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ALERT

DOL Announces Proposed Rule on Classifying Employees and Independent Contractors

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WHAT: The U.S. Department of Labor (DOL) has released its proposed rule on how to classify workers as either employees or independent contractors under the Fair Labor Standards Act (FLSA). This rule would adopt the "economic reality" test for determining whether a particular worker is an employee or an independent contractor, making it easier for employers to make this determination and avoid the penalties of misclassification.

WHEN: DOL has placed the proposed regulations on a fast-track, with a plan to finalize the rule before January. Once the proposal is formally published on the Federal Register, which is anticipated to happen early next week, members of the public with an interest in the rule will have 30 days to comment on its provisions.

IMPACT ON INDUSTRY: As employers should be aware, employees are subject to the FLSA minimum wage and overtime protections, while independent contractors are not. Historically, courts have been left to interpret what it means for an employer to "suffer or permit" a person to work (the requirement for an individual to be considered an employee), with sometimes inconsistent results. The issue has taken on new importance as the "gig" economy has grown, with some jurisdictions considering legislation to capture gig workers into the definition of employee. California took such a measure with Assembly Bill 5, a law that greatly broadens the type of workers that are captured in the definition of employee and has created a storm of litigation in its wake. The DOL rule would not trump the California test, but it would undoubtedly have an impact on the numerous ongoing litigations relating to misclassification of employees elsewhere.

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Under the test proposed by the DOL, the agency would consider the "economic reality" of the relationship by looking at whether a worker is in business for themselves, meaning they are an independent contractor, or if the worker is economically dependent on a putative employer for work, meaning they are an employee. In making the determination, DOL has identified two "core" factors:

- The nature and degree of the worker's control over the work.
- The worker's opportunity for profit or loss based on initiative or investment.

DOL has also identified three other factors that may serve as additional guides in the analysis:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production.

Again, the two core factors are given the greatest amount of weight, with DOL noting that "where the two core factors align, the bulk of the analysis is complete."

In less than a day after DOL's announcement, the proposed rule has already incurred backlash from employee rights advocates and attorneys. It is a relatively employer-friendly test and a departure from past judicial interpretations of worker classification which have typically emphasized level of control by the employer over the work, not the worker. If the rule is adopted, it will undoubtedly make it easier for workers to be classified as independent contractors.

For now, however, employers are advised to stay appraised of developments of this rule. It is likely to affect nearly every employer if it is enacted, and those who are particularly interested in the outcome of this rulemaking are encouraged to submit comments on the rule. Wiley will continue to monitor this issue.