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# DOL Proposes New Rule to Better Define Independent Contractor Status

On September 22, 2020, the Department of Labor ("DOL") issued proposed regulations that are intended to clarify the standard for determining whether a worker qualifies as an independent contractor for Fair Labor Standards Act ("FLSA") purposes. See RIN 1235-AA34 (Independent Contractor Status under the Fair Labor Standards Act).

In its Notice of Proposed Rule Making ("NPRM") the DOL points out what employers and workers have long known: "[T]he multifactor test [for determining independent contractor status under the FLSA], as currently applied, has proven to be unclear and unwieldy." **See NPRM at pg. 21.**

The DOL's proposed regulations are an attempt to clarify the economic realities test and reduce the confusion. Specifically, the NPRM proposes the following changes:

- Adding a regulatory provision which expressly states that an independent contractor who renders services to a person is not an "employee" of that person under the FLSA.
- Adding a regulatory provision which expressly adopts the economic reality test as the method courts must use to determine a worker's status as an employee or an independent contractor under the FLSA.
- Simplifying and clarifying the economic realities test by focusing it on two core factors: (a) the nature and degree of the worker's control over the work; and (b) the worker's opportunity for profit or loss. The proposed regulation expressly states that these two factors should be given more weight than any of the other factors.

- Adding regulations that clarify what is meant by "skill required." The proposed regulation "explains that the 'skill required' factor weighs in favor of classification as an independent contractor where the work at issue requires specialized training or skill that the potential employer does not provide. Otherwise, it weighs in favor of classification as an employee." **See NPRM, at pg. 62.**
- Adding regulations that clarify the meaning of the factor addressing the "permanence of working relationship." The proposal states that this factor "would weigh in favor of classification as an employee where the individual and the potential employer have a working relationship that is by design indefinite in duration or continuous." In comparison, where the relationship is temporary or sporadic, it would weigh in favor of an independent contractor relationship. **See NPRM, at pg. 65.**
- Adding regulations that clarify the "integrated unit" factor. The proposed regulation "focuses the 'integrated unit' factor on whether an individual works in circumstances analogous to a production line." If a worker is "a component of a potential employer's integrated production process, whether for goods or services," then the factor weighs in favor of employee status. It further explains that "if the individual's work is not integrated into the potential employer's production process, the factor would favor classification as an independent contractor. This includes where an individual service provider is able to perform his or her duties without depending on the potential employer's production process." **See NPRM, at pg. 73-74.**
- Adding regulations which expressly state that the actual practice of the parties involved – both the workers at issue and of the potential employer – is more relevant than what may be contractually or theoretically possible.

Employers should carefully monitor this development because it may provide much greater clarity on when and how independent contractors can be utilized within their business operations without the risk that those workers will subsequently claim that they should be treated as employees for FLSA purposes.

## Key Takeaways

1. The DOL issued proposed regulations that attempt to simplify and clarify the economic realities test for determining whether a worker should be treated as an independent contractor or an employee for FLSA purposes.

2. Employers should carefully monitor this proposal to see if it is officially adopted.

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