

New Federal Contractor Rule

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The question of who's an employee with protections and benefits under labor law and who is a contractor not covered by those laws has always been important for many reasons. New trends favoring more flexibility to classify workers as contractors have highlighted the issue even more.

The Department of Labor has now proposed a new rule designed to favor the classification of workers as employees. Secretary of Labor Marty Walsh said, "misclassification deprives workers of their federal labor protections, including their right to be paid their full, legally earned wages." There is a comment period (make your organization's position known); then, the DOL reviews them and prepares to finalize the rule.

The new proposal from the Department of Labor would change the current test to determine worker status, which had been greatly simplified and had the effect of permitting more workers to be classified as contractors. This proposed rule uses a six-factor test to determine the working relationship. The test is consistent with the analysis federal courts use in making the decision. The proposed DOL test considers the nature and degree of the worker's control over the work; the worker's opportunity for profit or loss; investments by the worker and the employer; the degree of permanence of the working relationship; the extent to which the work performed is an integral part of the employer's business; and the degree of skill and initiative exhibited by the worker.

What are the problems if workers are falsely designated as independent contractors? Businesses have to face multiple types of potential claims, including failure to pay employment taxes, failure to provide unemployment and workers' compensation insurance, Obamacare issues, and the biggie: failure to pay overtime and provide breaks if the worker would have been entitled to overtime and break laws. So this is worth some serious consideration.