KRIEG DEVAULT

Insights

The (Economic) Reality for Employers: The Department of Labor's Proposed New Rule for Determining Independent Contractor Status

October 5, 2020

By: Elizabeth M. Roberson

On September 22, 2020, the U.S. Department of Labor ("DOL") announced a **new proposed rule** that could affect whether a worker is an employee or an independent contractor under the Fair Labor Standards Act ("FLSA"). The proposed rule sets forth the "economic reality" test as the proper test for determining whether a worker is an independent contractor or employee.

The FLSA requires covered employers to pay nonexempt employees at an amount equal to at least the federal minimum wage for every hour worked and overtime pay for hours worked over 40 hours per workweek. On the contrary, if a worker is an independent contractor those regulations do not apply. To employ means to "suffer or permit to work".1 The current standard for determining whether a worker is an employee under the FLSA is a multi-factor test that ultimately determines a worker's economic dependence on a potential employer. Although this standard exists, it is not clearly explained and the DOL's goal with the proposed rule is to implement a clearer standard to benefit workers and employers.

The DOL's proposed rule recommends that the widely used "economic reality" test be used to distinguish employees from independent contractors for purposes of the FLSA. Under this test, the following factors are analyzed:

1. the nature and degree of the worker's control over the work;
2. the worker's opportunity for profit or loss;
3. the amount of skill required;
4. the permanence of the working relationship; and
5. the extent to which services rendered are an integral part of the business.

Further, the DOL clarifies that the economic dependence of a worker turns on whether the worker is in business for him- or herself or is economically dependent on a potential employer for work. The DOL explains that the core factors will be factors (1) and (2) and they will be afforded greater weight in an analysis of worker status. In the proposed rule, the DOL explains that the parties' actual practice will be what controls versus what is contractually or theoretically possible.

When applying the factors of the economic reality test, the more control the employer exercises over the worker the more likely the worker is an employee. The less opportunity the worker has for profit and/or loss, the more likely the worker is an employee. The greater the skill level required of the worker, the more likely the worker is an independent contractor. The more permanent the relationship, the more likely the worker is an employee. And last, the more integral the services are to the business the more likely the worker is an employee.

The DOL will seek comment on this new proposed rule for 30 days and will thereafter decide whether to change or adopt the rule as is. If your entity has any concerns that it would like to submit during the comment period, we can assist with this process. In addition, with all changes to the law, it is important that your entity is aware of any final rules and changes to worker classification and considers any changes to policies and compliance procedures that may need to be made. Please contact **Elizabeth M. Roberson** or another member of our Labor and Employment Law Team for further questions and information as to how this proposed rule could affect your classification of employees and independent contractors.

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] 29 U.S.C. 203(d) and (e).