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U.S. Department of Labor Publishes Proposed Rule on Employee or Independent Contractor Classification Under the FLSA

On October 13, 2022, the U.S. Department of Labor (“DOL”) published a Notice of Proposed Rulemaking that would revise the DOL’s current guidance on determining employee versus independent contractor status under the Fair Labor Standards Act (“FLSA”). This client alert summarizes some of the key features of the proposed rule.

The proposed rule would rescind the DOL’s 2021 rule entitled “Independent Contractor Status Under the Fair Labor Standards Act” (the “2021 Rule”), which identified five economic reality factors that guide the analysis of whether a worker is properly classified as an employee or independent contractor. The 2021 Rule designated two factors (the nature and degree of control over the work, and the worker’s opportunity for profit or loss) as “core factors” that carry the most weight. The other three factors of the 2021 Rule are the amount of skill required for the work, the permanence of the working relationship, and whether the work is part of an integrated unit of production.

The DOL, after “further consideration,” believes the 2021 Rule departs from case law applying the economic realities test and does not fully comport with the FLSA’s text. In an attempt to align the DOL’s approach with how courts have interpreted the FLSA, the proposed rule would restore a multi-factor, totality-of-the-circumstances analysis to determine whether a worker is properly classified as an employee or independent contractor. The proposed rule would not assign a predetermined weight to any factor; instead, it is intended to ensure that all factors are considered in view of the economic reality of the whole activity.

The proposed rule would establish a six-factor test to guide an assessment of the economic realities of the working relationship and the question of economic dependence. The six factors are not exhaustive, and no single factor or subset of factors is necessarily dispositive; rather, each factor’s weight will

depend on the facts and circumstances of the particular case. The six factors are:

1. *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker exercises managerial skill that affects their economic success or failure in performing the work.
2. *Investments by the worker and the employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature.
3. *Degree of permanence of the work relationship.* This factor weighs in favor of the worker being an employee where the work relationship has an indefinite duration or is continuous. Conversely, this factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities.
4. *Nature and degree of control.* This factor considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.
5. *Extent to which the work performed is an integral part of the employer's business.* This factor considers whether the work performed is an integral part of the employer's business. This factor does not depend on whether any individual worker is an integral part of the business, but rather whether the function they perform is an integral part.
6. *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.

The DOL further notes that additional factors may be relevant if they indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work. The DOL believes its proposed rule is flexible and allows for application and adaptation across the entire economy, including disparate industries and occupations, and it can encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant. The proposed rule also leaves open the possibility that changed circumstances may make certain factors more important under certain circumstances or in future scenarios.

The proposed rule is not final and has not taken effect. The DOL will review and consider public comments before publishing a final rule. The comment period closes at 11:59 p.m. EST on December 13, 2022.

For further information about how we can advise you with respect to this proposed rule, or if you would like to review your own worker classifications, please contact your Kutak Rock attorney or any of the attorneys in the firm's [National Employment Law Group](#) or [FLSA Litigation and Wage and Hour Defense Group](#) and we would be happy to discuss this with you.

