

# CLIENT ALERTS

---

## Independent Contractors: DOL Proposes A New Standard But Is It Really “New”?

9.30.2020

Author Stephen King wrote, “Sooner or later, everything old is new again.” While King might have been referring to his many novels, this adage appears to be equally applicable to the independent contractor test.

On Friday, September 25, 2020, the U.S. Department of Labor (“DOL”) issued a proposed rule intended to offer clarity to the determination of whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor. In the proposed rule, the DOL recommended that an “economic reality” test be adopted to determine a worker’s status as an FLSA employee or an independent contractor. The proposed test considers whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee).

The DOL identified two “core factors” to make this determination:

1. the nature and degree of the worker’s control over the work; and
2. the worker’s opportunity for profit or loss based on initiative and/or investment.

These factors are intended to help determine if a worker is economically dependent on someone else’s business or is in business for himself or herself.

In addition to the two core factors, the DOL also identified three other proposed factors that may serve as additional guideposts in the analysis including:

1. the amount of skill required for the work;
2. the degree of permanence of the working relationship between the worker and the putative employer; and

### Related Services

Labor and Employment

## CLIENT ALERTS

---

3. whether the work is part of an integrated unit of production.

The DOL noted, however, that the two core factors are entitled to greater weight.

Do any of these factors sound familiar? The proposed rule of two core factors and three other factors is very similar to the economic realities test adopted by the DOL during the Obama administration. Specifically, in July 2015, the DOL issued informal guidance on an economic realities test by setting forth a six-factor test: (1) whether work performed is integral part of employer's business; (2) worker's opportunity for profit or loss depending on managerial skill; (3) relative investments of employer and worker; (4) whether work performed requires special skills and initiative; (5) permanency of relationship; and (6) degree of control exercised or retained by employer. After the presidential election in 2016, this informal guidance was withdrawn in June 2017 by the then Labor Secretary, Alexander Acosta. As a result, courts reverted to their pre-guidance interpretations of independent contractor classification and joint employment. This, however, led to inconsistent results as the various courts interpreted the economic realities factors differently depending on the facts and jurisdiction.

Whether the proposed rule is more beneficial for companies is debatable. At a minimum, however, it will provide a consistent standard for determining whether a worker is an employee under the FLSA.

The current proposed rule is available for review and public comment for 30 days. In the meantime, please do not hesitate to reach out to your Butzel Labor and Employment attorney to discuss how this proposed rule may affect your workforce.

**Rebecca Davies**

313.225.7028

[davies@butzel.com](mailto:davies@butzel.com)