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Department of Labor Releases Final Rule on Independent Contractor Classification

JANUARY 10, 2024 Written by

Overview

On January 9, 2024, the long-awaited new, final rule on employee or independent contractor classification under the Fair Labor Standards Act was released by the Department of Labor. The final rule rescinds the 2021 rule that implemented a different analysis for what constitutes an "independent contractor." Much of the back and forth surrounding this issue was impacted by the change in presidential administrations following the 2020 election. The Trump Administration sought to implement a rule that narrowed the test for classification. The rule never went into effect and once the Biden administration came into office, it took actions to withdraw the rule and the lengthy rulemaking process began all over.

The new rule adopts a non-exhaustive six-factor test focused on the "economic reality" of the relationship between a potential employer and a worker. The six factors include a worker's opportunity for profit or loss; investments made by the worker and the potential employer; the degree of permanence of the work relationship; and the degree of control an employer has over the work. The factors also include the extent to which work performed is integral to the employer's business, and the use of a worker's skill and initiative. Put another way, the "economic reality" test considers whether the worker depends on the potential employer for continued employment or if the worker is operating as an independent business. The final rule states that each factor in this test should be used to determine worker status under the FLSA and that all factors should be considered equally.

According to acting Labor Secretary Julie Su, DOL's rule brings the DOL "in line with the economic realities test developed by courts over the decades" and will "provide greater clarity and consistency in determining a worker's status, which helps workers and businesses known when they are covered by the Fair Labor Standards Act."

What do employers need to know?

This final rule could make it more difficult for companies to classify workers as independent contractors. The DOL itself has stated that this rule is designed to provide more protection to workers. Industries such as construction, trucking, and health care have been specifically identified as those that may be significantly impacted by the new rule.

What should employers do right now?

The final rule will be published in the Federal Register on January 10, 2024, and will go into effect on March 11, 2024. Based on the history surrounding this rule, as well as immediate responses to it, it is likely that new litigation from opponents of the rule could ensue. The U.S. Chamber of Commerce has already announced its opposition to the rule and publicly stated it is considering litigation to challenge its implementation. Additionally, previous litigation over

the 2021 rule and withdrawal is still pending in the U.S. Court of Appeals for the Fifth Circuit. It is likely that this case will restart and remanded to the Eastern District of Texas to consider the new final rule.

With that said, employers should undertake a review of their work force and assess whether they are at risk for potential independent contractor misclassification issues under the rule's new standard. Kilpatrick's Labor & Employment team is here to assist with any further questions and needs. Our team will continue to monitor any additional updates or material put out by the DOL and update this Legal Alert accordingly.