What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is an accomplished Employment Law attorney with a passion for helping clients, individuals, employers, and business representatives in planning for their future - from creating initial documents for a new company to advising on compensation, harassment and discrimination, and employment agreements - to estate planning, Connie advises clients with shrewdness and prudence backed by over three decades of experience.

Department of Labor Tightens the Screws on Contractor Classification

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As widely anticipated, on October 11, the Wage and Hour Division of the United States Department of Labor (DOL) issued a proposed rule revising its analysis of what constitutes an employee under the Fair Labor Standards Act (FLSA). The proposed rule is scheduled to be officially published in the Federal Register on October 13, at which point the public will have 45 days to submit written comments before the rule is finalized.

The proposed rule seeks to redefine again the standard by which workers are classified as employees as opposed to independent contractors. In 2021, the DOL announced that it would use a limited "core factors" test which assigned a predetermined weight to certain factors, giving 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 – greater weight than the other factors.

This is the second time the DOL has attempted to rescind the 2021 standard, which was reinstated after a federal court in Texas ruled in March 2022 that the DOL failed to consider meaningful policy alternatives before revoking the 2021 rule.

The proposed rule returns to DOL precedent established prior to the 2021 standard, which the DOL states would further align the department's approach with the court's interpretation of the FLSA and the economic reality test. The proposed rule would officially rescind the 2021 regulation in favor of a return to a totality-of-the-circumstances analysis of the economic reality test. Each of the following factors must be reviewed in order to determine whether workers are economically dependent upon an employer for work (and therefore an employee) or whether they are in business for themselves (as an independent contractor). Each factor would be given full consideration, with no predetermined assigned weight:

- **Opportunity for Profit or Loss Depending Upon Managerial Skill:** Whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work.
- **Investments By the Worker and the Employer:** Whether any investments by a worker are capital or entrepreneurial in nature.

- **Degree of Permanence of the Work Relationship:** If the working relationship is indefinite in duration or continuous, this factor weighs in favor of the worker being an employee.
- **Nature and Degree of Control:** Whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others.
- **The Extent to Which the Work Performed is an Integral Part of the Employer's Business:** A worker who performs work integral to an employer's business is more likely to be an employee of the company.
- **Skill and Initiative:** Whether the worker uses specialized skills to perform the work and whether those skills contribute to entrepreneurial initiative. If no specialized skills are utilized, or the worker depends on the employer's training to perform the work, this factor indicates employee status.
- **Additional Factors:** The proposed rule indicates that additional factors relevant to the overall question of economic dependence should be considered in determining whether a worker is an employee or a contractor.

Employer Takeaways

We will continue to report on these developments as this standard continues to evolve, both within the DOL and the National Labor Relations Board, which has also expressed its intent to clarify what constitutes an independent contractor. In an era of increasing remote and gig-oriented work, and notwithstanding former DOL Secretary Eugene Scalia's assertion that the agency sought to support deeply-rooted American traditions of freedom and entrepreneurialism, the DOL has become much more vigilant in what it perceives as relationships designed to bypass employer responsibilities for minimum wage and overtime payments and other worker protections provided by the FLSA and other federal and state laws. In announcing the proposed rule, current DOL Secretary Marty Wash stated that "while independent contractors have an important role in our economy, we have seen in many cases that employers misclassify their employees as independent contractors, particularly among our nation's most vulnerable workers," thereby depriving them of federal labor protections including "their right to be paid their full, legally earned wages."

The DOL's proposal has already drawn criticism from numerous business groups, including the National Retail Federation, on the basis that it would increase costs for businesses, reduce innovation, and make the complicated legal analysis for determining worker status more confusing. As a result, it is anticipated that there will be legal challenges to the proposed rule once it is finalized.

In the meantime, it is recommended that employers remain focused on enforcing sustainable employment practices, including evaluating contractual language and policies pertaining to the right to control workers' terms and conditions of engagement.

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

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