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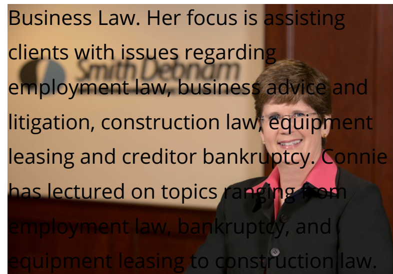

Department of Labor Proposes Rule Clarifying Parameters of Contractor Relationship

September 22, 2020 | by

Folks who follow the United States Department of Labor received notification on Monday, September 21, that a significant new rule would soon be announced on Tuesday morning. Secretary Eugene Scalia penned a press release sent in advance of the briefing announcing the Department of Labor's intention to provide clarity for "gig workers" and to simplify the definition of what constitutes an independent contractor.

Secretary Scalia noted that it had been more than 80 years since the federal Fair Labor Standards Act ("FLSA") had codified the employment relationship as it relates to the payment of wages, and that since that time, courts, agencies, and legal scholars had struggled with defining what relationships constitute independent contractor status, often with varying interpretations. While employees are entitled to the minimum wage and overtime pay provisions in the FLSA, contractors are not.

In recognition of the fact that the national landscape has changed dramatically over the years with the growth of the "gig" economy, this proposed rule seeks to "codify a simple, clear approach that can be applied consistently nationwide" and to "simplify, clarify and harmonize principles the federal courts have espoused for decades" when determining what workers are employees covered by the FLSA.

The proposed rule adopts an "economic reality" test to determine a worker's status as either an employee or an independent contractor; i.e., whether, as a matter of economic reality, the worker is dependent on a particular person, business, or organization for work or is in business for herself. This inquiry would be conducted through the application of five factors, with two of those factors – the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss – being provided greater weight than the other three factors, which evaluate the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the putative employer, and the extent to which the services rendered are an integral part of the putative employer's business. The public will have 30 days from the publication of the proposed rule to provide commentary before the rule is finalized.

Interestingly, Secretary Scalia states in his press release that the purpose of the proposed rule is not to “slant the analysis toward classifying independent contractors as employees” because the Department of Labor recognizes there are “powerful reasons why some workers prefer to be independent, rather than accountable to a company as its employee.” In making this assessment, Secretary Scalia opined that “[b]eing in business for oneself draws on two of America’s most deeply rooted traditions: freedom and entrepreneurialism,” and that he’s never met a young person who told him that they “dream of being a FLSA-covered employee.”

> Secretary Scalia provides further support for this approach by pointing to a recent report from the Bureau of Labor Statistics that 79% of independent contractors “overwhelmingly prefer their work arrangement to traditional jobs” and concludes that “[f]reedom from the strictures of a nine-to-five can be especially welcome to parents, caregivers and others who need greater control over their schedule and workload.”

This approach to the analysis of what constitutes an employment relationship stands in sharp contrast to past court and agency decisions, which assumed that a worker would be better served to be classified as an employee despite clear indications, such as the existence of a contractor agreement, that the worker wished to be viewed as a contractor. It appears that the proposed rule intends to rely more heavily than in the past upon the worker’s desires in determining the appropriate classification. It is important to note, however, that in the event employers come away with the impression that the rules surrounding the employment relationship have become completely relaxed, Secretary Scalia warned against companies improperly classifying employees as independent contractors in order to dodge responsibilities they owe to their employees under the FLSA.

If you have questions about this proposed rule or any other employment-related matter, please contact Connie Carrigan at (919) 250-2119 or via e-mail at ccarrigan@smithdebnamlaw.com.

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