indeed, IOIA believes that, following careful analysis of the relevant factors, many (though certainly not all) inspectors may qualify for contractor status. The Final Rule preamble cites examples of diverse industries that use **both** independent contractors and employees for the same tasks. The status determination is not based on **what** work is being done, rather by application of the factors that define **if the worker is economically dependent or is in business for themselves**. Ultimately, each certifier will need to evaluate their own practices and relationships with inspectors, as will each independent inspector need to clarify their relationship with certifiers for whom they work.

The IOIA/ACA Inspector Retention Working Group Final Report (2022) discussed the various ways that independent contractors are self-employed. The report also does an excellent job of addressing a broad array of issues at the core of human capital concerns the organic industry is currently facing. The Final Report can be found [here](https://www.ioia.net/media/pbwnvmhj/irwg_v1_9_23_22_final.pdf)

Certifiers - and, indeed, inspectors - should conduct a robust assessment of the business relationship at issue, considering all of the relevant factors, when determining whether the inspector is properly classified as an employee or an independent contractor. Four stated principles of organic agriculture (ref. IFOAM) are health, ecology, fairness, and care. It is our observation that independent contractor classification, when done on a case-by-case basis in accordance with the EICC Final Rule, could reinforce the four principles.

Footnote:

*Certifiers and inspectors should also continue to monitor the status of the EICC Final Rule, as it may not be the final word on the topic of worker classification under the FLSA. Specifically, while the EICC Final Rule is currently in effect nationwide, it is subject to a number of legal challenges. For example, almost immediately after the EICC Final Rule was issued, a group of freelance workers filed an action in the U.S. District Court for the Northern District of Georgia arguing that the new rule is unconstitutionally vague, forces them into employment relationships they neither want nor need, and may cause them to lose business due to the uncertainty associated with the totality of the circumstances test. See Warren, et al. v. U.S. Dep’t of Labor, et al., No. 2:24-cv-00007 (N.D. Ga. Jan. 16, 2024). In April 2024, a trucking firm that routinely hires independent contractors filed suit in New Mexico, claiming that enactment of the EICC Final Rule violates the appointments clause of the U.S. Constitution. See Colt and Joe Trucking LLC v. U.S. Dep’t of Labor, No. 1:24-cv-00392 (D.N.M. April 25, 2024). In that case, the plaintiffs allege that the Final Rule is arbitrary and capricious, that the Secretary of Labor lacks constitutional authority to approve the Final Rule, and that the Final Rule effectively permits the DOL to confer employee status “under essentially any circumstance” and therefore makes it impossible for businesses to hire independent contractors without significant liability under the FLSA. These and other legal challenges to the EICC Final Rule are pending as of the date of this IOIA statement.*

*In addition, a recent decision by the U.S. Supreme Court may make it more difficult for the DOL to prevail in these legal challenges. Specifically, in Loper Bright v. Raimondo et al., 603 U.S. \_\_, No. 22-451 (June 28, 2024), the Court overturned a longstanding precedent by which courts would defer to agency interpretations of ambiguous or broad statutes (referred to as Chevron deference after the seminal case Chevron U.S. A. Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837 (1984)). Under Loper Bright, federal courts will no longer grant such deference to administrative agencies and, instead, are instructed to exercise independent judgment when reviewing challenges to agency rulemaking. While Loper Bright did not address or rule on the EICC Final Rule, its practical effect is that courts reviewing challenges to that rule will likely approach DOL’s interpretation with more scrutiny. These issues bear careful watching as the organic regulatory industry continues to grapple with case-by-case assessment of inspector classification as an employee or independent contractor.*

References:

EICC Final Rule, 2024, Preamble and *§ 795.110(b)* <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>