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DOL Signals Changes to Independent Contractor Rule

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On May 1, 2025, the United States Department of Labor (DOL) Wage and Hour Division (WHD) issued a Field Assistance Bulletin, announcing that it will no longer enforce a 2024 Biden-era independent contractor rule under the Fair Labor Standards Act (FLSA). Going forward, the DOL will apply the framework set forth in a 2008 DOL Fact Sheet. That is, at least until the DOL is able to pass updated guidance, which is fated to occur under the new administration. Although the 2024 Rule remains in effect for private litigants (for the time being), the DOL is sending a strong message that it is changing course on the analysis it will apply as part of its own investigation and enforcement efforts.

Background

In the final days of the first Trump administration, the DOL issued an independent contractor rule, which generally made it easier for employers to classify workers as independent contractors. Departing from the long-used six-factor "economic realities" test, the new rule focused on only two "core" 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 the rule, a number of secondary factors would only be considered if the core factors pointed to different classifications. The new final rule was touted as a measure that would reduce litigation,

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increase flexibility, and support the gig economy. A larger impact of the rule would have been to limit employer obligations such as overtime and minimum wage.

In 2024, with the Biden administration at the helm, the DOL issued a final rule containing extensive guidance that generally expanded the circumstances under which a worker could be classified as an employee. The rule was intended to broaden worker protections and prevent misclassification. In the case of the gig economy, for example, workers may lack autonomy or entrepreneurial control and typically make limited investments in the business. The business, on the other hand, generally sets rates, substantially invests, and makes key business decisions. And, typically, workers are integral to the business. Thus, application of the 2024 Final Rule to a gig worker could result in an employee classification, rather than an independent contractor classification, increasing the number of workers who might be entitled to protections and benefits typically afforded only to employees, especially under the FLSA.

The Trump-era rule on the other hand — which focused on control over the work and opportunity for profit and loss and downplayed the other factors such as investment and how integral the worker is to the business — tipped the scale towards an independent contractor classification. Now, under a second Trump administration, the pendulum is poised to swing back, once again broadening the circumstances under which a worker may be classified as an independent contractor.

Since its implementation, the Biden-era rule has been the subject of many legal challenges. Now, in recent weeks, the DOL has asked federal courts to place most of the ongoing litigation challenging the legality of the Biden-era rule on hold, given that the DOL is now reconsidering the 2024 Final Rule, including whether to rescind the regulation.

The Field Assistance Bulletin

The Field Assistance Bulletin, titled *FLSA Independent Contractor Misclassification Enforcement Guidance*, provides that, as of May 1, 2025, the DOL "will no longer apply the 2024 Rule's analysis when determining employee versus independent contractor status in FLSA investigations." In a news release, the DOL explained that this "approach provides greater clarity for businesses and workers navigating modern work arrangements while legal and regulatory questions are resolved."

Until the DOL determines "the appropriate standard for determining FLSA employee versus independent contractor status," it will rely on Fact Sheet #13 (July 2008), and the analysis and guidance set forth in its newly reinstated Opinion Letter FLSA 2019-6, with respect to pending and future matters under DOL's investigation.

The 2024 Final Rule

As explained above, and as we wrote about here, the Biden-era final rule embraces a more "employee friendly" framework to determine whether a worker is properly classified as an independent contractor or an employee. The 2024 Final Rule focuses on the "economic realities" of the relationship between a worker and a potential employer and employs the following six-factor "totality of the circumstances" test:

1. The worker's opportunity for profit or loss based on managerial skill
2. Investments by the worker and the potential employer
3. The degree of permanence of the work relationship
4. The nature and degree of control over performance

5. The extent to which the work performed is an integral part of the employer's business
6. The worker's skill and initiative

The 2008 Fact Sheet

Like the 2024 Final Rule, both the 2008 Fact Sheet and the 2019 Opinion Letter consider the "economic realities" of the relationship between a worker and a potential employer. Both also look at the same six factors (plus a seventh factor) under a "totality of the circumstances" approach.

The 2008 Fact Sheet provides that "an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by 'economic reality' rather than 'technical concepts.'" The 2008 Fact Sheet explains that, while "the total activity or situation" controls, the following seven factors are considered significant:

1. The extent to which the services rendered are an integral part of the principal's business
2. The permanency of the relationship
3. The amount of the alleged contractor's investment in facilities and equipment
4. The nature and degree of control by the principal
5. The alleged contractor's opportunities for profit and loss
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
7. The degree of independent business organization and operation

The 2008 Fact Sheet also provides that certain factors are "immaterial" to determining whether there is an employment relationship, including the place where the work is performed, the absence of a formal employment agreement, whether an alleged independent contractor is licensed by a state or local government, and the time or mode of pay.

Unlike the 2008 Fact Sheet, however, the 2024 Final Rule contains detailed guidance and analysis regarding the application of each factor, which, in practice, tended to tip the scale in favor of an employee classification. Thus, the DOL's adoption of the 2008 Fact Sheet represents a "step back" from the Biden-era interpretation of the factors.

The 2019 Opinion Letter

The 2019 Opinion Letter addresses whether service providers working for a "virtual marketplace company" (VMC) are employees or independent contractors. "Generally, a VMC is an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services."

The Opinion Letter explains that the "touchstone of employee versus independent contractor status has long been economic dependence." Similar to the to 2024 Final Rule, the Opinion Letter outlines six factors that should be weighed "to answer the ultimate inquiry of whether the worker is engaged in business for himself or herself, or is dependent upon the business to which he or she renders service." The DOL concluded that the VMC service providers were independent contractors, not employees, noting, among other things, that that the service providers had significant flexibility, including the ability to pursue external economic opportunities, and thus, the service providers were not economically dependent on the company. While the exact reasoning for the DOL's reliance on the 2019

Opinion Letter is unknown, it could signal that the DOL will generally consider gig workers to be independent contractors going forward.

Key Takeaways

For now, the 2024 Final Rule has not been repealed or replaced, and according to the DOL, "remains in effect for purposes of private litigation." Yet, given the DOL's stated intentions regarding the 2024 Final Rule, we anticipate that a new final rule — similar to the two "core" factor rule issued under the first Trump administration — is on the horizon. Importantly, employers should continue to be aware of rules at the state and local level (like California, Arizona, and New Jersey) that may differ from the federal rules.

For guidance regarding worker classification issues, consult your Akerman Labor and Employment attorney.
