

Department of Labor Announces Proposed Rule on Employee/Independent Contractor Test

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The U.S. Department of Labor yesterday announced a Proposed Rule on the test to determine whether a worker should be classified as an employee or an independent contractor under the Fair Labor Standards Act. The DOL will receive comments on the Proposed Rule through November 28, so the Rule likely will not go into effect until early 2023. As a reminder, workers are presumed to be employees, with this classification triggering various legal requirements such as minimum wage, overtime pay, tax withholdings, and employee benefits coverage.

The Proposed Rule would return to an “economic reality” test, considering the following factors, none of which would be solely determinative:

- the extent to which the work performed is an integral part of the employer’s business;
- the worker’s opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skills and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer over the worker.

The immediate reaction to the Proposed Rule reflects its middle ground approach. On the one hand, some business associations criticized the Proposed Rule, and the stock prices of Uber and Lyft took hits. On the other hand, Uber issued a statement that “The Department of Labor listened to drivers, who consistently and overwhelmingly state that they prefer the unique flexibility that comes with being an independent contractor. [The Proposed Rule] takes a measured approach essentially returning us to the Obama era, during which our industry grew exponentially.”

The Proposed Rule certainly could have been stricter. For example, under California’s “ABC” test, a worker cannot be classified as an independent contractor unless, among other things, he or she performs work outside the usual course of the hiring entity’s business. This test (absent a statutory exemption) would challenge many independent contractor business models, such as Uber, Door Dash, over-the-road truckers, and flooring installers. The Proposed Rule, by contrast, is not as definitive. On the other hand, the Proposed Rule is more restrictive than the Trump Administration’s test, which, among other things, had completely removed consideration of whether the work is integral to the employer’s business.

The DOL stated that it does not intend for its Proposed Rule to target any particular industry, although it added that enforcement has focused primarily on low-wage industries, including restaurants, construction, and health care.

We Can Help

Miller & Martin will continue to provide updates as the Proposed Rule moves toward Final Rule status and, perhaps, legal challenges arise. Should you have any questions regarding this proposed rule, please feel free to contact Brad Harvey or any other member of our [Labor & Employment Practice Group](#).