

## Department of Labor Issues Proposed Rule on Independent Contractor Classification under the FLSA

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On October 13, 2022, the Department of Labor published its Notice of Proposed Rulemaking to determine whether an individual is an employee or an independent contractor under the Fair Labor Standards Act. This rule is intended to replace the Trump Administration's "simplified test." The Trump test listed five economic factors to be considered but placed greater weight on two factors: the nature and degree of control over the work and the workers' opportunity for profit or loss. The Biden Administration's attempt to rescind the Trump Administration rule resulted in litigation and uncertainty for companies and independent contractors. The Department of Labor estimates there are 22.1 million independent contractors and proposes a return to the "totality-of-the-circumstances" of the economic reality test so that no one factor has a particular weight. Comments to the proposed rule may be submitted by November 28, 2022.

The proposed rule points out that the minimum wage, overtime pay, and recordkeeping obligations of the FLSA apply only to workers who are covered employees. Independent contractors are not covered by the FLSA but, "Labeling employees as 'independent contractors' does not make these protections inapplicable." Therefore, the Department of Labor's "economic reality test" emphasizing six factors to determine whether "the worker is economically dependent on the employer for work or is in business for themselves." The six factors are:

- 1) *Opportunity for profit or loss depending on managerial skill.* This factor is designed to determine whether economic success or failure can be affected by the individual: by negotiating the charge or pay for the work provided; by deciding whether to accept or decline jobs; by engaging in marketing, or advertising to expand or secure more work; and by hiring others, purchasing materials and equipment, or renting space.
- 2) *Investments by the worker and the employer.* This factor examines whether the individual makes any capital investments into the business. The proposed rule notes that purchasing tools does not constitute investment in capital. Rather an investment that is "entrepreneurial in nature" refers to those that increase an individual's ability to do more work or different types of work, reducing costs, or expanding markets.
- 3) *Degree of permanence of the work relationship.* If the relationship is ongoing or for an indefinite period of time, the Department of Labor states this would tend to demonstrate an employment relationship. On the other hand, project based or sporadic work that allows the individual to provide services to others would tend to support an independent contractor relationship.
- 4) *Nature and degree of control.* If the employer sets a schedule, supervises the work, or limits the individual's ability to work for others, this factor would support an employment relationship. The more control the employer has, the more likely an employer-employee relationship will be found.
- 5) *Extent to which the work performed is an integral part of the employer's business.* This factor is focused on the function, rather than the individual itself. If the employer's business is the same as the function being performed by the worker, then an employment relationship would likely be found.
- 6) *Skill and initiative.* The Department of Labor looks to whether the individual has a specialized skill or whether the individual is dependent on training provided by the employer. The more individualized the skill, the more likely an independent contractor relationship is supported.

Interestingly, the Department of Labor says there are six factors but then goes on to list a seventh "additional factors." Therefore, other evidence that would be relevant may also be considered.

The Department of Labor is uncertain of the impact of the proposed changes but calculated the costs to affected entities as over \$188 million dollars. This rule will also be challenged in various courts and will likely not provide the elusive bright-line test sought by companies or workers.

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