Uber New Rule: DOL Proposed Guidelines on Classifying Independent Contractors

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In a constantly evolving economy, New Jersey and the Federal government have taken strong positions regarding the use of independent contractors. For example, in a "record-setting case for New Jersey," Uber paid the State of New Jersey $100 million after the New Jersey Department of Labor and Workforce Development found that the company misclassified as independent contractors nearly 300,000 drivers in New Jersey who should have been classified as employees.[1] As the New Jersey Attorney General made clear, New Jersey "will not tolerate companies that misclassify their workers, thereby denying employees vital benefits and dodging their obligation to contribute to programs that benefit the workforce. By misclassifying workers, companies both harm their employees and sidestep their obligations under the law. New Jersey will continue to enforce our employee misclassification laws aggressively to prevent such conduct. As the economy changes, we will vigorously defend workers' rights." [2] In a press release following the Uber payment, the New Jersey Department of Labor and Workforce Development made clear that its continuous enforcement on the classification of workers will be "rigorous." [3]

The United States Department of Labor likewise closely scrutinizes the classification of independent contractors. Under the Fair Labor Standards Act (FLSA), employers must meet the law's minimum wage, overtime, and recordkeeping requirements as it relates to their employees (which does not apply to independent contractors). The Biden Administration has taken a strong position on this issue, repealing the rule issued during the Trump Administration in January 2021 that narrowed the scope of workers classified as employees as compared to independent contractors (see our alert issued in January 2021 describing the former rules) The previous rule created a simplified test that stressed only two core factors to determine when an employee was an independent contractor: (1) a worker's control over their work; and (2) their opportunity for profit or loss.

Under the Biden Administration's proposed rule, far more workers would be classified as employees, rather than independent contractors. Under the proposed rule, an employee would be defined more broadly, to encompass all workers who "as a matter of economic reality, are economically dependent on an employer for work." Comparatively, independent contractors are limited to workers who, as a matter of economic reality, are "in business for themselves." The proposed rules provide a six-factor test to determine whether an employee is economically dependent on the employer:

1. Opportunity for profit or loss depending on managerial skill.

This factor examines whether the individual can earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure.

The Department of Labor provides the following example: a worker for a landscaping company performs assignments only as determined by the company for its corporate clients. The worker does not independently choose assignments, solicit additional work from other clients, advertise their services, or endeavor to reduce costs. The worker regularly agrees to work additional hours to earn more. In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more. Because of this lack of managerial skill affecting opportunity for profit or loss, this factor indicates employee status.

2. Investment by the worker and the employer.

This factor examines whether there are any investments made by the worker and whether those investments are capital or entrepreneurial. Such investments, for example, generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, thus suggesting that the worker is in business for themself.

The Department of Labor provides the following example: a graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing certain jobs. Thus, this factor indicates employee status.

3. Degree of permanence of the work relationship.

This factor examines whether the work relationship is "by design indefinite in nature or continuous," which would favor the worker being an employee, rather than an independent contractor.

The Department of Labor provides the following example: a cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. The permanence factor indicates employee status.

4. Nature and degree of control.

This factor examines the control the company has over the key aspects of the performance of the work. Such factors include setting schedules, compelling attendance, supervising or directing the work, selecting projects, setting prices for services, controlling workloads, and affecting the worker's ability to work for others. However, the "analysis focuses on whether the employer still retains control over meaningful economic aspects of the work relationship such that the control indicates that the worker does not stand apart as their own business, not simply whether the employer lacks control over discrete working conditions (e.g., scheduling) or whether the employer failed to exercise physical control over the workplace."

The Department of Labor provides the following example: a registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with Alpha House to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts related to the control factor indicate employee status.

5. Whether work performed is an "integral" part of the employer's business.

This factor examines whether the type of work being performed by the worker is central to the employer's business, i.e. whether the work is "critical, necessary, or central to the employer's business."

The Department of Labor provides the following example: a large farm grows tomatoes it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business. The integral factor indicates employee status.

6. Skill and initiative.

This factor examines whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative consistent with the worker being in business for themself instead of depending economically on the employer.

The Department of Labor provides the following example: a highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates employee status.

The proposed rule notes that additional factors may be considered if they are relevant to the ultimate question of whether workers are economically depending on the employer for work or in business for themselves. The proposed rule provides that the "totality of the circumstances" must be evaluated to determine the worker's status as employee or independent contractor.

The proposed rule is now subject to public comment over a 45-day period, which the Department will review and consider before finalizing the new rule.

Recommended Actions For Employers

Based on the proposed Federal rule and the positions taken by New Jersey and the Federal governments on the classification of independent contractors, employers must be cautious when classifying workers as independent contractors. The New Jersey Governor's Office and the Biden Administration have made it clear they will closely examine employment classifications to ensure employees are properly categorized. Those employers inappropriately classifying employees as independent contractors will face harsh penalties.

Employers and HR professionals should review their classifications of workers as independent contractors under the applicable legal standards to ensure they have supporting documentation for their decisions to classify a worker as an independent contractor. Employers using staffing agencies also should review their contracts with the agencies to ensure the contracts shield them from liability in the event of a wage and hour or other employment-related violation.

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[1] Price Mueller, Karin, *Uber Pays a Record $100M in Back Taxes to N.J. for Treating Drivers as Gig Workers,* available at https://www.nj.com/news/2022/09/uber-pays-a-record-100m-in-back-taxes-to-nj-for-treating-drivers-as-gig-workers.html#:~:text=In%20a%20record%2Dsetting%20case,a%20misclassification%20case%2C%20it%20said.

[2] New Jersey, Department of Labor & Workforce Development, Uber Pays $100M in Driver Misclassification Case with NJ Department of Labor and Workforce Development and Attorney General's Office, available at nj.gov/labor/lwdhome/press/2022/20220913_misclassification.shtml

[3] *Id*.