

Small Business Notes

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U.S. Department of Labor (DOL) Withdraws Most Recent Rule on Definition of an Independent Contractor

In September 2020, the DOL published a proposed rule, the first on the topic in more than twenty years, on the tests to be used in determining a worker's status as either an employee or an independent contractor. The new rule, scheduled to go into effect on May 21, 2021, was withdrawn by DOL on May 5, 2021.

The new rule would have replaced the seven factor "economic reality" test with two new "core factors" and three "guidepost factors."

The factors which would be replaced were:

- The extent to which the services provided are an integral part of the principal's business.
- The permanency of the relationship between the worker and principal.
- The amount of the worker's investment in facilities and equipment.
- The nature and extent of control by the principal.
- The worker's opportunity for profit or risk of loss.
- The amount of initiative, judgment, and foresight required of the worker.
- The degree of independent business organization and operation.

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Each of these factors to be given equal weight.

The proposed rule narrowed the focus to two “core factors:”

- The nature and degree of the worker’s control over the work.
- The worker’s investment in the business and the opportunity for profit or loss.

Three other factors were put forward “guidepost factors” with less weight than the core factors:

- The amount of specialized training or skill required that is not provided by the principal business.
- The degree of permanence of the relationship.
- Whether the work is part of an integrated unit of production.

The proposed rule attracted considerable controversy as to whether it was too employer friendly with the result that more workers would be classified as independent contractors not subject to employer payment of unemployment insurance or the protections of employment laws like the Fair Labor Standards Act (FLSA).

The rule withdrawal means that the previous seven factor test remains in effect. DOL has been silent as to whether it will reissue a new rule on the subject.

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