DOL Issues Proposed Rule on Independent Contractors

By Leah Shepherd
October 12, 2022

The U.S. Department of Labor (DOL) has issued a proposed rule (https://public-inspection.federalregister.gov/2022-21454.pdf) to clarify who is an independent contractor under the federal Fair Labor Standards Act (FLSA), potentially affecting the gig economy.

The DOL is proposing to rescind a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. Under the new proposed rule, employers would use a totality-of-the-circumstances analysis, in which all the factors do not have a predetermined weight.

"We have seen in many cases that employers misclassify their employees as independent contractors, particularly among our nation's most vulnerable workers," said U.S. Secretary of Labor Marty Walsh. "Misclassification deprives workers of their federal labor protections, including their right to be paid their full, legally earned wages."

The 2021 rule, which is still in effect, made it easier for employers to classify workers as independent contractors, rather than employees. Under the FLSA, employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to such benefits, but they generally have more flexibility to set their own schedules and work for multiple companies.

The new proposed rule directs employers to include exclusivity as a consideration under the permanency factor, but it acknowledges that simply having multiple jobs does not weigh in favor of independent contractor status. Factors in the economic realities test may include:

- The amount of skill required for the work.
- The degree of permanence of the working relationship.
- The worker's investment in equipment or materials required for the task.
- The extent to which the service rendered is an integral part of the employer's business.

"With the proposed rulemaking, the pendulum shifts more towards a pro-employee definition of employment, [but] it does not swing all the way in that direction," said Scott Mirsky, an attorney with Paley Rothman in Bethesda, Md. "This is some good news for companies who use independent contractors, since the DOL agreed that it did not have the authority to adopt an ABC test for use with the FLSA, which would have been devastating to businesses who use the independent contractor model."

States like California and Illinois use the ABC test, under which a worker is considered an employee unless the employer proves that:

- The worker is free from the control and direction of the hiring entity.
- The worker performs work that is outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation or business.

Gig Workers

The proposed rule could have the biggest impact on ride-hailing companies, delivery services and other industries that rely on gig workers. "For the gig economy, this will mean that employers will have a harder time classifying as independent contractors," said James Evans, an attorney with Alston & Bird in Los Angeles.

The National Retail Federation opposes the rule change, calling it unwarranted and unnecessary.

"The current rules clearly define the difference between employees and independent contractors, providing much-needed legal certainty for employers, employees and independent contractors alike," said David French, senior vice president of government relations for the National Retail Federation. "The changes being proposed by the Labor Department will significantly increase costs for businesses across all industries and further drive already-rampant inflation."

The proposed rule is scheduled to be published in the *Federal Register* on Oct. 13. Employers and employees may comment on the proposal for 45 days after the published date.