Classifying Workers After DOL Contractor Rule Repeal

By **Katie Barton, Chris Caiaccio and Kayla Frederickson** (May 17, 2021)

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On Jan. 7, when then-President Donald Trump was still in office, the U.S. Department of Labor published a new, employer-friendly rule for determining independent contractor status under the Fair Labor Standards Act. The independent contractor rule had an initial effective date of March 8, but the Biden administration postponed the effective date to May 7.

On March 12, the DOL issued a notice of proposed rulemaking to withdraw the rule. On May 6, after providing an opportunity for public comment, the DOL withdrew the rule.

As a result, employers are left without the benefit of concrete DOL guidance for conducting worker status assessments. Instead, they will have to rely on case law that has provided inconsistent direction on application of the standard known as the economic realities test.

Background

The independent contractor rule would have focused on two core factors in determining independent contractor status under the FLSA: (1) the nature and degree of control over the work, and (2) the worker's opportunity to earn profits or incur loss based on the worker's actions.

The rule would also have considered three other less-probative factors, including the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the employer; and whether the work is part of an integrated unit of production.

In the absence of the independent contractor rule going into effect, independent contractor status under the FLSA will continue to be evaluated using the previous economic realities test applied by courts. Some of the most common factors for consideration under the economic realities test include:

- The extent to which the work performed is an integral part of the employer's business;
- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency of the relationship; and
- The degree of control exercised or retained by the employer.

Although the factors listed under the independent contractor rule and the economic realities test are essentially the same, under the economic realities test, typically, no single factor is determinative, and courts assess the totality of the circumstances to determine the extent of economic dependence between the worker and the employer.

Accordingly, the independent contractor rule was generally perceived as more employer-friendly than the economic realities test because it deemed certain factors to be the most important and thus offered some clarity to the classification analysis.

The Economic Realities Test

In contrast, under the economic realities test, the weight given to each factor, and occasionally the factors themselves, can vary significantly among jurisdictions. For example, while most jurisdictions describe the economic realities test as a six-factor test, courts in the Fifth Circuit typically describe the test as a five-factor test, which includes the factors listed above, minus the extent to which the work performed is an integral part of the employer's business.[1]

Because no factor is dispositive, courts have substantial discretion to determine the weight of each factor based on the individual circumstances at issue. However, even in cases where the economic realities test has been applied to the same or similar facts, courts have sometimes reached different conclusions.

For example, in Donovan v. Brandel in 1984 and Secretary of Labor v. Lauritzen in 1987, the U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Seventh Circuit, respectively, both considered the worker status of pickle harvesters within the same basic fact context and reached different conclusions on nearly every factor.[2]

There are numerous cases where courts have considered the appropriate classification of workers such as delivery drivers, ride service drivers, welders and sales workers, and for each profession, courts have reached different conclusions as to the appropriate status of the workers in question.

In some cases, the difference in outcome can depend on a minor factual difference. In other cases, the reason for the differing outcome is less obvious, which underscores the lack of predictability that so often results under the economic realities test. The DOL's independent contractor rule would have reduced this lack of predictability.

Conclusion

Now, employers are forced to make assessments concerning worker status without the benefit of concrete guidance, as contained in the independent contractor rule, and instead, are forced to rely on the sometimes directly conflicting case law applying the economic realities analysis, which is likely to produce differing results.

The DOL's decision to withdraw the independent contractor rule is a signal that the Biden administration is more likely to pursue policies considered employee-friendly than the previous administration. Employers may also see an increase in enforcement actions as compared to the previous administration.

With that in mind, employers should carefully consider whether any of their independent contractors should be reclassified as employees. Employers can start by identifying any

independent contractors who perform critical tasks for the company, whose work relates directly to the company's core business, or who the employer can't live without.

These individuals may be appropriately classified as employees. The fact that an individual works a flexible schedule or works remotely is likely insufficient standing alone to support the individual's classification as an independent contractor.

Additionally, employers should review their independent contractor agreements to ensure that the written agreement clearly reflects the parties' intention to create an independent contractor relationship.

However, employers should also bear in mind that an employee's preference to be classified as an independent contractor is not a factor in the classification determination. This is particularly significant for workers in the gig economy, who may prefer to be classified as independent contractors because of the added flexibility that comes along with such classification.

Employers who misclassify workers as independent contractors can be held liable for unpaid overtime pay, taxes, penalties and employee benefits. Employers should become familiar with how courts have applied the economic realities test in the jurisdictions where their employees are located. Employers should also bear in mind that many states have their own wage and hour laws and the test for determining worker status under state law may not be the same as under the FLSA.

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[1] See, e.g., Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369 (5th Cir. 2019).

[2] Compare Donovan v. Brandel, 736 F.2d 1114, 1119 (6th Cir. 1984) (workers were independent contractors) with Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987) (workers were employees).