Patterson Belknap

Employment Law Alert
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U.S. Department of Labor Issues a New Proposed Rule on the Method for Classifying Workers as "Independent Contractors" Under the Fair Labor Standards Act

On February 26, 2026, the U.S. Department of Labor (DOL) released a New Proposed Rule ("NPR") that would again tweak how "independent contractors" are evaluated under the federal Fair Labor Standards Act ("FLSA"). An NPR is a proposed regulation that federal agencies like the DOL publish in the Federal Register to elicit feedback from the public. The notice and comment period for this NPR runs through the end of April 2026. The DOL will review public comments and could decide to withdraw the proposed rule entirely, issue a modified Final Rule, or promulgate the Final Rule as currently drafted.

The key takeaways for employers are:

- **Nothing changes now** – this is only a proposal, not a final rule.
- **Change in emphasis –** the NPR represents a change in emphasis, not a fundamental overhaul.
- **State law still applies –** even if the slightly more employer-friendly NPR goes into effect, employers—including New York employers—must still comply with stricter state laws.

Background

The FLSA contains no definition of "independent contractor." Since the mid-20th century, the DOL and federal courts have considered the "economic reality" of a relationship determinative—not labels adopted by the parties involved—and have formulated an ever-changing series of tests and points of emphases to determine whether a worker is an "employee" subject to the FLSA's wage and hour rules, or instead an independent contractor exempt from them.

Over the last decade, there has been push and pull between Democratic and Republican administrations, primarily between whether:

(1) Two factors—right to control and a worker's opportunity for profit or loss—should be given extra weight over other factors (Bush and Trump administrations); or

(2) Instead, a number of factors, including the two above, should be balanced under the totality of the circumstances, without giving any particular weight (Obama and Biden administrations).

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Since 2017, informal guidance documents and rules have been promulgated, rescinded, and challenged in court. Skipping over the details, the DOL describes its current enforcement position in Field Assistance Bulletin No. 2025-1 (the "Field Assistance Bulletin"), explaining that:

(1) For *private* litigation, the Biden Era 2024 Rule remains in effect—subject to court challenges—as summarized in a March 2024 DOL Fact Sheet;

(2) For DOL enforcement actions, the DOL will follow a July 2008 DOL Fact Sheet.

Under **both fact sheets,** employers must consider enumerated factors **without automatically giving any factor greater or lesser weight** to determine whether a worker is an employee or an independent contractor.

Under the 2024 Fact Sheet—applicable to private disputes—those factors are:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the employer,
3. Permanence of the work relationship,
4. Nature and degree of control,
5. Whether the work performed is integral to the employer's business, and
6. Skill and initiative.

Under the 2008 Fact Sheet—applicable to DOL enforcement actions—those factors are:

1. Extent to which the services rendered are an integral part of the principal's business.
2. Permanence of the relationship,
3. Amount of the alleged contractor's investment in facilities and equipment,
4. Nature and degree of control by the principal,
5. Alleged contractor's opportunities for profit and loss,
6. Amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor., and
7. Degree of independent business organization and operation.

The factors between the two tests overlap considerably and it is not immediately clear in what scenarios (if any) the tests would result in different outcomes.

The NPR

Nine months after clarifying its interim position in the Field Assistance Bulletin, the DOL has now proposed—via the NPR—to restore the independent contractor approach adopted during the first Trump administration.

The NPR provides two "core" factors, as well as three non-exhaustive "other" factors that must guide assessments of the "economic reality" of the relationship between worker and employer. The core factors are:

(i) *The nature and degree of control that the employer exercises over the work*: An employer exercising substantial control over significant aspects of the worker's performance is a key factor weighing in favor of finding an employment relationship. However, employers can require independent contractors to satisfy health and safety regulations and quality control standards without transforming them into employees.

(ii) *The worker's opportunity to earn profits and incur losses*: A worker who is unable to increase their earnings except by working faster or longer hours is almost paradigmatically an employee. By contrast, workers who can increase their earnings by investing capital to purchase labor and material are more likely to be considered independent contractors.

If these two core factors point to the same classification, then the other factors will not have much—or any—probative value. However, if the core factors are not conclusive, then the analysis must include consideration of the following "other factors," together with the core factors:

(i) *The amount of skill required for the work*: A worker's greater specialization and training is a factor weighing towards independent contractor status;

(ii) *The degree of permanence of the working relationship between the individual and the potential employer*: Workers who perform indefinite, sporadic, or irregular work are more likely to be independent contractors;

(iii) *Whether the work is part of an integrated unit of production*; and

(iv) *Any other factor that* "*in some way indicate[s] whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.*"

Stated differently, under the NPR, a totality of the circumstances analysis may still apply, but generally only if a classification cannot be reached after first considering the two core factors.

Assuming that the core factors are not determinative, the traditional totality of the circumstances analysis applies, under which the NPR would make it easier for a business to classify a worker as a contractor who is doing work that is integral to their business.

Under current guidance, performing work that is "integral to the employer's business" would be a factor weighing in favor of an employee classification. However, under the NPR, employers would be required to instead consider "whether the work is part of an *integrated unit of production*." According to the NPR:

> This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

So, the NPR would give employers more flexibility to use contractors to fulfill key roles, including by altering internal structures.

What this Means for Employers

Employers should be on the lookout for the final rule that will be published in the Federal Register later in the spring. However, even after the Rule has been finalized, it may not have much practical impact in states that have codified stricter classification requirements with respect to independent contractors, particularly in states that have adopted the so-called ABC Test (like California), which *require* showing that the work is NOT part of the core business of the entity.

For a New York entity, any practical impact of the NPR would be subtle. New York law sets out a multi-factor test that assesses all aspects of the employment relationship to determine whether the employer exercised control over the results produced by the worker or the means used to achieve the results. A non-exhaustive list of factors relevant for analysis under New York law includes:

(i) the employer's power to assign work;

(ii) the ability of employees to negotiate pay;

(iii) the worker's level of skill or specialized training;

(iv) the worker's discretion in carrying out the task;

(v) ability of the workers to offer their business to the public or develop a client base by exercising control over their business choices; and

(vi) whether the workers' services are an integral part of the business, particularly when performed on a continuing basis

In effect, many employers would notice very little practical difference if this NPR were to go into effect. Although federal law might soon provide greater leeway to employers to engage independent contractors rather than employees to perform work that is critical to their business operations, the law in many states—including New York—would continue to consider the fact that a worker provides services integral to an employer's business operations as a "strike against" an independent contractor classification.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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