

Monthly Minute Memo: *DOL's Proposed New Rule Regarding Independent Contractors*

The Department of Labor (“DOL”) issued a proposed new rule addressing how it will determine if a worker is an independent contractor or an employee under the Fair Labor Standards Act (“FLSA”). According to the DOL, this proposed new rule takes into account existing DOL guidance and court decisions to fine tune the “economic reality” test currently used within numerous jurisdictions to evaluate whether an individual is an employee or an independent contractor.

The new rule adopts the “economic reality test” to determine a worker’s status as an FLSA employee or an independent contractor. The DOL provisions suggest that the focus should be on two core factors, instead of the original seven economic reality factors. These core factors are: (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. Under this new rule, these factors are more probative regarding the question of economic dependence (or lack of) and will be given greater weight in the analysis, although they alone may not be dispositive.

For example, if a worker maintains his or her own business and is not economically dependent on the employer, under this test, he or she may be considered an independent contractor. On the other hand, if the worker is economically dependent on the employer, he or she will likely be considered an employee. As was often the case in the past, “actual practice” is more relevant than what may be contractually agreed to in determining whether a worker is an employee or an independent contractor.

If, for example, the analysis of the core factors is not determinative, the DOL may also look to the following three guidepost factors:

- The amount of skill required for the work;
- The degree of permanence of the working relationship; and
- Whether the work is part of an integrated unit of production.

This proposed rule is currently in the public comment stage and will remain open for comment until October 26, 2020. The proposed new regulations will not go into effect until after the DOL reviews the submitted comments and publishes a final rule. Should the DOL’s new proposed rule be adopted, it may help to streamline the factually intensive argument as to whether a worker is an employee or independent contractor.

You are receiving this email as you are a valued client of K|D. If you no longer want to receive K|D's Monthly Minute Memos, please reply to this email and ask to be unsubscribed from any future emails. This material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between K|D and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions.