

Small Business Notes

In this issue:

- U.S. Department of Labor Publishes Proposed Rule on Independent Contractor Status
- Presidential Executive Order Prohibits Use of Certain Types of Diversity, Inclusion, and Bias Training by Federal Contractors and Grantees
- Thirteen State Attorneys General Object to U.S. Small Business Administration's Rule on Appeals Under the Payroll Protection Program
- Internal Revenue Service Notes that PPP Lenders Should Not Provide Borrowers with Loans Forgiven Under the CARES Act with Form 1099-C or Other Payee Statement

U.S. Department of Labor Publishes Proposed Rule on Independent Contractor Status

On September 25, 2020, the Wage and Hour Division of the U.S. Department of Labor (DOL) published a proposed rule amending the tests for determining whether a worker is an employee of an independent contractor. (85 Federal Register 60600) The proposed rule, the first on this topic in twenty years, comes about in great part as a result of concerns raised by Internal Revenue Service and the Department of Labor that many workers were being wrongly classified as independent contractors with businesses then failing to pay employment taxes or extend Fair Labor Standards Act protections to the wrongly classified workers.

At present DOL's guidance uses a seven factor "economic reality" test to determine whether a worker is an employee or independent contractor. Each of the factors carries equal weight.

- The extent to which the services provided are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the worker's investment in facilities and equipment.
- The nature and extent of control by the principal.
- The worker's opportunity for profit and loss.
- The amount of initiative, judgment, and foresight required of the worker.
- The degree of independent business organization and operation.

The proposed rule replaces those factors with two "core factors" and three "guidepost factors" and stresses that what occurs in actual practice is more important than what might be theoretically or contractually possible.

Continued...

Small Business Notes

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The “core factors” are:

- The nature and degree of the worker’s control over the work. Where a worker has substantial control over the major aspects of the job it favors a classification as an independent contractor.
- The worker’s investment in the business and opportunity for profit or loss. The rules do not involve a “side by side” comparison of investment or opportunity for profit or loss between worker and business since a business will always have more resources for investment.

The “guidepost factors” are:

- The amount of specialized training or skill required that is not provided by the business.
- The degree of permanence of the relationship between the parties.
- Whether the work is part of an integrated unit of production. If a worker’s work is segregable from the business production process, it favors classification as an independent contractor.

The proposed rule can be expected to attract considerable comment from affected parties. Comments are due by October 25.

Presidential Executive Order Prohibits Use of Certain Types of Diversity, Inclusion, and Bias Training by Federal Contractors and Grantees

On September 22, 2020, President Trump signed Executive Order 13950, “Executive Order Combatting Race and Sex Stereotyping” [published at 85 Federal Register 60683, 9/28/2020]. The Order prohibits federal contractors and grantees from using employee training which can be seen to have as its premise “...the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.”

Continued...

Small Business Notes

A federal contractor or grantee may not use any workplace training that “inculcates in its employees any form of race or sex stereotyping, or any form of race or sex scapegoating” to include concepts that:

- One race or sex is inherently superior to another race or sex;
- An individual, by virtue of his or race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly on the basis of his or her race or sex;
- Members of one sex or race cannot, and should not, attempt to treat others without respect to race or sex;
- An individual’s moral character is necessarily determined by his or her race or sex;
- An individual, by virtue of his or her race or sex bears responsibility for actions committed in the past by other members of the same race or sex;
- An individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex;
- Meritocracy or traits such as a hard work ethic are racist or sexist or were created by a particular race to oppress another race.

In the event of a contractor’s or grantee’s noncompliance, the federal contract or grant may be canceled, terminated, or suspended and the contractor or grantee declared ineligible for further government contracts or grants. Contractors and grantees are required to include the provisions of the executive order in every subcontract, subgrant, or purchase order. The Office of Federal Contract Compliance Programs (OFCCP) will enforce the provisions of the executive order.

Small Business Notes

Thirteen State Attorneys General Object to U.S. Small Business Administration's Rule on Appeals Under the Payroll Protection Program

On September 28, 2020, thirteen state attorneys general (including Minnesota Attorney General Keith Ellison) signed a comment letter to the U.S. Small Business Administration (SBA) objecting to certain parts of the SBA's Interim Final Rule "Appeals of Loan Review Decisions under the Payroll Protection Program" (published August 27, 2020, at 85 FR 52883).

Payroll Protection Program (PPP) loans are made by private lenders with an SBA guarantee and the possibility of loan forgiveness. The Interim Final Rule provides that the SBA may investigate a loan and make an appealable determination that the borrower is not eligible for the loan or for loan forgiveness under the terms of the Program. The Attorneys General letter notes that most small businesses do not have the resources to defend against an SBA investigation and, instead, must rely the Interim Final Rules appeal procedure which, the Attorneys General maintain, "...leaves borrowers in the dark about crucial factual and legal findings by the SBA "and so put borrowers at "an extreme disadvantage" in the appeals process.

The comment letter notes four major deficiencies in the Interim Final Rule:

- The SBA has failed to provide any guidance on how it either evaluates PPP loans in its initial investigation or makes a final loan review decision about whether a borrower is eligible for a loan or loan forgiveness. This has the effect of leaving the borrower without any information to determine if it has submitted the necessary documents for the administrative record which is the sole basis of SBA's decision making.
- The Interim Final Rule does not provide the borrower with the ability to defer payments during the period of appeal. Given that the appeal process could take months and must be exhausted before the borrower can seek judicial relief in the courts this could result in payments for a loan or forgiveness for which the borrower is ultimately found to be ineligible.
- The Interim Final Rule provides that the venue for appeal is before a judge of the SBA's Office of Hearings and Appeals resulting in a circular process in which the SBA Administrator's decision on eligibility or forgiveness is reviewed by a party who is a subordinate of the Administrator. This situation, the Attorneys General maintain, raise substantial due process concerns because the appeal is not before and independent and neutral party.

The Interim Final Rule establishes unfair appeal procedures with regard to briefing, discovery, and standards of review. For example, as noted above the SBA is silent in the administrative record on the facts and law used in its initial decision but the Interim Final Rule requires borrowers on appeal to state the reasons the decision is alleged to be erroneous.

Continued...

Small Business Notes

The Attorneys General letter urges SBA to amend the Interim Final Rule to: 1. require SBA to set forth the factual and legal bases of its decisions; 2. hold loan applications in abeyance during appeals; 3. ensure that independent and neutral decision makers conduct appeals; 4. Provide borrowers fair procedures on appeal.

Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at [Small Business Notes](#)

Internal Revenue Service Notes that PPP Lenders Should Not Provide Borrowers with Loans Forgiven Under the CARES Act with Form 1099-C or Other Payee Statement

Loan forgiveness is usually reported by a lender to both the borrower and the IRS via filing of Form 1099-C and issuance of a payee statement to the borrower. In its new Announcement 2020-12, the IRS confirmed that the amount of PPP loan forgiveness is, under the CARES Act, excludable from the gross income of the borrower for income tax purposes. The announcement is explicit that lender **should not provide** either a Form 1099-C or a payee statement. Doing so can cause confusion among borrowers and possibly lead to deficiency notices to the borrower from the IRS.

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