CLIENT ALERTS & INSIGHTS

Department of Labor Officially Withdraws Trump-Era Independent Contractor Final Rule

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On May 5, 2021, the U.S. Department of Labor withdrew the pro-business Independent Contractor Final Rule published in the final days of President Trump's administration. This withdrawal follows the Department of Labor's previous actions signaling a shifting stance on contractor-related matters including the proposed delay of implementation of the Final Rule and notice and comment period. The notice and comment period for the proposed withdrawal closed on April 12, 2021. On May 5, 2021, the Department of Labor announced that the rule would be withdrawn effective May 6, 2021.

Under the now-withdrawn Final Rule, employers would have been able to use the "economic reality" test by applying two core factors, and three other "guideposts" to determine status. Under the two core factors, the Department of Labor would have considered: (1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss. These factors were intended to "carry greater weight in the analysis than any other," according to the Department's publications prior to the withdrawal of the Final Rule. If the two factors conflicted, employers then would have considered three other "guidepost" factors, which would have assessed: (3) the amount of skill required for the work, (4) the degree of permanence in the working relationship, and (5) whether the work is part of an integrated unit of production.

According to the Biden administration's Department of Labor, the now-withdrawn Final Rule was inconsistent with the FLSA's purpose and text as well as existing judicial precedent. Also, the Department of Labor expressed concern that the prioritization of the two core factors would have undermined the longstanding "economic realities" test under which courts and agencies review a totality of the circumstances. The Department of Labor further acknowledged its concern that the Final Rule would have resulted in workers losing FLSA protections.

For the time being, the Department of Labor has not yet proposed a new independent contractor classification rule. Judicial precedent and Department of Labor regulations and guidance that were in place prior to the Final Rule's publication continue to apply. The Department of Labor will consider the "economic realities" test to be the governing standard. In the economic realities test, a factfinder considers the following six factors as relevant to the analysis of whether a worker is properly classified as an independent contractor:

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.

As employers should already have developed classification practices based on the preexisting economic realities test or more stringent state laws, this withdrawal does not create any new laws or rules with which employers must comply and accordingly modify practices. However, employers that have not already analyzed their contractor classification practices should do so, as the Biden administration has made clear that the expansion of protections for employees will be part of the administration's agenda. Benesch is continuing to monitor further developments and will provide future alerts as the Biden administration's Department of Labor continues to develop its stance on the proper classification of workers as independent contractors.

For more information on this topic, contact a member of the firm's Labor & Employment practice group.

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