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Labor & Employment Alert

OCTOBER 13, 2022

Department of Labor proposes “new” rule for determining independent contractor status under the Fair Labor Standards Act

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Notice of Proposed Rulemaking to publish on October 13, 2022.



What's the Impact

- / The DOL aims to clarify the test for determining whether an individual is an employee or independent contractor under the FLSA.
- / The DOL is seeking to reinstate Obama-era guidance that the Trump administration rescinded in January 2021.
- / There has been some confusion about what rule applies. Employers should prepare for the possibility that the DOL's rule could take effect as proposed.

On October 11, 2022, the United States Department of Labor (DOL) announced that it would publish a Notice of Proposed Rulemaking on October 13, 2022, clarifying the test that should be applied to determine whether an individual is an employee or independent contractor under the Fair Labor Standards Act (FLSA), which lays out federal minimum wage and overtime rules.

The DOL intends to adopt the longstanding “economic realities test.” Under this test, “[t]he ultimate inquiry is whether, as a matter of economic reality, the worker is either economically dependent on the employer for work (and is thus an employee) or is in business for themselves

(and is thus an independent contractor).” This determination will require a “totality-of-the-circumstances analysis,” which weighs the following factors equally:

- / Worker’s opportunity for profit and loss depending on managerial skill
- / Investments by the worker and the employer
- / Degree of permanence of the work relationship
- / Nature and degree of control
- / Extent to which the work performed is an integral part of the employer’s business
- / Skill and initiative required for the work
- / Any additional factors which may indicate whether an individual is “economically dependent on this employer for work or in business for themselves”

This “new” rule may sound like déjà vu to employers. That’s because the DOL seeks to reinstate an Obama-era interpretation rescinded last year via the Trump administration’s January 2021 “Independent Contractor Status Under the Fair Labor Standards Act” (2021 IC Rule). Although the 2021 IC Rule identified five “economic reality” factors similar to those listed above, it emphasized the first two of those five factors—the degree of control over the work and the worker’s opportunity for profit or loss. The 2021 IC Rule was viewed as friendlier to employers because of the focus on these two “core factors.” However, before the 2021 IC Rule became effective, the Biden DOL delayed its effective date and attempted to withdraw the Trump rule. Ongoing litigation has caused some confusion about the status of the 2021 IC Rule and what test applies. In light of this confusion, the DOL is now officially rescinding the 2021 IC Rule, noting that the current “analysis for determining employee or independent contractor status under the [FLSA]... is more consistent with existing judicial precedent and the [DOL’s] longstanding guidance prior to the 2021 IC Rule.”

The DOL is accepting comments regarding this proposed rule from October 13, 2022, to November 28, 2022. Nixon Peabody will monitor any future developments with respect to the proposed rule and report on any changes made in response to comments from stakeholders.

Employers should prepare for the possibility that the DOL’s rule could take effect as proposed, making each of the above-listed factors equally relevant when determining whether an individual is an employee or an independent contractor. It is advisable for employers to review their agreements with independent contractors to ensure they are properly classified based on the factors outlined above. Employers should also be mindful that, although this rule addresses independent contractor status under the FLSA, states may employ different tests to address whether an individual is properly classified as an independent contractor.

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