

## Insights

### Is Your Workplace Correctly Classifying Employees and Independent Contractors?

---

October 17, 2022

By: Elizabeth M. Roberson

On October 13, 2022, the U.S. Department of Labor (DOL) published a **Proposed Rule** to revise its prior guidance on how to determine who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This Proposed Rule rescinds a prior rule that was published on January 7, 2021, which was addressed in a **prior alert**. Comments on this Proposed Rule are being accepted until November 28, 2022.

The Proposed Rule takes a totality of the circumstances approach and asks employers to use the Economic Realities Test to determine whether workers are independent contractors or employees. In doing so, it looks at the following factors:

- the worker's opportunity for profit or loss depending on managerial skill;
- investments by the worker and the employer;
- how permanent the work relationship is;
- the nature and degree of control the employer has over the worker;
- whether the work is an integral part of the employer's business; and
- the skill and initiative of the worker.

The Proposed Rule also provides additional guidance to employers, including directing employers to include exclusivity as a consideration under the factor of "how permanent the work relationship is" but indicates that simply having multiple jobs does not weigh in favor of independent contractor status. Employers must consider each of the factors above and should not afford any individual factor greater weight than another.

This Proposed Rule makes it more likely that workers are determined to be employees and resembles the ABC test that Illinois, California, New Jersey, and Massachusetts courts apply to determine if a worker is an employee or independent contractor. Under the ABC test in those states, workers are employees unless employers can establish otherwise. If Courts interpret this Proposed Rule in the same manner, it will increase the likelihood that a worker is an employee.

This Proposed Rule is yet another depiction of the Biden Administration's view on protecting workers' rights, as employees generally have more rights than independent contractors. If the DOL adopts the Proposed Rule, employers should reanalyze whether their workers are employees or independent contractors. Misclassification of workers can result in expensive penalties such as unpaid overtime and minimum wages, liquidated



damages, and attorney's fees, among other legal issues, some of which include eligibility for unemployment compensation, worker's compensation, and various employee benefits. In addition, the IRS can bring criminal charges against someone who intentionally misclassifies an employee.

Thus, employers should monitor the status of this Proposed Rule and begin reviewing how such a change could affect their workforce. In the meantime, if you have any questions regarding the classification of a worker or the FLSA, please contact **Elizabeth M. Roberson** or another member of our **Employment Law Practice**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*