

Labor Department “Right to Know” Proposal **Would Impair the Research Process**

The U.S. Department of Labor is developing proposed rules -- “[The Right to Know Under the Fair Labor Standards Act](#)” -- that would require extensive legal work on the part of businesses seeking to work with independent contractors.

Survey, opinion and marketing research relies upon independent contractors

Any research respondent who receives an incentive for participating in survey, opinion and marketing research is an independent contractor, not an employee of a research company.

What the “Right to Know” rules would do

According to the Department, “The current recordkeeping regulations require covered employers to keep specified payroll records and other information but do not require that such information or other information regarding a worker’s employment or exemption status be disclosed to the worker.”

However, under the new rules, the Department would require a company to:

- Provide each independent contractor with whom the company does business with a written analysis explaining the legal basis for classifying the individual as an independent contractor for purposes of [the Fair Labor Standards Act of 1938 \(FLSA\)](#); and
- Provide each company employee treated as “exempt” from the FLSA's overtime and/or minimum wage requirements with a written analysis explaining the legal basis for classifying the individual as exempt.

If implemented, these rules would likely make it harder and more costly to procure research participants, because prospective research companies -- before doing research with them -- would need to conduct extensive due diligence and prepare a written legal analysis justifying each research participant’s independent-contractor status for purposes of the FLSA.

The Department of Labor lacks the authority to impose such rules

It is not clear that the Department has the statutory authority to impose this requirement with respect to independent contractors, because the cited authority ([29 USCS § 211\(c\)](#)), which DOL cites as its statutory authority, grants DOL authority to promulgate regulations imposing recordkeeping requirements with respect to employees – but independent contractors are not employees.

Independent contractors choose to be independent

These rules presume that a company makes the decision to treat an individual as an independent contractor, rather than the other way around. But only in isolated cases of intentional misclassification does this actually occur. By contrast, legitimate independent contractors – of which there are millions today, including participants in survey, opinion and marketing research – make their own decisions to operate as independent contractors.