Issue: Independent Contractor Proposed Rule

Comments Due: December 13, 2022

The U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (the Proposed Rule) on October 13, 2022, that proposes guidance on determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA). Proper classifications are significant because independent contractors are not afforded wage-and-hour protections under the FLSA and/or applicable state law, such as minimum wage for all hours worked or overtime compensation for more than 40 hours worked in one workweek. Misclassification can subject companies and organizations to class and collective actions and expose them to significant liability.

The Proposed Rule departs from the 2021 Independent Contractor Rule (the 2021 IC Rule), which remains in effect. While the 2021 IC Rule appeared to allow companies and organizations greater flexibility in designating workers as independent contractors, the Proposed Rule pulls back on that flexibility by essentially expanding the definition of employee.

The 2021 IC Rule identified five “economic reality” factors, two of which were designated “core factors,” to guide the independent contractor inquiry. The Proposed Rule seeks to rescind and replace the 2021 IC Rule, which the DOL believes is not fully aligned with court interpretations of the FLSA text or the decades of case law applying the “economic reality test.”

The Proposed Rule utilizes a six-factor economic realities test to assess the relationship and affirms that the “ultimate inquiry” is “whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor).” Unlike the 2021 IC Rule, which emphasized the two core factors, the outcome of the analysis under the Proposed Rule depends on the totality of the circumstances and considers the following factors, none of which have a predetermined weight:

- Opportunity for profit or loss depending on managerial skill.
- Investments by the worker and the employer.
- Degree of permanence of the work relationship.
- Nature and degree of control.
- Extent to which the work performed is an integral part of the employer’s business.
- Skill and initiative.

The Proposed Rule also acknowledges that additional factors may be relevant in determining employee or independent contractor status “if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”

With a renewed focus on the totality of circumstances, adoption of the Proposed Rule appears to be intended to expand those classified as employees. In fact, the DOL anticipates that the Proposed Rule identifies workers in "home care, janitorial services, trucking, delivery, construction, personal services, and hospitality and restaurant industries" as those who may be most affected. Before any final rule is issued, the public has an opportunity to submit comments regarding the Proposed Rule and may do so either electronically or via mail until December 13, 2022.

The Proposed Rule interjects the federal DOL into the wide-ranging debate over independent contractor status. This debate is playing out in California as AB5, which codified the "ABC" test in California for determining independent contractor status under various circumstances, including under the California Labor Code.

AB5 generally presumes a worker is an employee unless the hiring entity can satisfy the three "ABC" prongs. As the deputy secretary of labor is the former labor commissioner in California, it was expected that the Biden administration would seek to make it harder for hiring entities to designate workers as independent contractors.

In addition, this proposal fulfills one of the recommendations in the DOL's labor-friendly *Worker Organizing Task Force Report*, which focused on ways the government could spur union organizing.

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