

Gavel to Gavel: DOL proposes new rule for determining worker status

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Since 1938, The Fair Labor Standards Act has provided certain protections for workers deemed non-exempt employees, namely a minimum wage and overtime. The FLSA, however, does not apply to independent contractors.

Perhaps unsurprisingly, the issue of worker classification under the FLSA has resulted in substantial litigation, and the advent of the gig economy has

only made the issue more pertinent to employers. In the years since the FLSA's enactment, the U.S. Department of Labor has never promulgated a generally applicable regulation for determining whether workers are deemed employees or independent contractors under the FLSA. That is about to change.

On Sept. 22, the DOL proposed a new rule aimed at clarifying FLSA worker classification. According to the DOL, the proposed rule is meant to promote certainty, reduce litigation, and encourage economic innovation. If the proposed rule is adopted, it would become the DOL's sole authoritative rule for determining worker status under the FLSA, thereby replacing current, context-specific guidance.

The proposed rule clarifies that independent contractors are not covered by the FLSA – a position consistent with Supreme Court precedent. It also adopts the "Economic Reality Test" to determine worker status under the FLSA. The Economic Reality Test addresses, among other things, a worker's economic dependence on the would-be employer. In this context, economic dependence is largely defined by exception; it excludes individuals in business for themselves.

The Economic Reality Test, as proposed, weighs five non-exclusive factors:

- The nature and degree of the worker's control over the work.
- The worker's opportunity for profit or loss.
- The worker's skill required for performance.
- The permanence of the working relationship.
- The extent to which the work is part of the integrated unit of production.

Two of these factors are deemed core factors: the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss.

According to the DOL, these two factors are particularly probative because “the ability to control one’s work and to earn profits and risk losses strikes at the core of what it means to be an entrepreneurial independent contractor, as opposed to a wage earner employee.” If the DOL is correct in its estimation, this new and improved Economic Reality Test will provide more consistent adjudication of worker classification under the FLSA.



The DOL will accept written comments on the proposed rule through Oct. 26.

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