



LABOR & EMPLOYMENT PRACTICE GROUP

Meltzer Lippe is home to a large, experienced Labor and Employment Law Practice Group.

We are an integral component to the human resource chain and the first stop before taking action that impacts the employee – employer relationship.

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United States Department of Labor Unveils Revised Independent Contractor Rules

On October 11, 2022, the United States Department of Labor announced a proposed rule that, if enacted, would change the requirements for whether a worker is an independent contractor or an employee under the Fair Labor Standards Act (“FLSA”). The proposed rule was released in the *Federal Register* on October 13, 2022, and will be open for public commentary until November 28, 2022. The proposed rule would revise FLSA classification standards that will limit the circumstances under which a worker would be classified as an independent contractor.

- Properly classifying a worker as an “employee” or “independent contractor” is vital in determining the legal obligations of an employer to its workers. When workers are classified as “employees,” employers must comply with the minimum wage, overtime, and recordkeeping provisions of the FLSA as well as other state and federal regulations (such as tax and workers’ compensation).
- The proposed rule guides courts and legal authorities to examine the following six (6) factors when determining whether an employee is an independent contractor:
 1. The worker’s opportunity for profit and loss;
 2. Investment by the worker and employer;
 3. The degree of permanence of the working relationship;
 4. Nature or degree of employer control over the worker;
 5. The extent to which the work is integral to the employer’s business; and
 6. The degree of skill and initiative the worker exhibits.
- The foregoing factors are collectively known as the “economic realities” test and all factors are analyzed with a focus on whether the worker is economically dependent on the employer for work or is in business for themselves.

In January 2021, under the prior administration, the USDOL published a rule focused on the following two factors as being most probative: the nature and degree of worker’s control over work and worker’s opportunity for profit or loss. The remaining three factors - the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production – was “highly unlikely” to impact the ultimate classification if contrary to the core two factors. As a result, under the current rule, workers would most likely be classified as “independent contractors” rather than “employees.”

Now, the USDOL is signaling a major shift from the 2021 Rule. This new framework will return a “totality of the circumstances” approach that expands the analysis to include six (6) broad factors that are significantly more likely to lead to a worker being classified as an “employee.” Practically, the USDOL anticipates the new Proposed Rule will likely affect worker classifications in “home care, janitorial services, trucking, delivery, construction, personal services, and hospitality and restaurant industries.”

Meltzer, Lippe, Goldstein & Breitstone, LLP will be closely monitoring the proposed rule for further developments and/or enactments. Internally, employers should determine whether their employees may be classified as independent contractors under this broader standard. Furthermore, employers should consider conducting an internal audit to determine which of their workers, if any, may be affected by the new rule if it becomes effective. Externally, employers may submit comments to the USDOL to advocate any concerns they may have with the Proposed Rule.

Given the potential changes, employers utilizing independent contractors are encouraged to seek legal counsel to assess how the proposed rule may affect their legal obligations to their workforce. Employers with questions relative to the foregoing are encouraged to contact Justin A. Schwamb, Esq. or Nicholas P. Melito, Esq. at jschwamb@meltzerlippe.com, and nmelito@meltzerlippe.com.

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