



SCWA Legislative Update

March 22, 2021



U.S. Department of Labor Announces Plans to Rescind Two Rules that Undermine Worker Protections Against Unfair Pay Practices

The U.S. Department of Labor announced plans to rescind two final rules that would significantly weaken protections afforded to American workers under the Fair Labor Standards Act.

The first Notice of Proposed Rulemaking proposes the withdrawal of the Independent Contractor Final Rule issued by the department on issued on Jan. 7, 2021, for several reasons. They include the following:

- The rule adopted a new “economic reality” test to determine whether a worker is an employee or an independent contractor under the FLSA.
- Courts and the department have not used the new economic reality test, and FLSA text or longstanding case law does not support the test.
- The rule would narrow or minimize other factors considered by courts traditionally; making the economic test less likely to establish that a worker is an employee under the FLSA.

Among its provisions, the FLSA requires covered employers to pay employees at least the federal minimum wage for every hour worked and overtime premium pay of at least one and one-half times their regular rate of pay for every hour worked over 40 in a workweek. An independent contractor has no FLSA protections.

The second Notice of Proposed Rulemaking seeks to rescind a current regulation on joint employer relationships under the Fair Labor Standards Act, published in the Federal Register and which took effect on March 16, 2020. In February 2020, 17 states and the District of Columbia filed a lawsuit in the U.S. District Court for the Southern District of New York against the department, arguing that the Joint Employer Rule violated the Administrative Procedure Act. The court vacated the majority of the Joint Employer Rule on Sept. 8, 2020, stating that the rule was contrary to the FLSA and was “arbitrary and capricious” due to its failure to explain why the department had deviated from all prior guidance or consider the effect of the rule on workers.

The department invites comments from the public on both proposed rules at www.regulations.gov. The comment periods end on April 12, 2021.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment, including any personal information provided, will become a matter of public record. The division will post comments without change at www.regulations.gov and include any personal information provided. The division posts comments gathered and submitted by a third-party organization as a group, using a single document ID number at the site.

More information about the proposed rules is available at <https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor> and at <https://www.dol.gov/agencies/whd/flsa/2020-joint-employment>.

