

DOL Proposes New Regulations for Determining Independent Contractor Status under FLSA

1 min read

Sep 29, 2020

Last week, the Department of Labor (DOL) proposed new regulations designed to make it easier for companies to determine whether workers can be classified as independent contractors. The DOL proposed an “economic reality” test to determine whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA).

The test considers whether a worker is in business for themselves (independent contractor) or is economically dependent on a putative employer for work (employee). The DOL set forth two “core factors” to be considered in making this determination:

- the nature and degree of the worker’s control over the work; and
- the worker’s opportunity for profit or loss based on initiative and/or investment.

After these “core factors” are considered, three additional factors would serve as “guideposts.” Those factors include:

- the amount of skill required for the work;
- the degree of permanence of the working relationship between the worker and the potential employer; and
- whether the work is part of an integrated unit of production.



The DOL’s proposed regulations are similar to those set forth in last year’s Wage and Hour Division guidance letter, which concluded that workers for a unnamed gig economy platform were independent contractors rather than employees. The proposed regulations are the DOL’s first formal regulations on this topic under the Trump Administration. According to the DOL, the proposed regulations are meant to bring clarity and consistency to the determination of which workers are independent contractors under the FLSA. The DOL is seeking comments on the proposed regulations until October 26, 2020.

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