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DOL Finalizes Regulation on Independent Contractor Classification

The Department of Labor (DOL) published its [final rule](#) putting forth a test to determine whether workers are independent contractors such that they are not entitled to the minimum wage or overtime pay that the Fair Labor Standards Act (FLSA) requires for employees. Published on January 6, 2021, the final Rule slightly modifies the initial version that it proposed in September 2020 (which was summarized [here](#)).

The DOL's new test evaluates the "economic realities" of the working relationship between the worker and the employer. More specifically, the worker is an employee if, "as a matter of economic reality, the individual is economically dependent on that employer for work." The factors set forth are the same as the previously proposed rule. Namely, the two core factors remain (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss.

The control over the work factor weighs in favor of independent contractor status if, for example, the worker sets his or her own schedule "by selecting his or her projects, and/or through the ability to work for others, which might include the potential employers' competitors." In contrast, this factor weighs in favor of employee status if the putative employer "controls the individual's schedule or workload, "and/or by directly or indirectly requiring the individual to work exclusively for the potential employer." However, requiring the individual to comply with specific legal obligations or meet deadlines or quality control standards does not evidence the required control to make a worker an employee.

The opportunity for profit factor weighs in favor of independent contractor status if the individual "has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in capital or expenditure on for example, helpers or equipment" However, this factor weighs in favor of employee status if the individual can increase his earnings only by working faster or doing more work.

Other "guidepost" factors assess the amount of skill required for the work, the degree of permanence in the working relationship, and whether the work is part of an integrated unit of production. Under the final rule (but unlike the proposal issued in September), the DOL permits the guidepost factors to outweigh the two core factors if the circumstances of the case so warrant.

Notwithstanding the issuance of this final rule, its future is somewhat suspect. The final rule will take effect on March 8, 2021—60 days after publication in the Federal Register. As a result, the incoming administration of President-elect Joe Biden will have an opportunity to withdraw it prior to publication.

Further, although the rule clarifies the distinction between employees and independent contractors for purposes of the FLSA, it does not impact other state or federal laws, including tax laws, nor does it override state laws that may provide a narrower standard.

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