



U.S. Department of Labor Publishes New Proposed Independent Contractor Regulations (Again)

Earlier this month, the U.S. Department of Labor (DOL) released a proposed rule to once again update the test to determine whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA). The proposed rule is intended to replace the 2021 independent contractor regulation. The new 2022 rule largely returns to the “economic realities” test. In publishing the proposed new rule, the DOL emphasized that courts have applied the economic realities test for several decades in interpreting the FLSA. If adopted, the rule could impact certain workers’ eligibility for overtime and minimum wage laws. As a result, employers may need to revisit their existing policies and practices to determine whether workers that they previously characterized as independent contractors should be reclassified as employees.

Under the new proposed rule, an employee is defined as any individual who an employer “suffers, permits, or otherwise employs to work,” and an independent contractor is any worker who, as a matter of economic reality, is “in business for themselves.” Whereas the current rule in effect emphasizes whether the worker has control over their duties and earnings, the proposed rule would place significant weight on a worker’s “economic dependence,” which is evaluated through six factors. These factors include:

1. Opportunity for profit or loss depending on managerial skill;
2. Investment by the worker and the employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control;
5. Whether work performed is integral to the employer’s business; and
6. Skill and initiative.

Under the proposed rule, “no one factor or set of factors is presumed to carry more weight,” and additional factors may be considered to determine if the worker is economically dependent on the employer for work. The revamped rule is intended to help evaluate “modern work arrangements,” such as gig workers, and bring consistency to how courts classify workers.

While the rule is unlikely to take effect until 2023, employers should evaluate the effects the proposed rule may have on their workforces. Employers initially had until November 28, 2022 to submit comments to the DOL regarding the proposed rule. With significant interest expressed so far, the Department of Labor extended the comment period this morning through December 13, 2022. Following the comment period, the DOL will evaluate whether any changes are necessary to the rule prior to issuing a final rule.

Key Takeaways:

- If adopted in 2023, the new independent contractor rule will result in a shift back to the six-factor “economic realities test.”
- In advance of the rule’s adoption, employers should consider auditing their existing independent contractor and employee classifications to ensure compliance under the revised test.

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