

DOL Proposed Rule Clarifies Requirements for Classifying Workers as Independent Contractors

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Please Note: On May 5, 2021, the U.S. DOL repealed the Trump Administration Era's Independent Contractor Test.

On Sept. 22, 2020, the U.S. Department of Labor (DOL) issued a proposed rule providing guidance to employers on whether workers should be classified as employees or independent contractors under the Fair Labor Standards Act (FLSA). This distinction is important as independent contractors are not covered by the minimum wage, overtime and recordkeeping requirements of the FLSA. The DOL stated that it is motivated to clarify this often confusing legal issue “in order to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.”

The proposed rule relies on a common law “economic realities test” to determine which classification is appropriate. This test ultimately centers on whether the worker is “economically dependent” on the employer for work and therefore should be considered an employee. In contrast, an individual may be classified as an independent contractor when the economic realities show that the individual is “in business for him-or herself.”

In applying the economic dependence factors, the proposed rule provides the five factors, listed below, for consideration. Notably, this list is not exhaustive and no single factor is determinative. However, the DOL has deemed the first two factors as core factors that are most probative: the degree of control; and the individual’s opportunity for profit and loss. The five factors include:

- The nature and degree of the individual’s control over the work;
- The individual’s opportunity for profit or loss;
- The amount of skill required for the work;
- The degree of permanence of the working relationship between the individual and the potential employer; and
- Whether the work is part of an integrated unit of production.

Although job descriptions, contracts and other documents defining the working relationship are instructive, the “actual practice” of the individual and potential employer should be the focus when examining the above factors.

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The proposed rule was published in the Federal Register on Sept. 25, 2020. A 30 day comment period will follow during which the DOL will receive feedback from the public regarding the proposed rule. As such, the proposed rule may be subject to change.

If you would like more information about classification of workers or the proposed DOL rule, please contact a member of our Labor & Employment team.

PEOPLE

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