

LEGAL UPDATE

DOL Proposes New Independent Contractor Classification Rule

On Oct. 11, 2022, the U.S. Department of Labor (DOL) [announced](#) a proposed rule to rescind and replace its 2021 independent contractor classification rule under the Fair Labor Standards Act (FLSA). The proposal is scheduled for publication in the Federal Register on Oct. 13, 2022. Comments on the proposal must be submitted within 45 days of the publication date.

Worker Classification

Whether a worker is covered or protected by the FLSA depends on whether the worker falls within the FLSA's definition of "employee." The DOL has traditionally favored using the five-factor economic realities test (ERT) to classify workers as either employees or independent contractors.

The 2021 Rule

The DOL issued the 2021 independent contractor classification [final rule](#) on Jan. 7, 2021. While the 2021 rule continued using the ERT to classify workers, the rule designated two factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as "core factors," having more probative value and carrying greater weight than the other factors.

The Proposal

With this [proposed rule](#), the DOL would return to the pre-2021 rule precedent and allow employers to consider all five ERT factors equally. If the rule is adopted, employers need to consider the "totality of the circumstances" in their worker classification efforts.

Impact on Employers

Employers should continue to monitor this development and consider how they may need to update their worker classification procedures if this proposal is finalized and adopted.

Provided to you by [DSP Insurance Services](#)

Economic Realities Test

The factors used in the ERT are:

1. The nature and degree of control over the work;
2. The worker's opportunity for profit or loss based on initiative and/or investment;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship; and
5. Whether the work is part of an integrated unit of production.

If the rule is adopted, employers need to consider the "totality of the circumstances" in their worker classification efforts.