

DOL Proposes Rule That Would Change How Independent Contractors Are Classified

Article By:

Anthony J. Judice

The U.S. Department of Labor (DOL) [published a proposed rule today](#), October 13, 2022, that effects any companies utilizing independent contractors (Proposed Rule). copy of the Under the Proposed Rule, the DOL hopes to revert to a “totality of the circumstances analysis” for determining independent contractor status. A totality of the circumstances analysis focuses on analyzing the following factors as they relate to each company’s workers:

- 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.

Additionally, the Proposed Rule does not limit the DOL to the above six factors. Instead, it also allows for the DOL to consider any additional factors if those factors “in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”

Despite the Proposed Rule being a strong shift to a pro-employee atmosphere, this is not the strictest possible proposition. Multiple states, including California, utilize the strict ABC test, under which a worker is considered an employee unless the employer proves that: 1) the worker is free from the control and direction of the hiring entity, 2) the worker performs work that is outside the usual course of the hiring entity’s business, and 3) the worker is customarily engaged in an independently established trade, occupation or business. Despite clearly wishing to adopt the strict ABC test, the DOL acknowledged their belief that they are legally constrained from adopting an ABC test because

the Supreme Court has held that the economic reality test is the applicable standard for determining workers' classification under the FLSA. As such, employers can brief a slight sigh of relief.

Notably, the Proposed Rule is not yet final. Interested parties have 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.

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