

COMPLIANCE ALERT

DEPARTMENT OF LABOR WITHDRAWS INDEPENDENT CONTRACTOR FINAL RULE

On May 6, 2021, the Department of Labor (DOL) withdrew the Independent Contractor Final Rule that was set to go into effect on May 7, 2021.

The Fair Labor Standards Act (FLSA), enacted in 1938, provides a guarantee of a minimum wage and overtime pay to employees who are classified as non-exempt. Those classified as independent contractors are not provided protection under the FLSA, as they are not employees. The FLSA itself, does not provide much guidance as to how to properly identify independent contractors.

The Final Rule that was scheduled to go into effect would have established an “economic reality” test that employers could use to help determine if an individual was properly classified as an employee or an independent contractor. The withdrawn Final Rule had been said to make it easier for employers to classify workers as independent contractors, with two “core factors” that would have been applied in the determination of independent contractor classification. These two “core factors” were:

- ▶ The nature and degree of the individual's control over the work
- ▶ The individual's opportunity for profit or loss

Determination of whether someone is an employee or an independent contractor has been a challenge. And technology has only served to further confound matters. Take for example, newer-to-the-market smartphone, app-based “rideshare” and “delivery” businesses such as Uber and DoorDash. The DOL had to consider the classification of these organizations’ employees with really no prior benchmarks or precedent.

Over the years there have been more factors used by the courts and the DOL to determine independent contractor status. Though the factors may vary slightly and have not been used consistently, the six factors, generally speaking, are:

- ▶ The employer's versus the individual's degree of control over the work;

- ▶ The individual's opportunity for profit or loss;
- ▶ The individual's investment in facilities and equipment;
- ▶ The permanency of the relationship between the parties;
- ▶ The skill or expertise required by the individual; and
- ▶ Whether the work is “part of an integrated unit of production.”

DOL Secretary Marty Walsh has stated that the withdrawal of the Final Rule will “help preserve essential work rights and stop the erosion of worker protections that would have occurred had the rule gone into effect.” The Secretary wants to ensure that worker rights under the FLSA are protected.

The DOL even went so far as to issue reasons for withdrawing the rule:

- ▶ The independent contractor rule was in tension with the FLSA's text and purpose, as well as relevant judicial precedent.
- ▶ The rule's prioritization of two “core factors” for determining employee status under the FLSA would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring a review of the totality of the circumstances related to the employment relationship.
- ▶ The rule would have narrowed the facts and considerations comprising the analysis of whether a worker is an employee or an independent contractor, resulting in workers losing FLSA protections.

Employers need to look at the employment relationship with individuals and consider all relevant factors while determining whether an individual meets the requirements to be classified as an independent contractor or employee. Not only does the withdrawal of the Final Rule protect worker rights under the FLSA, but will also ensure that workers’ rights to fringe benefits are retained. Independent contractors typically go uncovered by unemployment insurance and worker’s compensation, so, if not properly classified, these benefits are lost.

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