DOL Sent Independent-Contractor Proposal to White House for Review

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The U.S. Department of Labor (DOL) recently sent a proposed rule to the White House that would clarify whether workers are independent contractors or employees under the Fair Labor Standards Act (FLSA). The department recently delayed a rule that was issued by the prior administration and was supposed to take effect on March 8.

We've rounded up articles and resources from *SHRM Online* and other trusted media outlets on the news.

Prior Rule May Be Modified or Repealed

The rule from former President Donald Trump's administration would have made it easier for businesses to classify workers as independent contractors rather than employees. President Joe Biden's administration, however, delayed the rule's effective date by 60 days to "allow the department to review issues of law, policy and fact." The DOL sent a new proposal (https://www.reginfo.gov/public/do/eoDetails?rrid=151962) on March 5 to the White House Office of Information and Regulatory Affairs for review, but the specifics of the proposal were not made available to the public. After the White House clears the new proposal, the DOL may seek public comments on whether the agency should modify or repeal the prior administration's rule.

(Bloomberg Law (https://news.bloomberglaw.com/daily-labor-report/trump-rule-on-gig-worker-status-to-be-reconsidered-by-biden-dol))

'Significant and Complex Issues'

The DOL sought public comment on whether to delay the Trump administration's independent-contractor rule. The department received more than 1,500 comments, and the majority of commenters did not support the proposed delay. However, the DOL said "allowing more time for consideration of [the rule] is reasonable given the significant and complex issues [the rule] raises, including whether [the rule] is consistent with the statutory intent to broadly cover workers as employees as well as the costs and benefits of the rule, including its effect on workers."

(Jackson Lewis (https://www.wageandhourlawupdate.com/2021/03/articles/department-of-labor/as-expected-dol-delays-independent-contractor-final-rule/))

Economic-Realty Test

The distinction between employees and independent contractors is significant because employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to such benefits, but they generally have more flexibility to set their own schedules and work for multiple companies.

The delayed federal rule would apply an economic-reality test to determine whether workers are independent contractors or employees and would primarily consider the following factors:

- The nature and degree of control over the work.
- The worker's opportunity for profit or loss based on initiative and investment.

Three other factors may serve as guideposts in determining employment status:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production (or the individual works under circumstances analogous to a production line).

(*SHRM Online* (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/DOL-Officially-Delays-Independent-Contractor-Rule.aspx))

The 'ABC' Test

Biden has said he supports an "ABC" test similar to California's independent-contractor rule. With some exceptions, California requires all three of the following factors to be met for a worker to be properly classified as an independent contractor:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work.
- The worker performs tasks that are outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Other states, such as Illinois, Massachusetts and New Jersey, apply a similarly stringent independent-contractor test.

(*SHRM Online* (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-worker-classification-rules.aspx))

Tip-Sharing Rule Also Delayed

The DOL delayed until April 30 a rule that would make it easier for restaurants and other hospitality businesses to allow "back-of-the-house" workers—such as cooks and dishwashers—and other nontipped workers to share in gratuities under the FLSA. The DOL said that "delaying the effective date of the tip rule would provide the department additional opportunity to review and consider the questions of law, policy and fact raised by the rule."

(*SHRM Online* (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-tip-pooling-rule-delayed-until-april.aspx))

More Opinion Letters Expected to Be Reviewed

In January, the DOL withdrew several opinion letters issued in the last days of the prior administration that addressed tipped workers and independent-contractor status under the FLSA. "These letters were issued prematurely because they are based on rules that have not gone into effect," according to the DOL. The new administration is expected to thoroughly review other FLSA opinion letters that were issued by the prior administration. More opinion letters may be withdrawn as the department aligns with the new administration's priorities.

(The National Law Review (https://www.natlawreview.com/article/dol-begins-withdrawal-trump-era-opinion-letters))