

Small Business Notes

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U.S. Department of Labor Announces Proposed Rule on Employee/Independent Contractor Test

The U.S. Department of Labor has today (October 13, 2022) published a proposed rule ([87 FR 66218](#)) to update the test for determining the FLSA (Fair Labor Standards Act) requirements relating to minimum wage, overtime, and recordkeeping that apply to employees, but do not apply to independent contractors, making the proper classification of a worker under the law critical and consequential. The proposed rule defines independent contractors more narrowly than the 2021 Trump administration rule it is intended to replace.

The proposed rule would codify a six-factor, “totality-of-the-circumstance test” for who qualifies as an independent contractor. Under DOL’s proposed rule, independent contractor status would be determined by looking to the following factors: the worker’s opportunity for profit or loss; the worker’s investments; the permanency of the relationship; the degree of control by the employer over the worker; whether the work is an integral part of the employer’s business; and the skill and initiative required to do the work. The proposed test would not assign special weight to any of the six factors, and instead consider them “in view of the economic reality in question of the whole activity” in which the worker in question is engaged. These factors would be codified through formal rule-making rather than being subject to interpretive guidance issued by the DOL.

The final terms of the Department’s proposed rule will depend on its response to comments submitted by interested parties during the notice-and-comment period, including legal objections raised to the Department’s proposed six-part test and commenters’ description and substantiation of any significant adverse consequences under the proposed approach.

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Social Security Administration Releases 2023 FICA and Medicare Rates

Despite much public speculation that 2023 would see a very substantial increase in both federal unemployment insurance rates and the amounts to which those rates apply. The Social Security Administration announced on October 13th that the 2023 combined rate for Old Age Survivors Disability Insurance and Medicare would remain at 15.30 percent (6.2 percent for OASDI and 1.45 percent for Medicare payable by both employer and employee. The maximum wage base on for the employee's portion will be \$160,200 (up from \$147,000 in 2022).

This means that an employer must withhold 6.2 percent on the first \$160,200 of employee wages; and withhold 1.45 percent Medicare tax on the first \$200,00 of employee wages; and 2.35 percent additional Medicare tax on all employee wages in excess of \$200,000.

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