U.S. Department of Labor Issues New Final Rule Altering Independent Contractor Test

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The U.S. Department of Labor issued its long-awaited Final Rule establishing its current independent contractor test. The test governs when employers can permissibly classify workers as independent contractors under federal law, specifically the Fair Labor Standards Act. Employers have been awaiting this Final Rule, or, at the very least, some level of certainty, for a year and a half since the Department of Labor issued its proposed rule in October 2022. This Final Rule comes at a busy time for the Department of Labor with President Biden also recently renominating Acting Secretary Julie Su for Labor Secretary again after a failed first nomination.

The Final Rule largely mirrors the proposed rule and includes a six-factor, totality-of-the-circumstances test:

- The degree to which the employer controls how the work is done;
- The worker's opportunity for profit or loss;
- The amount of skill and initiative required for the work;
- The degree of permanence of the working relationship;
- The worker's investment in equipment or materials required for the task; and
- The extent to which the service rendered is an integral part of the employer's business.

No factor has a predetermined weight, and they are not exhaustive. Meaning, the Department of Labor and courts now have flexibility to apply any given set of facts to the factors and weigh other external criteria. As always has been the case, employer internal classifications and labels are immaterial; what matters are the facts and the worker's relationship with the company.

The difference between employee and independent contractor status can be significant in multiple aspects of employment law. If a worker is determined to be an employee under the test but is misclassified as an independent contractor, the worker is entitled to overtime for all hours worked over 40 in a workweek if non-exempt, as well as workers' compensation coverage, unemployment compensation contributions, and other employee benefits. Employers are responsible for unpaid payroll taxes as well. Under the National Labor Relations Act, the difference is the right to unionize and engage in protected concerted activity.

The Final Rule rescinds the January 2021 test promulgated during the expiration of President Trump's term. Under that test, two core factors were given great weight: (1) an employer's control over a worker's work; and (2) the worker's opportunity for profit and loss. Those factors predominated in determining whether a worker was properly classified as an independent contractor; however, they no longer will under the Department of

Labor's new test. The Final Rule is expected to have major implications for the gig economy as well as consultants, trainers, and outsourced professionals like Human Resources and Information Technology.

This Final Rule will take effect on March 11, 2024. Employers should be mindful that different tests may apply based on the applicable law, agency, or state. For example, the Internal Revenue Service and the National Labor Relations Board both have different tests. State laws may vary as well. If companies classify certain workers as independent contractors, it is important to ensure that compliance exists across all tests. It is possible that a worker could be lawfully classified as an independent contractor under one test but not the next.

It is time to review workers classified as independent contractors to ensure compliance with this new test as well as the NLRB's and the IRS's tests. Often, the relationship may exist in a gray area, with some factors favoring employee status and others favoring independent contractor status. It is valuable to speak with employment counsel to evaluate the position's classification and role with the company. Misclassifications can be very costly and spawn civil suits and audits. If you have any questions about the Final Rule or employment-related inquiries at large, please contact Caleb P. Setlock or any member of Barley Snyder's Employment Practice Group.

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