CLIENT ALERTS & INSIGHTS

Department of Labor Finalizes Rule Change on Independent Contractor Classification

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Authors: W. Eric Baisden, Adam Primm, Jordan J. Call

On January 9, 2024, the U.S. Department of Labor released details of its final rule regarding the proper circumstances for independent contractor classification under the Fair Labor Standards Act ("FLSA"). On January 10, 2024, the DOL followed up on its announcement and published the text of the final rule. Overall, the final rule will make it more difficult for companies to maintain independent contractor classification. The DOL stated its goal that the rule contains "an analysis for determining employee or independent contractor status that is more consistent with the FLSA as interpreted by longstanding judicial precedent."

The DOL's final rule changes the manner in which the DOL determines whether a worker is properly classified as an independent contractor or is actually an employee under the FLSA and entitled to minimum wage, overtime, and other protections. In a past alert, we discussed the DOL's initial proposal of the rule in October 2022. This final rule repeals a prior rule (issued by the Trump administration) with a new, less predictable multi-factor test. Under the now-repealed rule, the DOL focused primarily on two factors: the putative employer's degree of control over the work, and the contractor's opportunity for profit or loss. The new final rule uses a totality-of-the-circumstances, "economic realities" test, which includes the two primary factors from the Trump-era rule but does not give those two factors preferential or added weight. Although the DOL notes that these six factors are non-exhaustive, the DOL's final rule provides for an analysis that considers the following factors:

- The contractor's opportunity for profit or loss;
- The investments made by the contractor and the putative employer;
- The degree of permanence of the relationship between the contractor and the putative employer;
- The nature and degree of control by the putative employer over the contractor;
- The extent to which the work performed by the contractor is an integral part of the putative employer's business; and
- The contractor's skill and initiative.

None of these six factors has a predetermined weight. Also, the DOL may consider additional factors that it deems helpful in determining whether a worker is in business for themselves or economically dependent on a putative employer. It is widely expected that this rule will have a significant impact

on industries that regularly rely on independent contractor classification, such as trucking, construction, and healthcare.

Although the final rule overall will make it more challenging to maintain contractor classification, employers may find that there are some positive components in the Comments to the final rule. For example, in response to public comments received on the proposed rule, the DOL noted that a contractor's investments in vehicles for a business purpose can be considered investments of capital or entrepreneurial in nature. Also, the DOL clarified that requirements for compliance with a specific law or regulation (e.g., safety regulations) are not indicative of control, although compliance with the putative employer's preferences or quality control standards in excess of legal compliance may be indicative of control. The DOL also acknowledged that a contractor's possession of a commercial driver's license would be indicative of independent contractor status when used in conjunction with an entrepreneurial purpose.

The DOL's final rule is set to take effect on March 11, 2024. In advance of the effective date, employers should contact their legal counsel to review their classification of independent contractors and to determine whether to make any changes prior to the rule's effective date.

For more information on how the DOL's final rule may affect your business, contact a member of the firm's Labor & Employment practice group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at APrimm@beneschlaw.com or 216.363.4451.

Jordan J. Call at JCall@beneschlaw.com or 216.363.6169.