

DOL Proposes to Revert the Independent Contractor Analysis to the Employee-Friendly Totality-Of-The-Circumstances Analysis

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On October 11, 2022, the Department of Labor (“DOL”) issued a new proposed rule, entitled “Independent Contractor Status Under the Fair Labor Standards Act,” for determining whether an individual is an independent contractor or an employee under the Fair Labor Standards Act (“FLSA”).

The current Trump administration rule became effective in March 2021 and makes it easier for employers to classify workers as independent contractors rather than employees. The current rule applies an economic reality test that primarily considers two “core factors:” the nature and degree of control over the work and the individual’s opportunity for profit or loss based on initiative and investment, to determine if an individual is an independent contractor or an employee.

The Biden administration’s new proposed rule seeks to revert the current standard back to a *totality-of-the-circumstances* analysis of the multifactor economic reality test. The *totality-of-the-circumstances* analysis weighs six economic reality test factors, which include:

- The nature and degree of control exercised by the worker over the work they are performing;
- The individual’s opportunity for profit or loss in connection with the work;
- The permanency of the relationship between the parties;
- The amount of skill required to perform the work;



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- The nature of individual's investment in equipment or other resources as compared to the hiring entity's investment; and
- Whether the work is an integral part of the employer's business.

Under the proposed rule, the economic reality factors do not have any predetermined weight and are considered by weighing all the factors in view of the economic reality of the whole activity and relationship.

The current standard's "core factors" makes it easier to classify individuals as independent contractors since it focuses on just two core factors and a narrow set of facts. The totality-of-the-circumstances analysis, on the other hand, makes it harder to classify individuals as independent contractors under the FLSA because of the multitude of facts that must be considered and can be weighed by the DOL.

As such, employers must be cautious in evaluating whether an individual is an independent contractor or whether they are an employee subject to FLSA and state wage protections. Misclassifying individuals can lead to substantial penalties for each violation.

Comments on the proposed rule are due on November 28, 2022 and the final rule is not expected to go into effect until mid-2023. We will keep track of the status of the DOL's proposed rule. In the meantime, please do not hesitate to reach out to any member of the Labor and Employment Practice Group with any questions or concerns about classifying workers.