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DEPARTMENT OF LABOR INITIATES RULEMAKING TO REVISE ITS INTERPRETATION OF WHO QUALIFIES AS AN INDEPENDENT CONTRACTOR UNDER THE FLSA

To Our Clients and Friends:

Today the U.S. Department of Labor issued a proposed rule regarding who is an "independent contractor" under the Fair Labor Standards Act (the "FLSA" or "Act"), and thus not subject to the minimum wage and overtime requirements the Act applies to "employees." The proposal defines independent contractor more narrowly than the 2021 Trump Administration rule it is intended to replace. Interested parties will have 45 days from the proposal's expected October 13 *Federal Register* publication to submit comments.

The proposal would codify a six-factor, totality-of-the-circumstances test for who qualifies as an independent contractor, similar in some respects to the approach the Department often used before the 2021 rule. Under DOL's proposal, independent contractor status would be determined by looking to the following factors: the worker's opportunity for profit or loss; the worker's investments; the permanency of the relationship; the degree of control by the employer over the worker; whether the work is an integral part of the employer's business; and the skill and initiative required to do the work. The proposed test would not assign special weight to any of the six factors, and instead consider them "in view of the economic reality of the whole activity" in which the worker in question is engaged.

Apart from jettisoning the framework of the 2021 rule—which relied on five factors, not six, and gave particular weight to "control" and the "opportunity for profit or loss"—the new proposal would make important adjustments to how the six traditional factors are applied. For example, DOL proposes considering the worker's investments on a relative basis with the employer's investments. The proposed rule states, "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." Likewise, the proposal would reformulate the factor concerning whether a worker's activities are part of an "integrated unit of production" into an assessment of whether the activity is important or "central" to a business's operations. The proposal would also treat control measures implemented by a company to comply with "legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations" as indicative of employee status.

The proposed rule does not adopt either the common-law test or the "ABC test" for determining independent contractor status. DOL stated that it "continues to believe that legal limitations prevent the Department from adopting either of those alternatives."

If finalized, these changes could reduce the number of workers who can be treated as independent contractors.

In its proposal, DOL acknowledges that the proposed rule is an "interpretive" rule, meaning that if finalized it would be entitled only to "*Skidmore* deference" from the courts, rather than the more robust "*Chevron* deference" that sometimes is given to binding substantive rules.

The terms of the Department's final rule will depend on its response to comments submitted by interested parties during the notice-and-comment period, including legal objections raised to the Department's proposed six-part test, and commenters' description and substantiation of any significant adverse consequences expected under the proposed approach. Until a final rule is issued—possibly in mid-to-late 2023—the Department's 2021 rule will remain in place. Legal challenges are possible once a final rule is adopted.

The following Gibson Dunn attorneys assisted in preparing this client update: Gene Scalia, Michael Holecek, and Blake Lanning.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Administrative Law and Regulatory practice groups, or the following authors or practice leaders:

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