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Out With The Old, In With The… Old? DOL Releases "New" Independent Contractor Rule, Bringing Us (Mostly) Back to Status Quo

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Fulfilling a campaign promise for President Joe Biden, the United States Department of Labor (DOL) sent employers New Year's greetings by opening 2024 with a new final rule on independent contractor classifications, revising the economic realities test that determines those classifications. Is Biden's campaign promise to create a more stringent, California-like "ABC" worker classification test coming true? Just how much will this new rule change your business?

Quick Background

The DOL occasionally issues guidance regarding classifications of employees and independent contractors to help reduce instances of misclassification. The rule, titled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (FLSA), is the DOL's most recent iteration of that guidance.

The Short Answer

The rule reflects the DOL of the Biden Administration reverting to its Obama-era guidance after relaxing the independent contractor standard during the Trump Administration. It is reflective of

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decades of case law on the matter, so chances are it will not result in drastic changes to your company's current worker classification practices. Except for a few additional minor clarifications, the rule is also identical to the rule DOL initially proposed for public comment in October 2022.

The Long(er) Answer

The traditional worker classification "economic realities test" articulated in the DOL's guidance over time originates from 1947 Supreme Court decision *United States v. Silk*. Courts, who ultimately decide whether a worker is properly classified as an independent contractor, focus on the totality of the circumstances when determining whether workers depend on someone else's business or are effectively in business for themselves.

The factors that Courts look at under the economic realities test, which has been used for most of recent history, are: (1) the degree of control exercised by the employer over the worker, (2) the worker's opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Days before leaving office in January 2021, the Trump Administration issued a new Independent Contractor Rule which boiled down the distinction between employees and independent contractors into only two factors: (1) the nature and degree of control over the work, and (2) the worker's opportunity for profit or loss based on initiative and/or investment. Under this version of the rule, the other factors of the economic realities test discussed above (and used by the Courts) would only be considered if the initial two factors pointed to different classifications. That rule was set to take effect March 8, 2021.

Cue the Biden Administration then freezing all pending rulemaking by the Trump Administration and issuing a Notice of Proposed Rulemaking to withdraw the Trump rule. The DOL found that the Trump rule was in tension with the text and purpose of — and judicial precedent concerning — the FLSA, and would have compromised the analysis and led to workers losing FLSA protections. As a result, the DOL officially withdrew that rule in 2021.

Then, as it goes, there was drama in the courts: a Texas federal district court found the rule withdrawal to be unlawful in March 2022 and reimplemented it, leading the DOL to appeal the Texas decision two months later, until the DOL finally threw in the towel and abandoned the appeal altogether. Now, the DOL is back and better than ever with the new rule, which mostly brings us back to the traditional status quo on independent contractor classifications.

What Exactly Does the Rule Say?

The rule reimplements, but slightly revises, the economic realities test and decades of FLSA case law developing that test. In response to comments and criticisms, an additional factor was added to the test: whether any investments by the worker are "capital or entrepreneurial in nature." The rule also clarifies that, when considering the ever-important factor of "nature and degree of the entity's control over the performance of the work and the economic aspects of the working relationship," it will be relevant if the entity: sets the worker's schedule, supervises or reserves the right to supervise or discipline the worker, limits the worker's ability to work for others, uses technological means of supervision for the worker, and/or controls the prices of services and the marketing of those services or products provided by the worker. The rule tells employers to continue to engage in a "totality of the circumstances" analysis when considering all of the economic reality factors.

The rule reminds the public that it is ultimately up to the courts to decide whether a worker is properly classified as an independent contractor, and that state laws will remain applicable to the extent they provide different or more stringent tests for who is an independent contractor (*see* California, New Jersey, and Massachusetts). The DOL also emphasizes that the rule *does not* contain a California-style ABC worker classification test.

As is par for the course when new rules are published, the rule has already spurred legal challenges. Barring any fatal legal challenges, it will take effect on March 11 and will be codified at 29 C.F.R. Part 795.

For guidance or questions regarding this new independent contractor rule, consult your Akerman Labor and Employment attorney.
