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Becca Rainey
Welcome to The FP5: Five Things for Your 9-to-5. We help employers make sense of the fast moving world of workplace law and compliance by breaking down topics into five parts. I'm Becca Rainey from the Fisher Phillips Content team.

Today, we're sharing five things you need to know about changes to the independent contractor standard at the Department of Labor. Joining me is David R. Dorey, who is a partner at FP. So, how are you today Dave?

David R. Dorey
I'm good Becca, how are you?

Becca Rainey
Good, good. Again, we're really happy to have you. Let's dive in to this Department of Labor proposal.
Our first thing, a lot of employers have been watching the independent contractor issue swing back and forth over the past few years. So can you give us the 1,000 foot view of what the Trump Department of Labor just proposed and who it's going to impact?

David R. Dorey
Yes, absolutely. The Trump administration proposed in February a new rule about independent contractor status. This is under the Fair Labor Standards Act and two other statutes that the department administers. This would, in my view, provide clarity and certainty around the question of who in this country is an employer--is an employee--and who is an independent contractor and in business for themselves.

This proposal, if finalized by the department, would replace the Biden administration's 2024 rule on the same topic. That 2024 rule in turn replaced the Trump administration's rule from 2021. So this is, when finalized, if finalized, the third version of this that we have seen in about seven years.

Becca Rainey
Wow. And so who uses contractors?

David R. Dorey
Businesses across this country every single day use independent contractors to get things done and independent contractors love to be in business for themselves as we have seen. So this is more about a business-to-business relationship than it is about an employer and employee relationship.

Becca Rainey
Absolutely. As someone who has covered this, I have heard from both sides of workers, whether it be freelancers who really do enjoy the freedom that comes with being an independent contractor, being able to set your own schedule, work from where you want to, and also being able to choose your own health benefits. For some people, yes, you're not getting the benefits of a group health plan, but you are also able to select the coverage that you need and prefer. I've heard that too.

But of course, there's other people on the other side of the aisle who say, you know, some independent contractors would rather have full employment benefits. But I think the reality of that is that gets really complicated, right? If you're working for 10 different employers, who do you go to when you get sick? Who do you ask for vacation? Who pays your benefits? You know, a lot of questions come up.

David R. Dorey
It does get super complicated when it comes to that sort of thing. And I think we often hear about these rules from the Department of Labor being focused on employers, on businesses, larger businesses. And at the end of the day, I think it applies across the board. The question, who is an employee and who isn't an employee affects people who are employees and who are in business for themselves as well as larger corporations.

So it's not just a question that applies to companies, it's a question that applies to everyone. And I think that having certainty as best as possible around that issue benefits everyone because they know what they are and where they stand.

Becca Rainey
Moving on to our second thing. So this proposal really turns on how the law defines an independent contractor under federal wage laws. So what legal framework is the DOL proposing to use? And just generally, how does that compare to the approach that the previous administration took?

David R. Dorey
The Department has proposed an economic realities test that has five factors that are spelled out in the proposed regulation. Two of them are called core factors and they are the most important. The first is control over work and the second is opportunity for profit or loss. And based on how those two factors point, especially if they point in the same direction, that is most often going to answer the question about whether someone is an independent contractor or not.

The Department has said that this provides certainty and predictability. There are three other factors that are listed out, but if the two core factors point in the same direction, you're probably not going to get to those. Those factors are the amount of skill that's required for the work that's being performed, the degree of permanence, and whether the work that's being performed is part of an integrated unit of production.

Ultimately, the question here is, is a person economically dependent upon a company for their work or not? And the Department has said that that is the ultimate inquiry that's here. I think that that is really helpful because it crystallizes this question that people have been trying to answer for decades at this point, which is, what is this economics realities test? What is the point of these factors? Why do we use them?

The Department has now reduced it to this single question that's the ultimate inquiry: whether someone is economically dependent or not. Using those factors helps us to answer that question. And ultimately it boils down to this: is someone in business for themselves or not?

Becca Rainey
What sort of things when we're trying to figure out if someone is an independent contractor or an employee, do we look at in the relationship? Is it pay? Is it, you know, who decides, you know, what the work's going to be, your schedule? What kind of things can, you know, really decide independent contractor status?

David R. Dorey
When we look back at those two core factors that we just talked about, those are going to be the most important for answering that question. And I think even the first one is perhaps the most important of them all: control over your work. Do you set your own schedule? Do you pick which projects you like? When you're doing those projects, what kind of control do you have over how those work? And if you look at the proposed rule, the department has spelled out a number of hypotheticals which are really helpful for folks to take a look at and try to understand because they make this real applying to situations that the department and employers and employees have seen, independent contractors have seen for many years now. And, opportunity for profit or loss. And this really goes to the question of whether you're in business for yourself. Are you receiving a wage or are you receiving profit from the work that you were doing?

A very important part of the rule that I think is helpful to mention as well is it doesn't matter how much the independent contractor, for example, is making relative to this relationship. Someone could be using an app to provide a service on a one-off basis once a month and make $50 here or there, but the fact that they only made $50 doesn't mean that they're now an employee of the service that provided the app.

Becca Rainey
Moving on to our third thing, so this could meaningly affect how companies structure their workforce. What does this proposed rule mean for employers that rely on freelancers, gig workers, or other types of independent contractors? And why is this so consequential in terms of wage and hour liability?

David R. Dorey
The reason is that it helps employers, especially businesses, to understand where their workforce sits and what kinds of benefits need to be provided based on the status of the people that are in the orbit of this business. If you have someone that's clearly an employee, then there are certain things that you need to do relative to those--most often these sound like minimum wage and overtime obligations and certain other taxes--when it comes to an independent contractor, these things don't apply.

The issue of misclassification is hugely important because if an employee--if an employer--or business was to misclassify someone as an independent contractor who is really an employee, then litigation can ensue. Investigations can ensue from the Department of Labor. And the result may be a lot of liability, multiple damages when it comes to back wages for non-payment of minimum wage, non-payment of overtime. The liability is so severe that having a test that is uncertain, that is unpredictable, just injects so much uncertainty and liability into that relationship that it's just very difficult, it makes it very difficult for folks to do business.

Becca Rainey
Can you tell me just a little bit too, you know, why do businesses need clarity on this? Why is this issue so muddied?

David R. Dorey
It's muddy because there have been, as we talked about, a variety of different rules around this. A number of court decisions over many years that weight factors in different ways, use different factors, has essentially resulted, until there was a rule around this, in a patchwork across the country when it came to applying the FLSA.

And so there was no certainty and it ultimately came down to this question of what's the economic reality on the totality of the circumstances based on what a court sees in a given relationship without much predictability in advance. And that's not good when you're trying to run a business. You don't want to have an unpredicted and unpredictable liability when it comes to how you're structuring your workforce that is going to result in expensive litigation.

Becca Rainey
Right, can make it very hard to plan for the future.
This is the FP5. I'm Becca Rainey. We're here with David R. Dorey, a labor and employment attorney at Fisher Phillips.

All right, the fourth thing. So, even if this proposal is seen as good news for businesses, there are still real compliance risks. I know there's a lot of questions about the staying power of a rulemaking like this, given what we've seen now with the Supreme Court, no longer really requiring judges to defer to agencies. So I'm wondering, does this provide meaningful change for employers and what other complications are still out there despite this rulemaking?

David R. Dorey
It's a great question. The first Trump administration rule was done in 2021 and the Biden rule was done in 2024, both at the end of those terms. And that led to a lot of uncertainty when it came to challenges to the rule, which of course can be brought in or brought under the Administrative Procedure Act in federal court.

Given that the second term for President Trump has produced an independent contractor rule so soon into the administration, so in year two, there's a lot of time left and a lot of runway for the Department to defend the rule in court. And I expect that even though *Chevron* deference is gone and *Loper Brite* is the law of the land at this point, if you read the proposed rule, the department has done a really, really good job of explaining how it got where it got and a lot of that is having looked at the litigation that's ensued over decades and trying to tease out from that litigation, what's the right answer when it comes to this? So I think that there is substantial staying power here just because of the time the administration, when it's happening, and the fact that the department has done a really good job of explaining itself.

Becca Rainey
Yeah, and I'm not going to pretend to be inside the mind of any judges, but I feel like typically when, you know, now that the direction from the Supreme Court is to use their own judgment in determining, you know, whether an interpretation is reasonable or not, they typically look to case law, right, and what previous other judges have done, which is kind of what the Department of Labor proposal walks us through.

David R. Dorey
Yes, exactly right. It starts in the 1940s and walks us through the history of how this question has been answered over many, many years and explains through the Department's experience that the five factors that we've talked about are the most salient factors, they're the ones that show up most of the time. And the two core factors are those that often courts have said are the most important. And if they point in the same direction, then that probably answers the question.

Becca Rainey

All right, and we've made it. Finally, the fifth thing. So if you're an employer listening to this episode and wondering, what do I do now? While the rule isn't final yet, the smart move is to be prepared, right? So what practical steps should organizations be taking today to stay compliant and position themselves for whatever the final rule ends up being if they finalize the proposal?

David R. Dorey
The most important thing right now is understanding that the proposed rule has a comment period that is open through April the 28th. And I think it's important for folks to read this rule, to do their best to understand it, call your counsel if you need to, and submit comments to the department that explain whether you like it or you don't, and if you'd like some changes based on what you've seen here. These are really very important, and the department considers all the comments that are submitted in finalizing a rule.

And it allows you to be part of the process instead of just passive. Oftentimes, when a rule is proposed, negative comments come in, but not a lot of positive comments. But positive comments can help. If you like what's here, then I think it's helpful to explain, “this is the type of business that I have. I'm an independent contractor. I like being an independent contractor. I want to stay that way. I think that this is great, but maybe I don't understand something. Can you clarify that for me?”

So, comments are really, really important, and I think that we should focus on that. When the rule comes out, which I expect it to be later this year, we will have likely the test that is proposed here. And it is somewhat consistent with what the department is enforcing today based on a 2019 memo, but not entirely. So employers, businesses should be looking through and considering, in light of the rule that we think is coming, who in the business at that point is going to be an independent contractor and who isn't, and structure accordingly.

Understanding that if someone is indeed an employee, then they need to be treated as such and given the benefits of that sort of relationship. And if they are not, then treat them as if it's a business relationship, which indeed it is. At the same time, it's important for folks to understand that this is just a federal question right now and this is only applicable to the three statutes that are in the proposed rule, most important of which is the Fair Labor Standards Act. Many, many states follow the FLSA when it comes to their own wage and hour loss but some of them don't and they have different tests. If your state has a different test and that doesn't just mean where your business for example is headquartered but where your workers may be, a different test could apply, one that is much more strict and tends to put more people who would be independent contractors under the department's rule into the employee bucket.

If you have folks in those states, then you need to do a lot more compliance work to understand how to treat your folks under that regime as it goes. And to that point, I think it's very important to work with your counsel to understand how to structure when you have competing tests that apply to the same employee.

Becca Rainey
Right. And so if I'm an employer, you know, is it likely that I'm going to be making a major change to how I treat my employees following this rule? Or does it really depend on, you know, where you are and the advice of your legal counsel?

David R. Dorey

I think it depends on where you are, the advice of counsel; at the end of the day the question as mentioned is there economic dependence here or not that is going to be facts and circumstances no matter how you slice it and you need to do an analysis based on the rule that the Department is put out to decide, “given my workforce and my business relationships, who counts as what?” and then treat them accordingly based on that.

There are certainly steps to prepare for this, we know something is coming and we very much know that it's likely to be very close to what is in the proposed rule. So I think the answer to that is let's start doing the work now to get ready for what's going to happen later. Don't wait and then have to scramble at the last minute.

Becca Rainey
Right. And I think part of this is for employers, just a reminder to get their ducks in a row on this issue. Even if this doesn't lead to major changes or less litigation or more litigation risk for their company, it's important to be familiar with where these employees or independent contractors are at under the law.

David R. Dorey
That's absolutely right.

Becca Rainey
Thanks, Dave. So this is the part of the show where we like to get to know you a little better. I'm gonna ask you five quick questions. Number one, what is your favorite comfort food?

David R. Dorey
I think the answer to that is pizza. Clear answer.

Becca Rainey
Is there a specific type of pizza, like topping-wise?

David R. Dorey
Lately, I'm enjoying a veggie pizza with some meat on top. There's a place by our house in DC that's got a Detroit style.

Becca Rainey
Ooh, yeah. Okay, so do you prefer to be remote, hybrid, or in-office?

David R. Dorey
Hybrid, I like a nice mix. Change it up from week to week depending on what the needs are for our clients.

Becca Rainey
No, I totally get that. A little bit of facetime is good, but also I can really lock in at home.

David R. Dorey
Absolutely right.

Becca Rainey
Alright, and what's your favorite way to spend a free Saturday?

David R. Dorey
I really enjoy some time at the beach, getting out of town, being outside in nature as much as possible.

Becca Rainey
Yeah, have you ever been to Ocean City, Maryland?

David R. Dorey
I have.

Becca Rainey
It's funny, me and the producer of this podcast, Evan Banks, grew up just 30 minutes away from there in Salisbury.

David R. Dorey
I didn't know that. We spend a lot of time in Delaware.

Becca Rainey
Oh nice. Yes. So don't hate me, folks, but the Delaware side is the better side. It's just the truth.

David R. Dorey
I didn't say it.

Becca Rainey
All right. What's the best movie villain of all time?

David R. Dorey
You might have stopped me on that, I might need to think about it.

Becca Rainey
What's the best movie hero of all time?

David R. Dorey
I mean, could it be Superman? It might be.

Becca Rainey
It’s classic. I mean, when I think of, I don't know, the best superhero of all time, I kind of like the Spider-Man, you know, series, but I also kind of grew up when like the, you know, classic Tobey Maguire version was coming out. So maybe that's my bias. All right, last question. Favorite sports team?

David R. Dorey
We really enjoy watching the Commanders here in DC. And we're going to be spending a lot of time in the upcoming season spending days watching them at the stadium.

Becca Rainey

I love that. Well, I'm a true Marylander, so favorite sports teams, y'know, Orioles, Ravens, but it's never really fun to be Maryland sports fan.

David R. Dorey
That's true. It's most often a disappointment, but it's all about the striving, right?

Becca Rainey
Right, right. Well, Dave, thank you so much for joining us.

David R. Dorey
Thanks for having me, Becca.

Becca Rainey
For more on this Department of Labor proposal, check out the Insight linked in our show notes. And as always, thank you for listening to The FP5.

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