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【更新版】米国労働省、従業員と独立請負人の分類基準を改正するための規則案を発表

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Executive Summary

UPDATE: On October 25, 2022, the U.S. Department of Labor extended the original 45 day comment period for this proposed rule by 15 days, or until December 13, 2022.

On October 11, 2022, the U.S. Department of Labor ("DOL") issued a proposed rule to revise the current test for determining whether an individual is an employee pursuant to the Fair Labor Standards Act ("FLSA"), or an independent contractor. With its proposed rule, the DOL seeks to return to a "totality-of-the-circumstances" approach, which is presumed to make it more challenging for companies to properly classify workers as independent contractors. Such is a critical classification for many companies across the country which rely heavily on independent contractors as they are exempt from the minimum wage, overtime and recordkeeping requirements under the FLSA which apply to employees. The proposed rule was published in the Federal Register on October 13, 2022 and may be publicly commented on for a period of 45 days, or until November 28, 2022.

Background and Overview

In January 2021, the Trump administration issued a final rule regarding the classification of independent contractors under the FLSA. The rule, entitled "Independent Contractor Status Under the Fair Labor Standards Act," endorsed an "economic realities" test to determine the nature of a worker's relationship with a business. That rule pointed to a list of non-exhaustive factors to be considered although sought to streamline the analysis by focusing on two "core factors": (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss.

The DOL's new proposed rule would rescind the independent contractor regulation adopted by the prior administration, eliminating the use of the core factors. Instead, the DOL proposes a return to a totality-of-the-circumstances analysis under the economic realities test "where no one factor or set of factors is presumed to carry more weight." According to the DOL, such a test will be more helpful in "evaluating modern work arrangements" and align more closely with courts' interpretations of the FLSA. However, many management-side attorneys are skeptical of a return to a totality-of-the-circumstances test which is considered more

ambiguous and expected to make it exceedingly difficult for businesses to support their classification of workers as independent contractors. Here are some key takeaways from the DOL's proposed rule:

"Employee" is Broadly Defined

Under the proposed rule, the definition of the term, "employee," is broad and considers economic independence as the ultimate inquiry distinguishing an independent contractor from an employee. More specifically, it defines an "employee" as any individual whom an employer "suffers, permits, or otherwise employs to work" and is intended to encompass all workers who "as a matter of economic reality, are economically dependent on an employer for work." The proposed rule further explains that an independent contractor is only a worker who is, as a matter of economic reality, "in business for themselves."

Six-Factor Test for Determining Whether a Worker is "Economically Dependent" on an Employer

The new proposed rule sets forth six factors to determine whether the economic realities of the working relationship reveal a worker to be economically dependent on the employer for work or in business for him or herself based on a totality-of-the-circumstances:

1. The worker's opportunity for profit or loss depending on managerial skill.

This factor considers the managerial skill exercised by a worker, which impacts success or failure in performing such work. Additional considerations include whether the worker can set the rate of pay for the service provided; whether the worker accepts or declines jobs or the order in which they are completed; whether the worker engages in marketing, advertising, or other efforts to expand business or secure additional work; whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space; and whether the worker has the opportunity to experience financial loss.

2. Investments by the worker and the employer.

The DOL has stated that any investment by the worker must be capital or entrepreneurial in nature in order to support an independent contractor status. The DOL further explained that "the worker's investments should be considered on a relative basis with the employer's investments in its overall business."

3. Degree of permanence of the work relationship.

The DOL's proposed rule states that where workers provide services under a contract that is "routinely or automatically renewed," that is indicative of a permanent or indefinite relationship and supports an employee status. The DOL's proposed rule explicitly states that "exclusivity" should be evaluated under this "permanence" factor of the economic realities test. While the DOL notes that exclusivity weighs against independent contractor status, it also notes that the ability to work for others does not necessarily weigh in favor of independent contractor status.

4. The nature and degree of control.

This factor would consider the company's control over the performance of the work and the economic aspects of the working relationship, including but not limited to whether the employer sets the worker's schedule, supervises the performance of the work, sets the price or rate for service, or explicitly limits the worker's ability

to work for others. The DOL specifically states that "control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control."

5. The extent to which the work performed is an integral part of the employer's business.

The DOL explains that "this factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part." In other words, when the work that a worker performs is "critical, necessary or central to the employer's principal business," then this factor weighs in favor of employee status.

6. The skill and initiative of workers.

This factor refers to whether a worker uses specialized skills brought to the job or is dependent on training from the employer to perform the work. Under the DOL's proposed rule, if a worker uses specialized skills which contribute to a "business-like initiative," then the worker is more likely to be considered an independent contractor.

None of the aforementioned factors are afforded any predetermined weight by the DOL. In other words, each factor should be considered in light of the economic realities of the whole relationship. The proposed rule suggests that the aforementioned six factors are not dispositive because it states that additional factors may be relevant if they relate to whether a worker is in business for themselves versus being economically dependent on the employer.

Impact on Employers

The DOL states that it recognizes the important role independent contractors and small businesses play in the economy, although admits that the proposed rule is meant to "reduce the risk that employees are misclassified as independent contractors." The DOL's proposed rule could be disruptive to numerous companies throughout the U.S. that heavily rely on the use of independent contractors because it will dramatically limit the circumstances under which a worker may be properly classified as such. The DOL's guidance makes clear that it is designed to decrease the number of workers that businesses classify as independent contractors and increase the number of employees in the workforce.

Employers who use independent contractors may wish to begin considering how the proposed rule could impact their operations if the DOL adopts a final rule that is the same or substantially similar in form. It is likely premature to take any concrete action now with respect to classification decisions as the final rule may be significantly different than the current proposal. Comments on the proposed rule are due no later than 45 days from October 13 (i.e., November 28, 2022), and any final rule would likely not go into effect until mid-2023 at the earliest. We will keep you informed on any developments in this matter.

Please contact Naureen Amjad, Kevin Borozan, or a member of the Employment, Labor and Benefits Group with any questions.