Insights: Alerts

DOL Withdraws Independent Contractor Rule

May 5, 2021

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On January 7, 2021, the Department of Labor ("DOL") published a new rule for determining independent contractor status under the Fair Labor Standards Act ("FLSA"). The "Independent Contractor Rule" had an initial effective date of March 8, 2021, but the Biden administration postponed the effective date to May 7, 2021. On March 12, 2021, the DOL issued a notice of proposed rulemaking to withdraw the rule. The notice and comment period for the proposed withdrawal closed on April 12, 2021. On May 5, 2021, the DOL announced that the rule would be withdrawn effective May 6, 2021.

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 (3) amount of skill required for the work, (4) the degree of permanence of the working relationship between the worker and the employer, and (5) whether the work is part of an integrated unit of production. In the absence of the rule, independent contractor status under the FLSA will 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: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. However, the factors, and weight given to each, can vary significantly among jurisdictions. Employers should become familiar with how courts have applied the test in the jurisdictions where their employees are located.

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