

CLIENT ALERTS

The Biden-era Department of Labor's Proposed Return to the Six Factor Independent Contractor Test

Client Alert

10.13.2022

The Department of Labor (DOL) has released its long-awaited proposed rule setting forth the test to determine whether a worker is an independent contractor or an employee.

This rule seeks to replace the Trump-era rule published in the Federal Register on January 7, 2021, which focused on the “core factors” of the “economic realities” of a worker’s relationship with a business.

The Trump-era rule, however, was delayed and finally withdrawn by the Biden-era DOL. On March 14, 2022, one federal district court found the DOL’s 2021 delay and ultimate withdrawal of the Trump-era rule unlawful. The district court, thereby, ruled that the Trump-era rule was to take effect, leading the Biden-era DOL to announce that it would propose a replacement rule.

The Biden-era DOL’s proposed replacement rule, announced October 11, 2022, marks a return to a “non-exhaustive, six factor test” used by courts, that focuses on the “totality of the circumstances” of the relationship with a worker. Critics have claimed that utilizing this test in the past resulted in imprecise and unpredictable rulings. These non-weighted factors include the following:

- Opportunity for profit or loss depending on managerial skill.
- Investments by the worker and the employer.
- Degree of permanence of the work relationship.
- Nature and degree of control.
- Extent to which the work performed is an integral part of the employer’s business.
- Skill and initiative.

Related People

Brett J. Miller
Shareholder

Sarah L. Nirenberg
Shareholder

Related Services

Labor and Employment

CLIENT ALERTS

Starting today through November 28, employers can submit public comments on the proposal.

A return to the non-exhaustive, non-weighted multi-factor economic realities test makes it more likely that an employment relationship will be found. Employees have a variety of legal protections not applicable to independent contractors, such as minimum wage and overtime requirements and non-discrimination laws. Improperly classifying an individual as an independent contractor can result in employers facing significant monetary penalties and other risks. Employers are, therefore, best served by reviewing their classification analysis for independent contractors consistent with the proposed rule. Your Butzel employment attorneys are at the ready to assist with this difficult analysis.

Sarah Nirenberg

248.258.2919

nirenberg@butzel.com

Brett Miller

313.225.5316

miller@butzel.com