



US DEPARTMENT OF LABOR ISSUES PROPOSED RULE ON INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT

On September 22, 2020, the U.S. Department of Labor (DOL) announced a proposed rule regarding how to determine whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor.

The DOL explained that with this proposed regulation, it intends to retain the current “economic reality” test to determine a worker’s status as an FLSA employee or an independent contractor, but simplify and clarify its requirements. The test considers whether a worker is in business for him or herself (and is considered an independent contractor) or is economically dependent for work on a purported employer (and is thus an employee).

The economic reality test will now have two “core factors,” specifically:

The nature and degree of the worker’s control over the work. Under this factor a person is an independent contractor to the extent that he or she exercises substantial control over key aspects of the performance of the work. The DOL clarified that requiring an individual to comply with contractual terms typical of business relationships is not an indicator of employee status.

The second factor is the worker’s opportunity for profit or loss based on initiative and/or investment. The DOL will analyze whether the worker has an opportunity for profit or loss based on either or both: (1) the exercise of personal initiative, including managerial skill or business acumen; and/or (2) the management of investments in, or capital expenditure on, for example, helpers, equipment, or material.

Three other factors may serve as additional guideposts in the analysis including: the amount of training or skill required for the work that the purported employer does not provide; the degree of permanence of the working relationship between the worker and the potential employer focusing on the continuity and duration of the relationship and weighing towards independent contractor status if the relationship is definite in duration or sporadic; and whether the work is part of an integrated unit of production.

The DOL advised that the actual practice is more relevant in determining employee status than what may be contractually or theoretically possible.

Once the proposed rule is published in the Federal Register the public will have 30 days to submit comments.

US DEPARTMENT OF LABOR ISSUES REVISED TEMPORARY REGULATION ON FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

In response to a decision by the U.S. District Court for the Southern District of New York that invalidated parts of the FFCRA temporary rule, on September 11, 2020, the U.S. Department of Labor’s Wage and Hour Division (WHD) announced revisions to the regulations that implement the paid sick leave and expanded family and medical leave provisions of the FFCRA.

The revised regulations:

- Reaffirm that employees may not take FFCRA leave when the employer does not have work available for the employee.
- Reaffirm that employees must have their employer's approval to take intermittent FFCRA leave.

- Revise the definition of "health care provider" to include "only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care."
- Clarify that employees must provide employers with documentation as soon as practicable supporting their need for FFCRA leave.
- Correct an inconsistency on when employees may be required to provide employers notice of their need to take expanded family and medical leave. The revised regulations now provide that, while the notice for taking expanded family and medical leave to take care of a child is still required as soon as practicable, if the reason for the leave is foreseeable, advanced notice of the leave will generally be considered "practicable" under the circumstances.

The revisions also address the district court's order by providing additional explanations for certain requirements. The revised regulation went into effect on September 16, 2020.

If you have any question or concern, please **Contact us**

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