

## 2020's omnipresent DOL investigations likely spilling into new year

by **Jodi R. Bohr**  
**Tiffany & Boscoe, P.A.**

*Aside from the personal and professional challenges 2020 presented (the COVID-19 pandemic, government shutdown orders, concerns about keeping employees safe, layoffs, remote working, homeschooling, and navigating the unknown), what stands out most to me in my practice—and had the biggest impact on my clients—was the U.S. Department of Labor's (DOL) continued uncompromising pursuit of investigations into employers' wage and hour practices. The department seemed to focus its efforts on companies using independent contractors as part of their workforce, all the while seemingly revising regulations to make it easier for businesses to classify workers as independent contractors. With those contradictory actions and a new administration taking over, how can employers protect themselves from wage and hour liability?*

### ***Proposed regulations and five-factor economic realities test***

On September 22, the DOL proposed regulations regarding workers who should be classified as employees and those who can be designated as independent contractors. The proposed rule considers five factors in determining whether workers are in business for themselves (independent contractors) or economically dependent on a putative employer (employees).

The test focuses on two "core factors," specifically (1) the nature and degree of the worker's control over the work and (2) the individual's opportunity for profit or loss based on initiative and/or investment. Within the core factors, the proposed regulations say an individual who can set his own schedule, select projects, and work for others, including potential competitors, exercises the type of control that would weigh in favor of independent contractor classification.

The other three factors serve as additional guideposts for companies in their analysis including (3) the amount of

skill required for the work, (4) the degree of permanence of the working relationship between the individual and the potential employer, and (5) whether the work is part of an integrated unit of production. Finally, the proposed regulations note the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or independent contractor.

### ***What to expect in 2021***

My explanations about the five-factor test may be all for naught. Even if the Trump administration finalizes the proposed regulations (public comment had closed at the time of this writing), they may quickly be targeted for reversal by the incoming Biden administration or repeal through Congress. The Biden DOL may then proceed to issue its own version of an independent contractor standard but likely wouldn't go to the extreme position recently laid out in California, given the controversy.

Essentially, much of the DOL's likely approach remains up in the air for employers. With all of the uncertainty, you should review your classifications conservatively under the current test and understand you may need to shift again soon because of the changing administration.

*[Jodi R. Bohr](#) is a shareholder with [Tiffany & Boscoe, P.A.](#) She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at [jrb@tblaw.com](mailto:jrb@tblaw.com) or 602-255-6082.*