Classifying Workers as Employees or Independent Contractors: New Rule on the Horizon

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Employers in all shapes and sizes often face the tricky decision of how to classify their workers: are they employees or independent contractors? The answer is not always straightforward, and making a mistake upfront can have costly consequences down the road. We have helped our clients through many private lawsuits and government investigations all centered on this issue, and the problem has been magnified in recent years not only among traditional companies, but especially for companies operating heavily in the gig economy. The decision is also complicated by the split in rules that agencies, regulators, and various court jurisdictions apply when answering this same basic question. In an important step designed to "bring clarity and consistency to the determination of who's an independent contractor under the Fair Labor Standards Act," late last month the U.S. Department of Labor ("DOL") announced a new proposed rule.

What is the New Proposed Rule? The new proposed rule would adopt an "economic reality" test. This test asks whether the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor). There are several factors to examine, including what this new rule would make "core factors": (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss. Beyond these "core factors", other factors that are part of this test include: (3) the amount of skill required for the work, (4) the degree of permanence of the working relationship between the worker and the potential employer, and (5) whether the work is part of an integrated unit of production.

Would this Change the Status Quo? In the past, the DOL viewed the classification question through the lens of five or six factors. Under this proposed rule, two factors have been "core factors" and the remaining factors are demoted to secondary importance. But beyond the technical changes to the rule, adoption by the DOL would bring more clarity to the classification of workers. Under the Obama Administration and into the Trump Administration there has been inconsistency and debate among various officials about what the rule is, how to apply it, and how to change it. Regardless of your politics or opinions about administrative rule promulgation, it is fair to say that this ever shifting ground makes an employer's task of classifying workers challenging at best. This proposed rule is generally seen as more employer friendly and would provide a clearer roadmap to follow.

When Will This Become Final? This proposed rule is subject to a 30-day comment period ending October 26th. After the DOL reviews all of the comments and publishes a final rule, it will become final. While the DOL seems to be moving quickly, it seems unlikely that this will happen before the upcoming election.

What Should Employers do in the Meantime? Although not yet final, the promulgation of the new rule underscores the need for employers to evaluate their workforce to determine whether individuals are properly classified as employees or independent contractors. In light of shifting ground over the past several years and the various tests used to determine whether an individual is properly classified as an employee or independent contractor, employers should consult with an employment lawyer to conduct this analysis.

Learn More: Read the Proposed Rule