DOL's New Proposed Rule For Independent Contractors: What Employers Must Know

Exclusive interview with **Erica Mason,**
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The U.S. Department of Labor (DOL) recently unveiled a new proposed rule which revises the agency's guidelines for categorizing employees or independent contractors under the Fair Labor Standards Act (FLSA).

In an exclusive interview with HR.com, Erica Mason, Partner in the labor and employment practice at Akerman LLP, touches upon the legal concerns that this rule presents for employers and the best practices for navigating them, and more.

Excerpts from the interview:

Q. What is the significance of the U.S. Department of Labor's new proposed rule for independent contractors?

Erica: The US DOL has issued a new proposed rule that will significantly impact how employers will evaluate individuals employed as independent contractors under the Fair Labor Standards Act (FLSA). Notably, this is the Biden Administration's second attempt to undo the Trump Administration's prior rule on the same issue, which made it easier for employers to classify workers as independent contractors.

Both the current and proposed rules are intended to provide employers with clarity regarding, but not alter, the six-factor "economic realities" test, which federal courts and the DOL have used for decades to determine whether an individual is in business for themselves or an employee of the company.

Current DOL leadership claims that the prior rule leaves workers vulnerable to misclassification, which can negatively impact their compensation and benefits. Business advocates argue that this new rule may negatively impact job creation and provides less flexibility to companies and individuals to transact in the "gig economy," an economy that the FLSA, originally enacted in 1938, could never have contemplated.

Q. What would be its impact on the business world?

Erica: Under the FLSA, employees are entitled minimum wage, overtime pay and contributions to Social Security and Medicare (FICA contributions). Although independent contractors must cover the full cost of their FICA contributions, they generally have more flexibility to negotiate their compensation and schedules, and work for multiple companies at the same time.

Practically speaking, because this rule will reduce the number of individuals who can maintain independent contractors classification, this new rule will cause employer overhead and staffing costs to skyrocket, particularly for those companies and industries that rely heavily on independent contractors, such as rideshare companies (Uber, Lyft, etc.), construction companies, and even financial services and insurance companies.

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Q. What are the new parameters of the new proposed rule regarding categorizing employees or independent contractors under FLSA?

Erica: Previously, the six factors of the "economic realities test" were meant to be "balanced" with "no one factor predominating over another. The vague nature of this formula leads to varying results across the federal district courts, and in many cases, contradictory case decisions within, and amongst, circuits.

Under the current rule, two of the five factors are given more weight than the other four: (1) the worker's level of control over their work; and (2) the worker's ability to profit from their position with personal investment. The proposed rule change under Biden's Department of Labor would also consider investments by the employee and employer, the skill displayed by the employee, the permanence of the working relationship, and the degree to which the worker performs a function that is integral to the business.

Q. What are the legal concerns employers should be aware of in the context of the revised rule?

Erica: In 2021, the DOL collected over $200 million in back wages for nearly 200,000 employees, who it determined employers had not paid in accordance with the FLSA— many of which involved independent contractor misclassification. Even more is collected through private independent contractor misclassification lawsuits, with an estimated 6,000 lawsuits filed each year in federal courts throughout the country, resulting in hundreds of millions of dollars in FLSA settlements each year.

Plaintiffs' attorneys seek out these claims because once a violation has been established, the FLSA affords liquidated (double) and in some cases treble damages, and a full recovery of all reasonable attorneys fees and costs

Given the prevalence, and high stakes nature of FLSA misclassification cases, employers should be very concerned about running afoul of the FLSA under the new proposed independent contractor rule.

Q. How should employers maintain compliance with the new rule?

Erica: An ounce of prevention is worth a pound of cure. Given the high-stakes nature of litigation of FLSA misclassification, employers should immediately review any workers, who are classified as independent contractors under the new proposed rule, to determine if they should be reclassified as employees.

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