

Florida Association of Chamber Professionals

DOL's Proposed Regulations on Independent Contractors and Overtime

December 7, 2023

Marc Freedman

Vice President, Workplace Policy
U.S. Chamber of Commerce



U.S. Chamber of Commerce

Summary of Proposed Reg

- Published in the Oct. 22, 2022 Fed. Reg. comments submitted Dec. 13, 2022
- Major points:
 - Rescinds the Trump administration’s 2021 IC rule
 - Reinstates the “traditional” economic realities test
 - Each factor weighted against independent contractors and for employees
 - Final regulation now under review at WH office—could issue anytime



Recission of 2021 IC Reg

- Trump reg focused on control of work, and opportunity for profit or loss as key factors—much more useful analytical framework
- Biden DOL attempted to rescind Trump IC reg before it took effect
 - Federal judge invalidated rescission process for not providing adequate comment period; Trump reg was reinstated and is in effect now
 - NPRM explicitly rescinds Trump reg



“Economic Dependence”

- The NPRM focuses on the concept of “economic dependence;” whether a worker is economically dependent on an employer for work, or in business for himself.
- Economic dependence is not defined by income or earnings, but rather whether the individual is dependent on the employer for the work in question.
- Sometimes called “economic realities” test.



“Totality of the Circumstances”

The NPRM relies on a “totality of the circumstances” analysis.

- Each component of the economic dependence test is given equal weight; no component is given more importance than another—compare with Trump reg which focused on most important.
- The NPRM thus provides little guidance as to how workers and businesses should apply those factors when they do not all point in the same direction.
- Will leave businesses and workers guessing as to whether an IC was properly classified—**employee classification will never be challenged**



U.S. Chamber of Commerce

7 Factors of Economic Dependence

The NPRM lists seven factors that are to be considered when deciding whether to classify a worker as either an employee or IC.

- Opportunity for profit or loss based on managerial skill
- Investments by the worker and the employer
- Degree of permanence of the relationship
- Nature and degree of control
- Extent to which work performed is integral part of business
- Skill and initiative
- Other factors that are deemed relevant



Opportunity for profit or loss based on managerial skill

Analyzes the level of *managerial skill* exercised by a worker in terms of the worker's success or failure in performing the work. Looks at whether:

- Worker can set the rate of pay for the service provided
- Worker accepts or declines jobs or the order in which they are completed
- Worker engages in marketing, advertising, or other efforts to expand their business or secure more work
- Worker makes decisions to hire others, purchase materials and equipment, and/or rent space
- Worker has the opportunity to experience a financial loss (beyond a reduction in pay)



Nature and degree of control

This factor looks at the level of control, to include *reserved control*, by looking at these indicators:

- Scheduling: Beyond just whether an employee chooses when or when not to work, but whether by demanding certain hours a business effectively prevents a worker from working for others, and whether a business can discipline workers for declining work.
- Ability to work for others: Where a worker has an exclusive work relationship with one employer and does not have the ability to work for others, this indicates employee status.



Nature and degree of control—pt. 2

- Supervision: The lack of direct supervision is not necessarily indicative of independent contractor status: “the nature of an employer’s business or the nature of the work may make direct supervision unnecessary.”
 - Also considers the *right to exercise* supervision, even if it is not exercised, as evidence of control. Moreover, such supervision may be exercised remotely or through technology in addition to being performed in person.
- Pricing: If the worker in question is not able to set their own price, or at least meaningfully negotiate it, that is indicative of employee status under the NPRM.



Nature and degree of control—pt. 3

- Compliance with legal obligations: “[A]n employer’s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer”—If the business specifies certain safety requirements, or contractual or quality control requirements that can be deemed control supporting an employee classification.
- Reserved Control: New concept, nowhere defined
 - Evokes concept of “indirect or potential control” from *Browning-Ferris* NLRB case on joint employer
 - Very open ended and troubling



Investments by the worker and the employer

An investment borne by the worker must be capital or entrepreneurial in nature to indicate independent contractor status.

- Notably, and concerningly, this section states that “the use of a personal vehicle that the worker already owns to perform work— or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.” (think Uber/Lyft)
- Also looks at the level of a worker’s investment relative to that of the business: “If the worker’s investment does not compare favorably to the employer’s investment, then that fact suggests that the worker is economically dependent and an employee of the employer.”



Degree of permanence of the relationship

- Where workers provide services under a contract that is “routinely or automatically renewed” that indicates a permanent or indefinite relationship that is indicative of employee status.
- NPRM also includes exclusivity as weighing *against* IC status—if a worker works exclusively for a company then should be considered employee
 - Goes beyond that to state that “operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ” that result in a lack of permanence should not weigh in favor of IC status—therefore, if a particular business or industry characteristically uses ICs on a sporadic basis, that still should not be considered supporting IC status



Extent to which work performed is integral part of business

- If the employer “could not function” without the services performed by the workers, then the service is integral and workers in this case are likely to be economically dependent because “their work depends on the existence of the employer’s principal business, rather than their having an independent business that would exist with or without the employer.”
 - If a business provides a product or service, “the workers who are involved in making the product or providing the service are integral.”
- NPRM specifically states that “an individual worker who performs the work that an employer is in the business to provide but is just one of hundreds or thousands who perform the work...is nonetheless an integral part of the employer’s business...”
 - Evokes “prong B” of CA ABC test: To be an IC, the worker performs work that is outside the usual course of the hiring entity’s business.



Skill and initiative

This factor looks at whether a worker has specialized skills that are used in the performance of the work.

- Of note, and great concern, it states that “Numerous courts have found that driving is not a specialized skill...”



Other factors that are deemed relevant (Bonus factor)

This is left undefined. Presumably, if something were found in the analysis of a particular case that made it apparent that there is an employee relationship, that factor would not be disregarded simply because it was not one of the enumerated six factors.



Conclusion

- Gig economy will get headlines but impact much broader
- Detailed descriptions of each factor reveal bias toward finding employee status
- Reg will determine whether worker is an employee for FLSA purposes
 - If DOL decides worker misclassified, employer could be liable for back pay: minimum wage, overtime
- Much uncertainty for employers if classify worker as IC
 - Totality of Circumstances analysis—all factors weighted the same
 - “Reserved Control”—could be anything
 - Any other factor—could be anything



Proposed Overtime Reg Revision

- Employees eligible for overtime comp. unless all three criteria met:
 - Must be paid a salary
 - Salary must be more than threshold—Obama DOL set it at \$47K, Fed. Judge invalidated, Trump DOL reset at \$35.6K
 - Must qualify under duties of exemption category (executive, administrative, professional)
- New proposed reg will increase salary threshold to \$55K, actually \$60K when implemented
- Includes 3 year automatic escalator w/possible suspension for economic conditions
- Severability clause—admission that escalator clause is vulnerable
- Published Sept. 8, comments submitted November 7



U.S. Chamber of Commerce

Expected Impacts of OT Revision

- Employers will have to decide to increase salary level to keep EEs exempt, or reclassify as non-exempt (OT eligible)
 - Salary compression for those just above threshold
 - Reclassified EEs may be eligible for OT but not earn OT
- Employees who are reclassified generally feel demoted—lose professional status, flexibility
- Worst impact on charitable nonprofits and municipalities who are not able to increase revenues



Outlook for OT Rule

- DOL got massive amount of comments
- Definitely wants to complete regulation—election looming
- Earliest possible final reg could be Q2 2024
- Latest would be Q3 2024—need to have implemented before January 20, 2025
- Legal challenge likely—see challenge to Obama OT reg



Thank you and Questions



U.S. Chamber of Commerce