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Proposed DOL rule targets independent contractor status

BY: RICHARD L. HACKMAN, STEPHEN J. FLEURY, JR., STEPHEN J. MATZURA | INSIGHTS | ARTICLE

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The U.S. Department of Labor has issued a proposed rule that would significantly alter an employer-friendly, Trump-era test for determining whether a worker is an independent contractor or an employee.

And employers likely will not be happy.

The proposed rule, published on Oct. 13, would make it more difficult for employers to classify workers as independent contractors if it is finalized as it is now proposed.

The proposed test

The DOL and courts have long used the "economic realities" test to determine whether, under the Fair Labor Standards Act (FLSA), a worker is an independent contractor or an employee. The proposed rule does not change the applicable test, but it does substantially alter what factors the DOL will consider relevant in determining whether a worker is economically dependent on the employer for work (indicative of an employee) or in business for themself (indicative of an independent contractor). Under the proposed rule, the DOL will examine the following nonexclusive list of factors:

- A worker's opportunity for profit or loss based on his use of managerial skill
- Whether a worker makes capital/entrepreneurial investments, and if so, whether those investments relative to the prospective employer's investment suggests the worker is an independent business
- Degree of permanence in the working relationship
- Nature and degree of control exercised over the performance of work
- Extent to which the work performed is an integral part of the employer's business
- Skill and initiative required of the worker

The proposed rule emphasizes that no single factor is dispositive, and the weight given to a particular factor or set of factors will depend on the facts and circumstances of each individual case. Additional factors may be considered if relevant to the ultimate question of whether the worker is economically dependent on the employer for work or in business for themself.

The future of independent contractors

The DOL's revised test will make it considerably more difficult for employers across all industries to classify their workers as independent contractors. Under the prior 2021 Trump-era rule, the DOL considered fewer factors and weighed two factors – the nature and degree of the worker's control over the work, and the worker's opportunity for profit and loss – more heavily than other factors. The new proposed rule returns the DOL to using a more "totality of the circumstances" type of analysis. Although the rule has been proposed by the DOL Wage and Hour Division for purposes of the FLSA, it potentially has broader impacts because case law regarding employment status under various statutes look to the "economic realities" and sometimes borrow from FLSA interpretations. Even if not controlling, the DOL's proposed test could be viewed as persuasive by courts in other contexts.

The public comment period for the proposed rule is scheduled to close on Nov. 28. While the proposed rule could ultimately be finalized and take effect in early 2023, it will face almost certain legal challenges. One potential area of vulnerability for the proposed rule is that it may violate the "major questions" doctrine. That doctrine holds that a government agency, like the DOL, must first show clear authorization from Congress before making "decisions of vast economic and political significance." Here, the DOL's proposed rule is certainly economically significant for the nation's employers. Industry groups are expected to challenge whether the DOL had the requisite authorization from Congress before announcing its proposed rule.

Saxton & Stump attorneys Rick Hackman, Stephen Fleury and Stephen Matzura are available to further discuss how to cost-effectively ensure your workforce is properly classified, or to aggressively defend your company during a DOL investigation or lawsuit alleging misclassification of your workers.

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Stephen J. Fleury, Jr.
Stephen J. Matzura
Richard L. Hackman

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