Chamberlain Hrdlicka
Attorneys at Law

LABOR & EMPLOYMENT ALERT

Independent Contractor Proposed Rule

On September 22, 2020, the Department of Labor (DOL) unveiled a proposed rule intended to further clarify whether a worker is deemed an independent contractor under the Fair Labor Standards Act (FLSA). This classification is critical to employers, as independent contractors - unlike employees - are not owed overtime under the FLSA. The proposed rule is intended to replace all prior administrative rulings, interpretations, practices, or enforcement policies relating to the classification of independent contractors under the FLSA that are inconsistent or in conflict with the proposed rule. Early analysis of the DOL's proposed rule suggests that it will broaden the classification of workers as independent contractors in a manner favorable to employers.

The DOL's proposed rule sets forth a multi-factor test of two "core" factors and three "guidepost" factors, with the ultimate inquiry being that of economic dependence vs. economic independence. In other words, the proposed rule focuses on whether a worker is economically independent and in business for him or herself, or is economically dependent on a putative employer for work. Those workers who are found to be economically dependent on a particular individual, business, or organization for work are properly classified as employees, while those workers who are found to be in business for themselves are properly classified as independent contractors. These factors are not exhaustive, and no single factor is considered dispositive. However, the two core factors-nature and degree of the worker's control and the worker's opportunity for profit and loss-are the most probative, and each is afforded greater weight in the analysis. If both core factors lean toward the same worker classification, whether employee or independent contractor, there is a substantial likelihood that the status indicated by the core factors is the appropriate classification.

The two core factors are (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit and loss. The "control" factor focuses on whether the worker exercises substantial control over key aspects of the performance of the work. The analysis includes whether the worker sets his or her schedule, chooses assignments, works with little to no supervision, and / or is able to work for others. The proposed rule clarifies that requiring a worker to comply with specific legal obligations, quality control, health, and safety standards, and / or meet deadlines does not constitute the type of control that would render a worker an employee as opposed to an independent contractor. The "profit and loss factor" focuses on the worker's exercise of personal initiative-including skill and business acumen-and the worker's management of investments in, or capital expenditure on, items such as helpers and equipment. The proposed rule abandons the analysis previously employed by some courts, which looked to whether the investments made by a worker were similar in amount to those made by the company engaging them.

In this regard, the new proposed rule lowers the bar for classifying an individual as an independent contractor.

The three guidepost factors in the DOL's proposed rule are (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship; and (3) whether the work performed is part of an integrated unit of production. The proposed rule clarifies that the "skill" factor should focus on skill alone and should not include a consideration of initiative, which the proposed rule instructs is properly analyzed as part of the control and profit and loss "core" factors. The "permanence" factor focuses on the continuity and duration of the working relationship. Work of a sporadic or indefinite duration would favor independent contractor status. Finally, the "integrated unit" factor focuses on whether the work was part of the integrated unit of production. Employee status would be favored where a worker is a component of an integrated production process, whether for goods or services. For example, a programmer on a software development team or a worker working closely alongside conceded employees, performing identical or closely interrelated tasks as those employees, is more likely to be found an employee than an independent contractor. The proposed rule is clear that focusing on whether a worker's work is "important" to a business has "questionable probative value."

The proposed rule differs somewhat markedly from previous DOL guidance on the employee vs. independent contractor classification. Prior guidance, as stated in DOL Fact Sheet #13, provides seven factors for analysis of the classification: 1) the extent to which the services rendered are an integral part of the principal's business; 2) permanency of the relationship; 3) the amount of the alleged contractor's investment in facilities and equipment; 4) the nature and degree of control by the principal; 5) the alleged contractor's opportunities for profit and loss; 6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and 7) the degree of independent business organization and operation. None of the factors in Fact Sheet #13 are determinative, and all are given equal weight. As noted above, the proposed rule would replace this list of seven factors with an analysis of the two more heavily-weighted "core" factors, combined with three "guidepost" factors.

The proposed rule, as compared with prior DOL guidance, would lower the bar for classification of a worker as an independent contractor if enacted. Specifically, by focusing on the "core" factors set forth by the proposed rule, employers can take well-defined steps to ensure a worker is properly classified as an independent contractor. Importantly, however, the DOL's proposed rule will not impact state laws or court decisions that dictate use of different, and potentially more worker-friendly, independent contractor tests. Examples include Assembly Bill 5 in California or the "ABC" test applicable in states such as Connecticut and Massachusetts.

Chamberlain Hrdlicka's employment law group is ready to assist you with updating policies and answering your questions in light of this newly proposed rule.

* * *

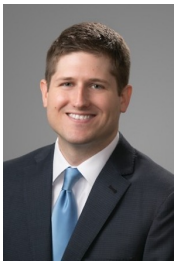
About Chamberlain Hrdlicka

Chamberlain Hrdlicka is a diversified business law firm with offices in Atlanta, Houston, Philadelphia and San Antonio. The firm represents both public and private companies, as well as individuals and family-owned businesses across the nation. The firm offers counsel in labor and employment litigation, tax planning and tax controversy, corporate, securities and finance, energy law, estate planning and administration, employee benefits intellectual property, international and immigration law, commercial and business litigation, real estate and construction law. For more information, visit: www.chamberlainlaw.com.

Annette A. Idalski
Shareholder
404-658-5386

C. Larry Carbo, III
Shareholder
713-356-1712

Diana Perez Gomez
Shareholder
713-654-9656



Kellen R. Scott
Shareholder
713-356-1767

Leslie T. Tan
Senior Counsel
713-356-1671

Kaitlin K. Lammers
Counsel
404-658-5390

Julie R. Offerman
Senior Associate
713-654-9678

Kyle D. Winnick
Senior Associate
404-658-5420

Brian A. Smith
Associate
713-658-2547

Gizem Petrosino
Associate
713-654-9608

Ray Abilmouna
Associate
713-356-1653

ATLANTA HOUSTON PHILADELPHIA SAN ANTONIO