

Department of Labor Proposes New Rule for Determining Independent Contractor Status

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This week, the Department of Labor announced a new proposed rule clarifying the test for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA). The rule would adopt the "economic reality" test to determine the worker's status, which considers whether a worker is in business for themselves (independent contractor) or is economically dependent on the employer for work (employee).

The proposed rule identifies two "core factors" for determining the economic reality:

- 1. The nature and degree of the worker's control over the work.*
- 2. The worker's opportunity for profit or loss based on their initiative or investment.*

In addition to these core factors, the proposed rule identifies three other factors that guide the analysis

- 1. Amount of skill required for the work.*
- 2. Permanence of the working relationship.*
- 3. Whether the work is part of an integrated*

unit of production.

While the economic reality test in various forms has been applied by the DOL and many federal courts to determine independent contractor status, the proposed rule "clarifies" the test, focusing on five factors and highlighting two core factors. This clarification appears to be favorable to employers seeking to utilize independent contractors in their workforce. The DOL itself highlights that this proposed rule may increase the use of independent contractors and shift workers from employee to independent contractor status.

The proposed rule is available for comment for 30 days. Typically, rules are given a longer comment period, which indicates that the DOL is making this rule a priority before any potential administration change in January.

If you have questions about the proposed rule, independent contractor rules, or other labor and employment matter, do not hesitate to reach out to the Labor and Employment Group at Levenfeld Pearlstein.