U.S. Department of Labor Issues Proposed Rule on When Employee is Independent Contractor

On February 27, 2026, the United States Department of Labor (DOL) published a proposed rule revising the standards for determining whether a worker is an employee or independent contractor. As you might recall, approximately two years ago, in March 2024, the DOL, under the Biden administration, issued a new rule establishing a more employee-friendly six-factor analysis that businesses could use to determine if a worker was an employee or independent contractor. See our client alert from January 19, 2024, here. This Biden DOL rule replaced a 2021 Trump DOL rule that made it easier to classify workers as independent contractors. The new Trump DOL Proposed Rule essentially reinstates the 2021 Trump DOL Rule.

Highlights of the 2024 Biden DOL Six-Factor Rule

The 2024 Rule, under the Biden administration, essentially formalized long-standing case law applying a six-factor test (note: some states use a similar five-factor test) to determine whether a worker should be classified as an independent contractor or an employee. Those factors are:

1. Whether the worker has an opportunity to earn profits or suffer losses depending on the worker's own managerial skill.
2. The relative investments made by the worker and the employer.
3. The degree of permanence of the working relationship.
4. The nature and degree of control by the employer over the work.
5. Whether the work performed is an integral part of the employer's business.
6. Whether the worker uses specialized skills and initiative to perform the work.

Highlights of the 2026 Trump DOL Proposed Rule

1. Adopts an "economic reality" test to determine a worker's status as an employee or independent contractor, examining whether a worker is in business for him- or herself (independent contractor) or is economically dependent on a potential employer for work (employee);
2. Identifies and explains two "core factors": (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, that federal courts primarily consider to answer the question of whether a worker is economically dependent on someone else's business or is in business for him- or herself;
3. Identifies three other factors relevant to the analysis, particularly when the two core factors do not point to the same classification: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production; and also notes that additional factors may be considered in the analysis;
4. Advises that the parties' actual practices are more relevant than what may be contractually or theoretically possible; and
5. Provides eight examples of how the economic reality factors would apply in certain real-life situations.

Significance of the 2026 Trump DOL Proposed Rule

1. In light of a ruling by the U.S. Supreme Court in *Loper Bright Enterprises v. Raimondo*, holding that courts can use their own analysis in construing statutes and that they need not defer to agency interpretations of ambiguous statutes, and given the DOL's flip flops on when a worker is an employee or independent contractor, it remains to be seen if the new Trump DOL Rule will change the result of very many cases where the issue involved is deciding whether a worker is an employee or independent contractor.
2. The 2026 Trump DOL Proposed Rule applies to the federal Fair Labor Standards Act (federal wage and hour laws), the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act. However, bear in mind that there are other federal laws (including but not limited to the IRS laws) that have different tests for when a worker is an employee as opposed to an independent contractor. Moreover, most states have their own laws governing when a worker is an independent contractor, and some of those state laws are more employee-friendly than the 2026 Trump DOL Proposed Rule. Thus, caution should be exercised in determining whether an employee is actually an independent contractor.
3. Even if all courts do not follow the 2026 Trump DOL Proposed Rule, that Rule (when it becomes final – it is not the law yet) may provide protection to employers sued for misclassifying employees as independent contractors because under 29 U.S.C. 259, no employer shall be subject to liability or punishment for federal FLSA wage and hour violations if an omission was in good faith and based on a U.S. Wage and Hour Division regulation that has been relied upon by the employer.

Seigfreid Bingham's employment lawyers will continue to monitor developments in this area and stand ready to assist its clients with advice on worker classification issues. This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the authors: John Vering (816.265.4109; jvering@sb-kc.com) and Shannon Johnson (816.265.4139; sjohnson@sb-kc.com), or your regular contact at Seigfreid Bingham at 816.421.4460.