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Proposed DOL Guidance Broadens Definition of Independent Contractors for Oil and Gas Employers

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Independent contractors have long been a mainstay in the oil and gas industry. Given the ebbs and flows of the industry, contractors allow for much-needed flexibility. But, using contractors can sometimes create risk, particularly if the relationship is not handled correctly. Care must be taken to ensure independent contractors are not incorrectly deemed employees in a legal proceeding or by the Department of Labor (DOL).

Recently, the DOL unveiled a proposed rule intended to further clarify whether a worker is deemed an independent contractor under the Fair Labor Standards Act (FLSA). Analysis of the DOL's proposed rule suggests that it will broaden the classification of workers as independent contractors in a manner favorable to employers in the oil and gas industry.

This article will outline the proposed rule and provide industry-specific advice for ensuring compliance.

The DOL's proposed rule sets forth a multi-factor test of two "core" factors and three "guidepost" factors, with the ultimate inquiry being that of economic dependence versus economic independence. In other words, the proposed rule focuses on whether a worker is economically independent and in business for himself or herself or is economically dependent on the business with whom the worker contracts. Significantly and very helpful to the oil and gas industry, the proposed rule clarifies that requiring a worker to comply with specific legal obligations, quality control, and health and safety standards, does not constitute the type of control that would render a worker an employee as opposed to an independent contractor.

This is an important and helpful clarification in an industry such as oil and gas, in which much of the work is of a high-risk, highly regulated nature where safety and quality control must be monitored.

The "control factor," the first of the two core factors, focuses on whether the worker exercises substantial control over key aspects of his or her performance of the work. The "profit and loss factor," the second core factor, looks at the worker's exercise of personal initiative, such as skill and business acumen, along with the worker's management of investments in, or capital expenditure on, resources, including helpers and equipment.

Given that these factors are considered the most probative, businesses in the oil and gas industry should focus substantial efforts at ensuring they weigh in favor of an independent contractor designation. To the extent possible, businesses should ensure that workers designated as independent contractors choose their own assignments, work with little to no supervision and are able to work for competitors within the industry. Additionally, businesses should ensure that independent contractors possess a demonstrated history of skill and business acumen by, for example, contracting with workers who can show developed and long relationships with a number or different operators, using helpers, and using their own equipment and materials, such as vehicles, computers and software, and other tools.

The three additional guidepost factors in the DOL's proposed rule are (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship; and (3) whether the work performed is part of an integrated unit of production. Businesses are encouraged by the guidepost factors to engage independent contractors for highly skilled work requiring the use of independent judgment and discretion.

Furthermore, under the guidepost factors, businesses in the oil and gas industry can put themselves on solid legal ground by engaging contractors only for projects of a defined time period. Engaging contractors on a project-by-project basis, as is common in the oil and gas industry, is preferable.

Finally, under the guidepost factors, if possible, businesses should strive to segregate work performed by independent contractors from work performed by employees. Sometimes, however, this is not possible in the oil and gas industry and it is acceptable to use contractors to fill in the gaps for certain skilled positions when the market is cyclical and unsteady. This means that sometimes a business may have employees and contractors who perform the same job, such as directional drillers or drilling supervisors, as examples.

Actual practice “in the field”, as opposed to theoretical possibilities or written agreements, will dictate whether an individual is considered to be properly classified as an independent contractor. For instance, a written contract alone is not sufficient, but helpful. A worker must actually have a say in whether he or she accepts a project and/or the number of projects he or she will perform. For this reason, it is critical to seek legal advice to determine that the actual practice of the business aligns with the recommendations of the new DOL guidance and the federal case law governing the particular state where the work is performed.

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