

Department of Labor Finalizes Regulation on Independent Contractor Classification

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On January 6, 2021, the Department of Labor (“DOL”) published its final rule clarifying who is an independent contractor, rather than an employee covered by the Fair Labor Standards Act (“FLSA”). The factors are the same as the previously proposed rule that was released back in September which adopted a modified “economic reality” test. (see [Benesch Law: Clarifying Employee and Independent Contractor Status under the FLSA](#)).

Under the new regulation, employers can use the “economic reality” test by applying two core factors, and three other “guideposts” to determine status. Under the two core factors, the DOL considers: (1) the nature and degree of the worker’s control over the work and (2) the worker’s opportunity for profit or loss. These factors “carry greater weight in the analysis than any other,” according to the DOL. If the two factors conflict, employers should look at the other three “guidepost” factors, which assess: (3) the amount of skill required for the work, (4) the degree of permanence in the working relationship, and (5) whether the work is part of an integrated unit of production.

In justifying the two core factor test, the DOL explains that each factor should be analyzed in accordance with its probative value to the ultimate inquiry of whether an individual is in business for him or herself. Hence, the two “core factors” are more probative than other factors in determining the business inquiry and therefore should carry the greater weight. However, compared to the initial proposal, the DOL permits the other factors to outweigh the two core factors if the specific circumstances of the case warrant such result. As the DOL notes: “Even when both core factors align, they are not ‘controlling’ because their combined weight can still be outweighed by other considerations.”

Notably, these guidelines apply across all industries. As such, it replaces the DOL’s previous interpretation of independent contractor status under the FLSA which applied only in certain contexts. Further, because the rule does not take effect until 60 days after publication in the Federal Register, incoming President-elect Joe Biden will have an opportunity to withdraw it.

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