

# Electronic Alert

Volume 25, Issue 35

October 11, 2022

## **The Independent Contractor Rule is Back to Haunt Us**

By Alysha Phelps & Andrew Schpak

On October 11, 2022, the United States Department of Labor (“DOL”) released a proposed regulation outlining how the Biden Administration plans to address workers classified as independent contractors under the Fair Labor Standards Act (“FLSA”). The public will have until 11:59 ET on November 27, 2022, to provide comments.

Recall that in January of 2021, the Trump Administration issued an independent contractor rule that sought to clarify the distinction between employees and independent contractors under the FLSA. Many private employers lauded the effort as the rule remedied inconsistent treatment by the courts and made it easier in most cases to classify workers as independent contractors.

After President Joe Biden took office in January of 2021, the DOL issued a rule postponing the effective date of the Trump-era rule, and later a final rule to withdraw the regulation completely. In March of 2022, a judge in the U.S. District Court for the Eastern District of Texas ruled that the DOL violated the Administrative Procedure Act in withdrawing the Trump-era rule, resulting in the rule going back into effect. The Biden Administration has initiated the current rulemaking to address this court decision.

The proposed regulation uses a multi-factored economic realities test to analyze the “totality-of-the-circumstances” and to ultimately determine whether a worker is economically dependent on the employer for work or in business for themselves. These factors include the opportunity for profit or loss, investment, permanency, the degree of control by the employer over the worker, whether the work is an integral part of the employer’s business, and skill and initiative. Unlike the Trump-era rule, which gave greater weight to two factors in the economic realities test, each factor is not assigned a predetermined weight and each factor is given full consideration.

Workers classified as employees are owed minimum wages, overtime, and other benefits and protections under the FLSA, whereas independent contractors are not. Workers misclassified as independent contractors may expose organizations to a lawsuit under the FLSA that seeks back pay, liquidated damages, and attorneys’ fees. Be sure to follow these new developments closely if you use independent contractors, as the proposed DOL rule is sure to significantly impact worker classifications.

*For questions about employee classification or for any other employment-related questions, contact Andrew Schpak at 503-276-2156 or [aschpak@barran.com](mailto:aschpak@barran.com) and Alysha Phelps at 503-276-2183 or [aphelps@barran.com](mailto:aphelps@barran.com).*