

Insights

DOL Proposes *Withdrawing Independent Contractor Status and Joint Employer Final Rules*

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On March 11, 2021, the U.S. Department of Labor (DOL) announced two proposed withdrawals of previously issued rules,¹ including those (i) for evaluating an individual's independent contractor status, and (ii) narrowing the definition of joint employer. The DOL's stated reasoning for issuing the proposed withdrawals is because both prior final rules would "significantly weaken protections afforded to American workers under the Fair Labor Standards Act (FLSA)."

Final Rule for Independent Contractor Status

The DOL originally published its final rule on the test for evaluating independent contractor status on January 7, 2021, with an original effective date of March 8, 2021, which is now delayed until May 7, 2021. The final rule on the independent contractor status set forth an economic realities test containing five factors for evaluating whether an individual is appropriately classified as an independent contractor:

- (i) the nature and degree of control over the work;
- (ii) the worker's opportunity for profit or loss based on initiative and investment;
- (iii) the amount of skill required for the work;
- (iv) the degree of permanence of the working relationship between the worker and the potential employer;
- (v) whether the work is part of an integrated unit of production.

Under this test, the DOL stated that the first two factors were to be given greater weight while the final three factors served more as additional guidelines for evaluating an individual's status. A more detailed article on the independent contractor status final rule is available [here](#).

The DOL is proposing to withdraw the final rule and the economic realities test because of the following:

- the final rule's "standard has never been used by any court or the [Wage and Hour Division] (WHD), and is not supported by the [FLSA's] text or case law;"
- the final rule would not provide the clarity it intended because "neither courts nor WHD have previously applied" it; and

- the final rule did not fully consider “the likely costs, transfers, and benefits that could result.” Specifically, the final rule did not consider the cost of individuals losing FLSA protection when classified as independent contractors.

Final Rule Narrowing the Definition of Joint Employer

The DOL issued its final rule narrowing the definition of joint employer under the FLSA in January of 2020. The final rule provided a four-factor balancing test to use in evaluating a joint employer scenario where another person is benefitting from the employee's work, also known as the vertical joint employment standard. A more detailed summary of the joint employer final rule is available [here](#). The rule took effect on March 16, 2020; however, on September 8, 2020, a New York federal court vacated most of the final rule. Specifically, the opinion vacated the vertical liability portion of the joint employer rule, while leaving other provisions, such as those relating to the horizontal joint employment standard, intact.

The DOL is proposing to rescind the final rule for the following reasons:

- the DOL believes that “further consideration of the statutory analysis and whether the test for vertical joint employment is unduly narrow” is necessary;
 - Specifically, the DOL wants to analyze further as the joint employer rule differs “from the analyses and tests applied by every court to have considered joint employer questions” before it was issued.
- the joint employer rule differs from the WHD's prior guidance on joint employment and the WHD had not applied the joint employer rule's analysis previously;
- courts have not widely adopted the joint employer rule since it was published, with most declining to adopt the vertical joint employment analysis;
- the joint employer rule may not have adequately considered the costs to employees who lose FLSA protections under the analysis as it may reduce the number of businesses currently considered joint employers; and
- the horizontal joint employment analysis is too interconnected with the vertical joint employment analysis to stand alone.

Next Steps and Takeaways

For now, employers are left in limbo with the proposed withdrawal of both final rules. The independent contractor status final rule has not yet taken effect. As such, employers should continue operating under the guidance in existence before the final rule was issued. For the joint employer rule, the rule remains in effect until it is formally rescinded; however, employers may wish to consider operating under the prior joint employer analysis.

The DOL has not imposed new regulations or guidance on either final rule and is now accepting comments on both proposed withdrawals until 11:59 pm EST on April 12, 2021. Employers affected by either or both of the proposed withdrawals and that are interested in providing feedback could consider submitting a comment to the DOL during the comment period.

If you have any questions about how the proposed withdrawals may affect your organization or the classification of your workers, please contact **Elizabeth M. Roberson** or any other member of Krieg DeVault LLP's **Labor and Employment Team**.

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.

[1] Proposed Withdrawal of Independent Contractor Status Final Rule: <https://www.federalregister.gov/public-inspection/2021-05256/independent-contractor-status-under-the-fair-labor-standards-act-withdrawal>; Proposed Withdrawal of Joint Employer Final Rule: <https://www.federalregister.gov/documents/2021/03/12/2021-04867/rescission-of-joint-employer-status-under-the-fair-labor-standards-act-rule>