

Insights: Alerts

DOL Proposes New Independent Contractor Rule

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Earlier today the United States Department of Labor (“DOL”) issued its much-anticipated [proposed rule](#) that would update the test for determining whether a worker is an employee or independent contractor under federal wage law (the “Proposed Rule”). The Proposed Rule is the Biden administration’s second attempt to undo the Trump-era standard that the former claims leaves workers susceptible to misclassification. The Proposed Rule will be published in the Federal Register on October 13th and will be open for public comment through November 28, 2022.

The Economic Realities Test

Subject to certain exceptions, the FLSA defines an “employee” as “any individual employed by an employer,” while the term “employ” is defined to mean “to suffer or permit to work.”¹ For decades, courts used the “economic realities test” to determine whether a worker is an employee within the meaning of the FLSA.² Some of the more common factors considered under the economic realities test include:

1. The extent to which the work performed is an integral part of the employer’s business;
2. The worker’s opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer.

Under the economic realities test, typically, no single factor is determinative, and courts instead assess the totality of the circumstances to determine the weight given to each factor. The test ordinarily focuses on the economic dependence of the worker on the hiring party for his or her livelihood. However, because no factor is dispositive, courts applying the economic realities test have substantial discretion to determine the weight of each factor, often yielding different conclusions despite the same or similar factual context.³

Trump Administration’s Proposed Rule

On January 7, 2021, less than two weeks before President Joe Biden was set to be inaugurated, and in a supposed effort to address the lack of predictability under the economic realities test, the DOL published a new, employer-friendly rule for determining independent contractor status under the Fair Labor Standards Act (the “Independent Contractor Rule”). The Independent Contractor Rule looks to the “economic reality” of a workplace

relationship, weighing five factors and determining whether the worker is in business for themselves (an independent contractor) or economically dependent on the hiring entity (an employee):

1. The nature and degree of control over the work;
2. The worker's opportunity to earn profits or incur loss based on the worker's actions;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship between the worker and the employer; and
5. Whether the work is part of an integrated unit of production.

Though the factors listed are similar to those used in the economic realities test, the Trump-era proposal highlighted the first two factors as “core factors” in the analysis. Under the proposal, the core factors were afforded greater weight than others. In most instances, where the core factors were in favor of one status over the other, the remaining factors would be irrelevant.

The Biden Administration's Attempted Withdrawal

On March 4, 2021, days before the Independent Contractor Rule was to become effective, the DOL's Wage and Hour Division announced a 60-day regulatory freeze, delaying the effective date of the Independent Contractor Rule to May 7, 2021. On May 6, 2021, the DOL issued a final rule withdrawing the Independent Contractor Rule. The withdrawal meant a return to the previous economic realities test.

Trade groups, including the Coalition for Workforce Innovation, a group representing gig-economy businesses, challenged the withdrawal rule. In March 2022, Judge Marcia Crone of the U.S. District Court for the Eastern District of Texas reinstated the Trump-era rule in a March 14 order, finding, among other things, the Biden administration failed to provide the public with a meaningful opportunity to comment, because the notice-and-comment period for the March 4 delay rule was only 19 days. Although the DOL appealed Judge Crone's decision, it later sought to pause the appeal, signaling a new proposed rule was on the way.

The Newly Proposed Rule

The Proposed Rule would rescind the Independent Contractor Rule, setting forth instead a six-factor test for determining whether a worker is “economically dependent” on an employer under the totality of the circumstances. The six factors are identical to those used under the economic realities test, meaning the Proposed Rule would restore consideration of a worker's investment as a standalone factor, focusing on whether the worker's investment is capital or entrepreneurial in nature.

The Proposed Rule clarifies that the six factors are not exhaustive, noting that “[a]dditional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.” It further specifies that none of the factors have a predetermined weight, scrapping the Independent Contractor Rule's focus on two “core factors.”

The Proposed Rule dispenses with the traditional analysis of the control factor, noting that “[e]mployers may also exercise control in other ways, such as by relying on technology to supervise a workforce, setting prices for services, or restricting a worker's ability to work for others—actions that can exert control without the traditional use of direct supervision, assignment, or scheduling.”

For example, the Proposed Rule declares that scheduling flexibility is not necessarily indicative of independent contractor status where other aspects of control are present, such as where an employer asserts that workers can work when and where they want but retains authority to discipline workers for declining work or imposes other methods of control that limit flexibility.

Though the scope of any final rule is unknown, the final rule is likely to significantly impact employers in all industries, especially those that rely heavily on contractors, such as transportation, energy, and those operating in the gig-economy.

Footnotes

¹ See 29 U.S.C. § 203(e)(1).

² See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (expressly adopting the test for FLSA cases).

³ See, e.g., *Donovan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984) (finding pickle harvesters were independent contractors); compare with *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (finding pickle harvesters were employees).

Related People



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