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October 31, 2022

October Tip of the Month: DOL Proposes New Rule on Independent Contractor Status

On October 13, 2022, the U.S. Department of Labor (DOL) proposed a new rule that would revise the DOL's guidance on how to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Under the proposed rule, a worker would be classified as an employee if the worker is economically dependent upon an employer for work. Six factors will be considered in making this determination: (1) the worker's opportunity for profit or loss depending upon their managerial skill, such as the worker's ability to accept or decline jobs and negotiate rates for those jobs; (2) investments made by the worker and the employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control that the employer exercises over the worker; (5) the extent to which the work performed by the worker is an integral part of the employer's business; and (6) whether the worker uses specialized skills in performing the work. These factors will be considered together, and no factor is necessarily more determinative than the other. The DOL will comment on the rule through November 28, 2022, after which the rule could be enacted. In the meantime, the ongoing attention to employee/contractor classification issues—and their substantial implications—is an important reminder to employers to carefully assess and possibly revisit their classification decisions.

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