DOL's Proposed Rule on Employee vs. Independent Contractor Classification - Redux

Labor & Employment Law Update

By Beverly Alfon on October 12, 2022

On October 11, 2022, the U.S. Department of Labor (DOL) announced that it is proposing to do away with the existing independent contractor test that the Trump administration slipped into place in January 2021, in favor of a shift back to a "totality of circumstances" analysis.

Why This Matters. The wage and hour protections of the FLSA, including minimum wage and overtime pay, only apply to *employees*. Misclassification of a worker as an "independent contractor" under the FLSA is often a high stakes issue for employers and workers.

The 2021 rule largely focused on two "economic reality" core factors: (1) the nature and degree of workers' control over their own work and (2) the opportunity for profit or loss for the worker. It is viewed as employer-friendly as it made it easier to classify workers as independent contractors.

The DOL's position regarding the 2021 rule's independent contractor test is that it is not in line with established precedent. The stated goal of the DOL is to "combat employee misclassification" and preserve workers' rights to minimum wage and overtime. Make no mistake that the end game here is to increase the likelihood that workers will be classified as employees.

The Biden administration previously attempted to thwart the implementation of the 2021 rule – first, delaying its effective date, and then withdrawing it in its entirety in May 2021. However, earlier this year, a federal district court found that the Biden administration unlawfully rescinded the regulation by failing to follow required standards in the rulemaking process. As a result, the 2021 rule went into effect. This prompted the DOL to announce plans to propose a new rule.

The proposed rule includes 6 non-exhaustive factors to be used in the assessment of a worker's status:

- Opportunity for profit or loss depending on managerial skill

- Investments by the worker and the employer
- Degree of permanence of the work relationship
- Nature and degree of control
- Extent to which the work performed is an integral part of the employer's business
- Skill and initiative required for the work (whether the worker is dependent on training from the employer to perform the work)

Employers will be able to submit public comments on the DOL proposal through November 28, 2022.

Notably, this proposed rule from the DOL will not affect independent contractor tests under state laws (e.g., tax laws, wage and hour laws, unemployment compensation, leave laws, and workers' compensation laws) or other federal laws such as the National Labor Relations Act and Internal Revenue Code. For a look at the bigger picture of the significance of misclassification, see Contractual Choice of Law Provision Can't Shield Employer From State Wage and Hour Class Action and DOL and NLRB Agree to Share Information and Counsel Employee on Overlapping Enforcement Matters.

Bottom Line: Employers should reevaluate the terms and nature of its arrangements with its independent contractors in light of the factors set forth in the DOL's proposed rule, as well as under applicable state and federal laws.