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Daily Labor Report®

# DOL Guidance Sheds Light on Employee vs. Independent Contractor Debate

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The Department of Labor clarified when employers can classify workers as independent contractors in a September proposed rule. Chamberlain Hrdlicka attorneys look at the various test factors and guidance posts in the rule and say the DOL lowered the bar for businesses to classify independent contractors.

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The Department of Labor's Sept. 22 proposed rule offering clarification on when a worker is deemed an independent contractor under the Fair Labor Standards Act is intended to replace all prior administrative rulings, interpretations, practices, or enforcement policies relating to that classification under the FLSA that are inconsistent or in conflict with the proposed rule.

An analysis of the rule suggests that it will broaden the classification of workers as independent contractors in a manner favorable to employers. If it is enacted as is, focusing in particular upon the "core" factors in the proposed rule will allow businesses to take well-defined steps to ensure a worker is properly classified as an independent contractor.

## 'Core' Factors to Test

The DOL's proposed rule sets forth a multi-factor test for independent contractor status 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 if the worker is economically dependent on a putative employer for work. Those found to be economically dependent on a particular individual, business, or organization for work are properly classified as employees, while those workers who are found to be in business for themselves are properly classified as independent contractors.

These factors are not exhaustive, and no single factor is considered dispositive. However, the two core factors—nature and degree of the worker’s control and worker’s opportunity for profit and loss—are the most probative, and each is afforded greater weight in the analysis. If both core factors lean toward the same worker classification, whether employee or independent contractor, there is a substantial likelihood that the status indicated by the core factors is the appropriate classification.

The first of the two core factors—the “control” factor—focuses on whether the worker exercises substantial control over key aspects of the performance of the work. The analysis includes whether the worker sets his or her schedule, chooses assignments, works with little to no supervision and/or is able to work for others.

The proposed rule clarifies that requiring a worker to comply with specific legal obligations, quality control, health and safety standards, and/or meet deadlines does not constitute the type of control that would render a worker an employee as opposed to an independent contractor.

The second core factor—the “profit and loss factor”—focuses on the worker’s exercise of personal initiative—including skill and business acumen—and the worker’s management of investments in, or capital expenditure on, items such as helpers and equipment.

The proposed rule abandons the analysis previously employed by some courts, which looked to whether the investments made by a worker were similar in amount to those made by the company engaging them. In this regard, the new proposed rule lowers the bar for classifying an individual as an independent contractor.

Given that these “core” factors are considered the most probative, businesses should focus substantial efforts at ensuring they weigh in favor of an independent contractor designation for those individuals they intend to designate as independent contractors. For example, businesses should ensure to the extent possible, that the worker sets his or her schedule (if appropriate depending upon the industry), chooses his or her own assignments, works with little to no supervision and / or is able to work for others.

Additionally, businesses should ensure that the worker possesses a demonstrated history of skill and business acumen by, for example: contracting with individuals who have a resume of work within the business’s industry; ensuring that the individuals have relationships with several businesses within the industry, and/or who employ helpers, and/or use their own equipment and materials.

Actual practice, as opposed to theoretical possibilities or a written contract, will dictate whether an individual is considered to be properly classified as an independent contractor. Thus, it is critical to ensure the actual practice of the business and the contractor aligns with these “core” factors.

#### **‘Guidepost’ Factors to Consider**

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.

The proposed rule clarifies that the “skill” factor should focus on skill alone and should not include a consideration of initiative, which the proposed rule instructs is properly analyzed as part of the control and profit and loss “core” factors.

The “permanence” factor focuses on the continuity and duration of the working relationship. Work of a sporadic or definite duration would favor independent contractor status.

Finally, the “integrated unit” factor focuses on whether the work was part of the integrated unit of production. Employee status would be favored where a worker is a component of an integrated production process, whether for goods or services. The proposed rule is clear that focusing on whether a worker’s work is “important” to a business has “questionable probative value.”

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