LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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DOL Proposes New Rule For Independent Contractor Classification

On Oct. 11, 2022, the U.S. DOL of Labor (DOL) released a Notice of Proposed Rulemaking that would revise the analysis for determining independent contractor status under the Fair Labor Standards Act (FLSA). The proposed standard would rescind the current rule that has been in effect since March 8, 2021.

The standard for independent contractor classification under the FLSA was consistent from the 1940s until 2021. During that time, federal courts and the DOL applied the "economic realities" test, which analyzed whether a worker is economically dependent on the employer for work or if they are in business for themselves. Courts considered six factors, including: (1) the degree of an employer's control over the manner of work performed; (2) the worker's opportunity for profit or loss depending on their managerial skill; (3) the worker's investment in equipment or materials or employment of others; (4) whether the work performed required special skills; (5) the permanency of the working relationship; and (6) whether the services rendered were integral to the employer's business. No one factor controlled the analysis, rather the totality of the circumstances were considered.

Under former-president Donald Trump, the DOL proposed a new rule for classifying independent contractors in September 2020. The final rule was issued on Jan. 19, 2021, with an effective date of March 4, 2021 (the 2021 Rule). The 2021 Rule deemed the degree of control and opportunity for profit factors as "core" factors, granting them more weight in the analysis. It also limited consideration of whether services were integral to an employer's business and instead considered whether a worker's services were an integrated unit of production. The DOL cited the need for greater certainty than the economic reality test allowed and determined the "core" factors were most important for determining economic dependence of a worker on an employer. In practice, the 2021 Rule made it easier to classify workers as independent contractors, alleviating employers' obligations under the FLSA.

Soon after its promulgation, the DOL, under the Biden administration, attempted to delay and later withdraw the 2021 Rule. Both attempts were vacated by the U.S. District Court for the Eastern District of Texas, and the court made the 2021 Rule retroactively effective to March 4, 2021.

With its recent Notice of Proposed Rulemaking, the DOL is attempting to dispose of the Trump-era rule and return to the original economic realities' standard. This would involve a return to consideration of all six factors, with no one factor controlling. The Notice also provides additional analysis for the control factor, discussing how scheduling, supervision, price-setting and the ability to work for others are to be considered and not limiting the analysis to control that is actually exerted. The Proposed Rule would return to the original interpretation of whether a worker's services are integral to an employer's business, making it more difficult to classify workers as independent contractors when they are offering work that is within the employer's regular business.

It is important for employers to remain updated on these changes because a worker's independent contractor classification can result in serious consequences for FLSA compliance. The rule is still in the proposal stage. However, if the rule becomes final, the new independent contractor standard could impact employers who classified employees as independent contractors under the 2021 Rule. The DOL has invited the public to comment on all aspects of the proposed rule. The public comment period will be open until Nov. 28, 2022.

For more information on the information presented in this information memo, please contact Adam P. Mastroleo or any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS