

From Nar Staff:

On October 11, 2022, the U.S. Department of Labor (DOL) released a **proposed rule** updating how a worker is classified under the *Fair Labor Standards Act* (FLSA). The proposed rule **does not** impact the classification of real estate professionals as independent contractors under the Internal Revenue Code (**26 U.S.C. §3508**).

The DOL has proposed the rule to ensure covered employers are providing workers, namely “gig workers,” with minimum wage and overtime pay as required under the FLSA to ensure consistency with existing judicial precedent and the Department’s longstanding guidance. The **proposed rule** adopts an “economic realities test,” where the standard for determining if a worker is an employee or an independent contractor is based on whether the worker is economically dependent on the employer for work or is in business for themselves. To evaluate the economic dependence, the proposed rule conducts a “totality-of-the-circumstances” analysis, considering multiple factors, rather than isolated criteria to determine employment status. While there are a number of factors considered in this analysis, they generally include:

- The opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the employer;
- Degree of permanence of the work relationship;
- Nature and degree of control by the employer over the worker;
- Extent to which the work performed is an integral part of the employer’s business; and,
- Skill and initiative.

Under the totality-of-circumstances analysis, the economic reality factors are not exhaustive, are not assigned a predetermined weight, and are each given full consideration.

The proposed rule does not adopt the “ABC test” or the “common law test” for classifying independent contractors, which DOL believes is prohibited from adopting due to “legal limitations.” (See **here** for more background on these tests.) **The proposed rule under the FLSA also does not impact real estate**

professionals' explicit protection in the Internal Revenue Code, 26 U.S.C. §3508, which provides the framework to classify them as statutory non-employees for federal tax purposes.

NAR supports the protection of, and efforts to further secure, the right of real estate sales people to work as independent contractors and for brokers to choose to classify real estate salespeople as independent contractors. NAR will submit a comment on the proposed rule during the 45 day public comment period.

Read more on the proposed rule **here**.

See **here** for more information on NAR's advocacy to protect independent contractors.

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