DOL PUBLISHES PROPOSED RULE TO RESCIND THE 2024 BIDEN-ERA INDEPENDENT CONTRACTOR TEST

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US Labor, Employment, and Workplace Safety Alert

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On 26 February 2026, the US Department of Labor (DOL) published a proposed rule (Proposed Rule) that would again modify the framework to determine whether a worker is an employee or independent contractor under the Fair Labor Standards Act (FLSA). In issuing the Proposed Rule, the DOL also proposed expanding this framework to apply to worker classification under the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

The Proposed Rule would rescind the 2024 Biden-era final rule (2024 Final Rule)[1] and replace it with a slightly modified version of the prior Trump-era 2021 rule that was viewed as more employer-friendly. If finalized, the Proposed Rule may offer employers greater certainty in classifying workers as independent contractors.

THE DOL REINTRODUCES THE "ECONOMIC REALITY" TEST

The Proposed Rule reinstates the "economic reality" test for worker classification, which focuses on the worker's economic dependence on an employer. The 2024 Final Rule set forth a six-factor test focusing on the "totality of the circumstances" of the relationship between a worker and a potential employer to determine independent contractor status and has generally been credited with resulting in more workers classified as employees. In contrast, the Proposed Rule seeks to functionally ease the standard for employers to classify workers as independent contractors.

Indeed, the Proposed Rule may have substantial consequences for employers, especially in industries that tend to rely more heavily on independent contractors, such as delivery services, home health agencies, and those in the construction industry. If an employer is covered by the FLSA, it generally must provide minimum wage and overtime pay protections to its employees and comply with the law's recordkeeping obligations. However, FLSA requirements do not apply to independent contractors.

KEY TAKEAWAYS FOR EMPLOYERS

The following are key takeaways for employers under the Proposed Rule as drafted:

- The DOL would reintroduce the "economic reality" test to determine whether a worker is an independent contractor or an employee who is economically dependent upon an employer.
- Under this "economic reality" test, two core factors will be given greater weight in determining if a worker is an independent contractor or employee: (1) *the nature and degree of control over the work*, and (2) *the*

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worker's opportunity for profit or loss based on initiative or investment. These two core factors should be considered first, and if they both point toward the same classification for a worker, it is likely that such classification is proper.

- While the Proposed Rule does not abandon the other "economic reality" factors as relevant to the classification analysis, these are "additional guideposts" and "are unlikely to outweigh the combined probative value" of the two core factors if they support the same classification. These other factors include the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of the business. Similar to the Trump-era 2021 rule, none of these factors are exhaustive and no single factor is dispositive.
- The DOL indicated that the *actual practice* of the worker and employer will be more relevant than contractual or theoretical practices. For example, under the Proposed Rule, requiring a worker to comply with legal obligations, satisfy health and safety standards, carry insurance, or meet contractually agreed-upon deadlines or quality control standards does *not* constitute control rendering the worker more or less likely to be classified as an employee.
- Employers still need to comply with other applicable state and federal regulations governing worker classification. Employers must remain mindful that the Proposed Rule only affects worker classification under the FLSA, FMLA, and MSPA. Furthermore, at the federal level, the National Labor Relations Board and other agencies may apply different tests than the DOL uses for FLSA cases, and state laws (such as those in New Jersey, Massachusetts, California, Arizona, and Illinois) have different standards that are unaffected by the Proposed Rule, including those related to classification of workers for unemployment insurance, workers' compensation, hours of work, and wage payment.

LOOKING AHEAD

While the Proposed Rule may result in more workers being classified as independent contractors, employers (of all sizes) should remain vigilant and evaluate their workforce, taking into account the following considerations:

Monitor the Rulemaking Process

The Proposed Rule's 60-day public comment period closes on 28 April 2026. The DOL is expected to take public comments into consideration before publishing a final rule and announcing its effective date. In the meantime, the 2024 Final Rule remains in effect.

Continue to Follow Jurisdiction-Specific Requirements

While the DOL may use the Proposed Rule for internal analyses, wage complaints, and enforcement actions, courts will not be bound by the DOL's rule. Independent contractor classifications will continue to face strict scrutiny in the courts and government agencies alike. Employers need to refresh themselves on those requirements and how the Proposed Rule may differ.

Assess Worker Population and Related Policies

Employers that retain independent contractors are encouraged to assess their current worker classifications, review and revise their policies, and analyze their current agreements to ensure that individuals retained as

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independent contractors satisfy the requirements for such classification under all applicable laws. Employers that engage independent contractors risk facing FLSA liability, which may include minimum wage and overtime back pay, liquidated damages, and attorneys' fees, as well as potential injunctive relief and even civil or criminal penalties if they are found to have misclassified their workforce.

Consult Employment Counsel

The lawyers of our Labor, Employment, and Workplace Safety practice regularly counsel clients on a wide variety of issues related to classification of employees and are well positioned to provide guidance and assistance to clients on this significant development.

FOOTNOTES

[1] *See* Erinn L. Rigney, *DOL Announces Final Rule Affecting Independent Contractor Classification Under the FLSA*, K&L GATES HUB (Jan. 12, 2024), https://www.klgates.com/DOL-Announces-Final-Rule-Affecting-Independent-Contractor-Classification-Under-the-FLSA-1-12-2024.

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