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## Fwd: Department of Labor Changes the Independent Contractor Rule (Again)

1 message

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From: **Drummond Woodsum's Labor and Employment Team** <[jrueterbories@dwmlaw.com](mailto:jrueterbories@dwmlaw.com)>

Date: Thu, Nov 10, 2022 at 1:19 PM

Subject: Department of Labor Changes the Independent Contractor Rule (Again)

**Drummond**Woodsum

November 10, 2022

### DEPARTMENT OF LABOR CHANGES THE INDEPENDENT CONTRACTOR RULE (AGAIN)

On October 11, 2022, The Department of Labor ("DOL") announced a new proposed rule outlining the criteria employers should use to determine whether to classify a worker as an "employee" or an "independent contractor." The change is meant to be more employee friendly, complicating the analysis employers must do when it comes to classifying their workers. Proper classification is important because misclassification of an individual as an independent contractor, as opposed to an employee, can result in liability for unpaid wages, failure to correctly report and pay taxes, and failure to provide required insurances and protections to the misclassified.

The new rule reverses a recent change in January 2021 that simplified the traditional multi-factored, totality of the circumstances test to one centered on the "economic realities" of the relationship between the worker and the employer. Specifically, the January 2021 rule focused the inquiry on the "economic dependence" of the worker on the employer. It set forth two "core" factors—among five total—to consider in the analysis: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss.

Finding the 2021 rule out of step with "longstanding judicial precedent," the DOL issued a "Notice of Proposed Rule Making" on October 13, 2022 proposing to revise the rule so that it functions more like it did before the 2021 changes. The newest version moves away from the "core factors" approach and sets out a six factor test. Those six factors are:

- **Opportunity for profit or loss depending on managerial skill:** This factor focuses on the level of autonomy the worker has over their own profit or loss. It examines whether a worker can set their own rate of pay, accept or turn down a job, engage in efforts to expand their business, or make management decisions such as hiring others, purchasing materials and other equipment, and renting space. If a worker's exercise of their managerial skill leads to significant profit, or loss, then this factor will likely weigh in favor of them being an independent contractor. To the contrary, if no managerial skills are exercised, or if they are not correlated to profit or loss, this factor may favor employee status.

- **Extent of the relative investments of the employer and the worker:** This factor considers whether the worker's investment is capital or entrepreneurial in nature. Specifically, it focuses on whether a worker invests in developing and marketing their own business or whether that investment substantially comes from an employer. For example, if a graphic designer spends money on marketing their own services, and time and resources to develop their own business, they are likely an independent contractor. On the other hand, this factor would likely favor employee classification for a graphic designer who obtains business opportunities through marketing paid for by the company that hired them to provide the services.
- **Degree of permanence of the work relationship:** This factor asks whether the work relationship is indefinite in duration or continuous in its nature. If work is definite in duration, non-exclusive, project based, or sporadic, it would lead to an independent contractor classification. Whereas, a worker who has been working for an employer for an indefinite period on a non-project basis is more likely an employee.
- **Nature and degree of control:** This factor analyzes how much control the employer has over "meaningful economical aspects of the work relationship." The more control exercised by the employer, the more likely it is that the worker is classified as an employee. Things to consider when analyzing this factor include control over scheduling, the degree to which the worker is supervised, the ability of the worker to set a price or rate for goods or services, and the ability of the worker to work for others.
- **Extent to which the work performed is an integral part of the employer's business:** This factor considers whether the work performed is critical, necessary, or principal work to the employer's principal business. The further the work is removed from the employer's principal business, the more it cuts in favor of an independent contractor classification.
- **Skill and initiative:** This factor considers whether a worker uses specialized skills to perform the work, and whether those skills are consistent with either self-management or economic dependence on the employer. For example, if a highly skilled welder works on jobs for one particular construction company, but does not have any control over the sequence of work at the job site, or bidding for the next potential job then this factor likely favors an employee classification. If the welder works with multiple different construction companies and has autonomy over the sequence of their work and what jobs bid for, as well as when they may travel to particular job sites, they are likely an independent contractor.

While these six factors are the most important considerations, the rule also allows for consideration of additional factors if they are relevant to the "economic dependence" of the worker. Ultimately, the six factors enumerated above and the consistent focus on the "totality of the circumstances test" reflect a return to pre-2021 DOL guidance.

Employers with questions about how to properly classify a worker, or the implications of those classifications, should feel free to contact a member of [Drummond Woodsum's Labor and Employment team](#) for assistance. We are happy to help with this issue or answer any other labor and employment questions.

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