"New" Department of Labor Independent Contractor Rule Issued

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On January 9, 2024, the United States Department of Labor (DOL) issued a ?new? Final Rule (the Rule), effective March 11, 2024, detailing how the DOL will determine whether a worker is an independent contractor or an employee for purposes of the Fair Labor Standards Act (FLSA), seehere. This so-called new Rule, originally proposed in October 2022, is actually not new at all ? it reinstates an equally weighted economic realities test that was developed through Supreme Court jurisprudence over the years and is a direct repudiation of the Trump-era rule that made it easier for hiring entities to classify their workers as independent contractors.

The Trump rule set out five factors to consider for worker classification. The test was imbalanced, explicitly highlighting two factors as the most important: (1) the company?s degree of control over the worker and (2) the worker?s ability to earn a profit. The other three factors that were deemed less important were: the skill required by the worker, the degree of permanence of the relationship between the worker and the hiring entity, and whether ?the work is part of an integrated production unit.? Based on this old rule?s test, if workers had some freedom in structuring their work and had the opportunity to make money off of that work, then they were properly classified as independent contractors. This Trump rule was a boon to the healthcare, trucking, construction, and gig economy industries, in particular.

The ?new? Rule focuses the inquiry on whether the workers are in business for themselves. Put differently, is the worker economically dependent on the hiring entity, or economically dependent on the worker?s own business? If yes, then the worker is an employee. As a result, DOL now has an *unweighted* list of non-exhaustive factors to consider. These six factors are: (1) the opportunity for profit or loss *depending on managerial skill*; (2) investments by the worker and the hiring entity; (3) the degree of permanence of the relationship; (4) the nature and degree of control; (5) the extent to which the work performed is an integral part of the employer?s business; and (6) skill and initiative.

The first factor is a material departure from the Trump rule. To be an independent contractor under this factor, the worker?s ability to earn a living must be tied to the *managerial skill* the worker needs to use. Examples of managerial skills are:

- whether workers can meaningfully negotiate their pay for the work;
- whether they accept a particular consulting job;
- whether they control when they work on the job;
- whether they engage in activities like marketing to expand their business; and
- whether the workers are the ones purchasing materials or equipment.

Also, if there is no opportunity for profit *or loss,* it suggests the workers are employees, not contractors.

The second factor analyzes whether the worker is invested in the worker?s own business. Contractors make monetary, capital, or entrepreneurial investments in the work they do, whereas employees do not. In short, this factor is asking whether the hiring entity is engaging another company to perform a project, or whether it is hiring an employee to do a job.

The third factor, the permanence factor, is the most straightforward. If the relationship is indefinite or ?at-will,? it weighs towards finding employment. Where the relationship is definite, non-exclusive, project-based, or sporadic (because the workers are in business for themselves), then the workers are more likely to be contractors.

The control factor has always been a part of the common law test for employment, so it is familiar. Where the hiring entity can set the workers? schedule, supervise the performance, reserve the right to discipline the workers, control the financial aspect of the relationship, or limit the workers? ability to work for others, then the workers are probably employees. If the worker is an independent contractor, then the hiring entity generally only retains the right to accept or reject the final product. Additionally, ensuring the worker?s compliance with applicable laws and regulations is not seen as a level of control sufficient to create an employment relationship, provided the sole purpose of the act in question is to ensure compliance.

The fifth factor, whether the work performed by the workers is integral to the company?s business, may be the ?hot button? factor of the moment. The analysis of this factor centers around a general description of what business the hiring entity is engaged in. If the worker?s duties go directly toward accomplishing the goals of that business, they are likely an employee. If the worker is doing something ancillary, then they may be an independent contractor. For example, the worker at the widget factory who operates the key machine in the widget-making process is probably an employee, but the worker who is called in to fix that machine when it breaks (and who fixes it at every widget factory in the area) may be an independent contractor.

The last factor looks at how the worker deploys skill and initiative in performing the work. Workers who have a special skill *and* take a ?business-like? initiative, are more likely to be independent contractors.

Again, this comes back to whether the workers are in business for themselves: is a worker?s participation in the economy centered around profiting from marketing and utilizing a specialized skill?

In sum, this new holistic approach looks at the economic reality of the situation. Where a worker is entirely dependent on the hiring entity to earn a livelihood, that worker is probably an employee. If the worker is operating their own business, especially if that worker is engaging in activities that businesses usually engage in, then that worker can possibly be an independent contractor.

One final point ? simply having an Independent Contractor Agreement does not make an individual an Independent Contractor. It is important to have such a contract to establish the understandings between the parties as to the scope of the engagement and financial terms, as with any vendor/vendee relationship, but the courts and the DOL will focus on the factors described above and will not rely on the existence of a contract to answer a potential misclassification question. This can be a nuanced and difficult analysis that should be taken seriously by businesses as FLSA misclassification litigation, and related DOL audits, are prevalent and costly for companies.

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