



Rewards Policy Insider 2022-22



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Department of Labor Issues Long-Anticipated Independent Contractor Proposal

In an attempt to repeal the Trump-era Department of Labor rules classifying employees and independent contractors under the Fair Labor Standards Act (“FLSA”), new proposed rules would restore a totality-of-the-circumstances analysis of the economic reality test factors and revise the classification framework to align the Department’s approach with previous courts’ interpretations of the FLSA.

Background

Enacted in 1938, the FLSA imposes requirements pertaining to minimum wage, overtime, and other employment-related rules that apply to employees but not to independent contractors. The classification of employees and independent contractors for purposes of the FLSA under regulatory guidance has been a longstanding issue that has generated significant—and often confusing—back-and-forth between presidential administrations.

On January 7, 2021, the Trump Administration finalized its own independent contractor rule, which was scheduled to go into effect on March 8, 2021. The rule was viewed as more business-friendly because it made it easier to classify workers as independent contractors. The Trump rule revised the so-called “economic reality” test, which uses a set of factors to determine whether, as a matter of economic reality, an individual is an employee or independent contractor. Notably, the Trump rule prioritized two “core factors” above all other factors: (1) the nature and degree of the worker’s control over their work; and (2) the worker’s opportunity for profit and loss based on initiative, investment, or both.

Before the Trump rule could go into effect, on May 6, 2021, DOL—now under the Biden Administration—withdrawed the Trump final rule (after first delaying the rule in early March 2021). Then, on March 14, 2022, the U.S. District Court for the Eastern District of Texas found in *Coalition for Workforce Innovation et al. v. Walsh* that DOL’s delay and withdrawal of the Trump rule violated the Administrative Procedure Act, which requires federal agencies to follow certain procedures when taking administrative action, such as allowing sufficient notice and public comment periods. The district court reinstated the Trump-era rule.

Proposed Rules

On October 11, 2022, DOL published a voluminous **proposed rule** to amend the independent contractor rules. According to a **news release** published by DOL, the proposed rule is intended to combat employee misclassification, which “denies workers’ rights and protections under federal labor standards . . . and hurts the economy at-large.”

In the proposed rule, DOL argues that the current rule “does not fully comport with the FLSA’s text and purpose interpreted by courts” and retaining the rule “would have a confusing and disruptive effect on workers and businesses” because of its departure from previous case law and the standard application of the economic reality test. The proposed rule would also explicitly rescind all prior administrative rulings and policies relating to determining who is an employee or independent contractor under the FLSA.

Perhaps the most significant proposed revision relates to the economic reality test. The proposed rule rejects the Trump rule’s elevation of two core factors,

stating that such prioritization is not consistent with how courts have applied the economic reality test in the past. The proposed rule would also bring about a return of the “totality-of-the-circumstances analysis” of the economic reality test, where no factors should be given inherently more weight over others. DOL also notes that the weight to give each factor may depend on the facts and circumstances of a particular case. Under the revised economic reality test in the proposed rule, the six factors to consider are: (1) the opportunity for profit or loss depending on managerial skill; (2) the investments made by the worker and the employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control; (5) the extent to which the work performed is an integral part of the employer’s business; and (6) skill and initiative. Additional factors may be relevant if they indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.

Comments on the proposal are due December 13, 2022.

Treasury Issues Final Rule to Change the Affordability Calculation for Employee’s Family Members

Hoping to make more Americans eligible for subsidized health insurance coverage through ACA health insurance exchanges, the IRS and Treasury Department have finalized regulations to change the rules for determining if employer-sponsored health coverage is affordable and provides minimum value with respect to employees’ spouses and dependents.

The preamble to the final rule confirms that it does not affect employers’ exposure to ACA shared responsibility penalties. However, the change could lead to certain employees dropping family coverage so that their spouses and dependents can get subsidized coverage in an exchange.

Background

Basically, an individual who is eligible for “minimum essential coverage” through an employer’s group health plan cannot qualify for an ACA premium tax credit (PTC) unless the employer’s coverage is not “affordable” or fails to provide “minimum value.”

Under current rules, an employer’s coverage is deemed “affordable” to an employee if the employee’s required contribution for self-only coverage does not exceed 9.61% of household income. (Note that the 9.61% affordability threshold will be reduced to 9.12% for 2023.) Additionally, an employer’s coverage does not provide “minimum value” if the plan’s share of the total allowed costs of benefits provided to an employee is at least 60%.

The issue is how these affordability and minimum value rules apply with respect to employees’ family members who are also eligible to participate in the

employer's plan. Current rules provide that if the employer's coverage meets the affordability or minimum value thresholds with respect to the employee, then these requirements are met with respect to the employee's family members too. As a result, if the employee can't qualify for a PTC, her family members can't either.

For example, assume an employer offers a group health plan that doesn't charge employees anything for self-only coverage, but requires employees to pay 50% of the premium cost for family coverage. Because the self-only coverage option is free to all eligible employees, the plan meets the affordability requirement. As a result, eligible employees and their family members would not be able to qualify for a PTC (assuming the minimum value requirement is also met) even if some employees are forced to pay significantly more than 9.61% of household income for family coverage.

Summary of Final Rule

Effective for tax years beginning after December 31, 2022, the final regulation modifies existing rules to create a separate affordability rule for eligible family members. Specifically, in 2023 the employer's coverage will not be affordable with respect to an employee's family members if the employee's required premium contribution for family coverage exceeds 9.12% of household income.

Thus, in the example above, in 2023 the employee still would not qualify for a PTC because the required premium contribution for self-only coverage does not exceed 9.12% of the employee's household income. However, the employee's eligible family members may qualify if the employee's contribution for family coverage exceeds 9.12% of household income.

The final rule similarly creates a separate minimum value test with respect to employees' eligible family members. So even if a plan provides minimum value to employees, it might not meet the test with respect to eligible family members.

Because the final rule might result in some employees' family members becoming eligible for a PTC in the middle of a plan year, the IRS also issued Notice 2022-41 to allow employees to make mid-year election changes to drop coverage for these family members so they can purchase coverage through an ACA Exchange and claim the PTC.

Impact on Employer Shared Responsibility Rules

The only way an employee who is offered "minimum essential coverage" by his or her employer can qualify for a PTC is if the coverage is not "affordable" or fails to provide "minimum value." As noted, the final rules do not change the standards for determining if coverage offered to an employee is "affordable" or provides "minimum value". Instead, they only change the rules for determining if coverage offered to an employee's eligible family member meets these standards.

An Applicable Large Employer (in general, an employer with at least 50 full-time equivalent employees) may be required to pay an employer shared responsibility penalty only if a full-time employee qualifies for and receives a PTC. Whether one or more of the employee's eligible family members qualifies for a PTC is irrelevant for this purpose. As a result, the final rules do not affect employers' potential exposure to Shared Responsibility penalties.

IRS Issues Updated Employee Benefit Plan Limits for 2023

As it does every year at about this time, the IRS has published inflation-adjusted limits for tax-qualified retirement plans and health and welfare plans for 2023. The year-over-year increases are noticeably higher than in past years.

The following table summarizes some of the key limits relating to 401(k) and 403(b) plans, defined contribution and defined benefit pension plans, and health and dependent care flexible spending arrangements (FSAs).

	2022	2023
401(k), 403(b), and 457 plan elective deferrals	\$20,500	\$22,500
Age 50 catch-up contribution limits	\$6,500	\$7,500
415(c) Annual Addition Limit for Defined Contribution Plans	\$61,000	\$66,000
415(b) Annual Benefit Limit for Defined Benefit Plans	\$245,000	\$265,000
401(a)(17) Covered Compensation Limit	\$305,000	\$330,000
Social Security Wage Base	\$147,000	\$160,200
Health FSA Salary Reduction	\$2,850	\$3,050
Dependent Care FSA Salary Reduction	\$5,000	\$5,000

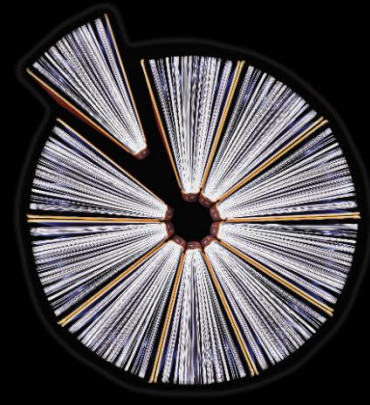
For additional information, see [IRS Notice 2022-55](#), [Rev. Proc. 2022-38](#), and the Social Security Administration's [website](#).

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