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DOL's Proposed Independent Contractor Rule Would Classify More Workers as Employees

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On October 11, 2022, the Department of Labor ("DOL") unveiled a proposed rule to define the test for independent contractor status under federal wage and hour law. The proposed rule is the latest in a series of back-and-forth political maneuverings and seeks to replace a proposed Trump administration regulation that sought to classify workers as independent contractors if they own their own businesses or have the ability to work for competing companies (the "Contractor Rule"). The DOL's new proposal mirrors guidance from the Obama administration that the Trump administration had sought to withdraw and replace with a more business-friendly test.

Under the Fair Labor Standards Act ("FLSA"),workers are generally classified as employees or independent contractors. Employers are required to comply with the FLSA's minimum wage, overtime, and recordkeeping requirements for employees, but not for independent contractors. Should the new test become a reality, it could impact millions of gig and contract workers including those in the rideshare, healthcare, and restaurant industries.

The proposed rule would be a return to a "totality-of-the-circumstances" test that considers such factors as 1) the opportunity for profit or loss depending on managerial skill; 2) investments by the worker and the employer; 3) degree of permanence of the work relationship; 4) nature and degree of control; 5) extent to which the work performed is an integral part of the employer's business; and 6) skill and initiative. The proposed rule opts for a more circumstantial and fact dependent test than the Contractor Rule. Instead of focusing on the two factors favored by the Trump administration, the DOL's new proposal would analyze all factors but with a focus on whether workers are economically dependent on their employers for work or actually are in business for themselves.

The proposed rule is not a new test for courts. In 1974, in *Rutherford Food Corp. v. McComb*, the United States Supreme Court held that employment classifications should be determined under an "economic realities test," whereby several factors were to be weighed evenly by the Court. Since that decision, federal courts of appeal across the country have weighed multiple factors and approached such classification determinations under a totality-of-the-circumstances approach.

Reversing course, with the new proposal, the DOL criticized the Contractor Rule for being inconsistent with the FLSA's broad definition of "employ," making it easier for employers to classify workers as independent contractors, thereby denying workers FLSA protections. As a side note, the DOL considered but declined to go with the "ABC" test used in several states including California, New Jersey, and Massachusetts, deeming such an alternative to be "inconsistent with Supreme Court precedent interpreting the FLSA."

The proposed rule will be published in the Federal Register on October 13, 2022, and the public will have 45 days to comment on the proposal. The final rule is expected to be issued next year, but employers should be aware that the regulation is only interpretive. Courts are not required to follow it, although some may find the DOL's interpretation persuasive. Of course, employers in states with more protective laws and regulations governing classification of workers must continue to comply with their respective state law tests.

If you have any questions regarding the topics discussed in this article, please contact Ellen M. Hemminger at ehemminger@vedderprice.com, Peter Walrod at pwalrod@vedderprice.com or any of our Labor & Employment group attorneys or any Vedder Price attorney with whom you have worked.

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