CLIENT ALERTS & INSIGHTS

Department of Labor Issues New Proposed Rule on Independent Contractor Classification

OCTOBER 13, 2022

Authors: Adam Primm, Jordan J. Call

On Tuesday, October 11, 2022, the Biden Administration's Department of Labor ("DOL") issued a proposed rule revising the agency's approach to evaluating independent contractor status under federal wage & hour law. The DOL's proposal clarifies when workers are properly classified as independent contractors operating their own independent business or when they are employees entitled to the protections of the Fair Labor Standards Act.

In issuing the new proposed rule, the DOL stated that the Trump-era independent contractor rule was overly simplified and inconsistent with the jurisprudence of federal courts. The Trump-era test multi-factor test included five factors for which two factors received greater weight: (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss based on personal initiative or investment. The DOL previously attempted to withdraw the Trump-era rule, but a federal court found the withdrawal unlawful due to the DOL's failure to comply with the Administrative Procedure Act. The federal court's decision kept the Trump-era rule in place. Thus, the DOL began a new rulemaking process in issuing its proposed rule on October 11, 2022.

The DOL's new proposed rule will use a multi-factor test that returns to the totality of the circumstances analysis of the worker relationship to determine the economic realities of the working relationship and whether the worker is truly an independent contractor. The DOL's new rule will consider the following factors in evaluating worker classification:

- the nature and degree of the worker's control over the work,
- the worker's opportunity for profit or loss based on personal initiative or investment,
- investments by the worker and the putative employer,
- the degree of permanence of the working relationship,
- the extent to which the work performed is an integral part of the putative employer's business, and
- the degree of skill and initiative exhibited by the worker.

The proposed rule elaborates that the analysis of the factor evaluating the nature and degree of control includes how scheduling, supervision, price-setting, and the ability to work for others influence the degree of control. Unlike the Trump-era rule, these factors are weighed equally. The

DOL also may consider any additional factors if they indicate the workers may be in business for themselves as opposed to being economically dependent on an employer for work.

Notably, the proposed rule does not include a strict test such as the "ABC" tests found under some states' laws. On the other, the proposed rule does not impact state laws on worker classification. Further, the proposed rule only addresses worker classification with respect to the Fair Labor Standards Act-it does not impact other federal statutes for which there may be a different analysis of independent contractor classification.

The proposed rule *is not* yet final. Interested parties will have 45 days until November 28, 2022, to submit public comments on the proposed rule explaining the impact the proposed rule might have on their businesses. After the conclusion of the comment period, the DOL will decide whether to implement a final rule. The timing of such a decision is unknown. **Update: On October 25, 2022, the DOL extended the public comment deadline until December 13, 2022.**

Although the DOL's proposed rule is not yet a final rule, businesses may want to consider how this proposal could impact their operations in the event it becomes final.

For more information on how the DOL's proposed rule may affect your business, contact a member of the firm's Labor & Employment practice group.

Adam Primm at APrimm@beneschlaw.com or 216.363.4451

Jordan J. Call at JCall@beneschlaw.com or 216.363.6169