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DOL ADOPTS FINAL RULE REGARDING INDEPENDENT CONTRACTOR CLASSIFICATIONS UNDER THE FAIR LABOR STANDARDS ACT

On January 9, 2024, the U.S. Department of Labor ("DOL") announced a final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, that provides guidance on whether a worker is an employee or independent contractor under the Fair Labor Standards Act ("FLSA"). The final rule is set to take effect on March 11, 2024, and revises the DOL's prior guidance on independent contractor classifications under the FLSA. The final rule rescinds and replaces the DOL's previous 2021 rule, which the DOL viewed as a departure from longstanding judicial precedent and the text of the FLSA.

Prior Judicial Precedent and the DOL's Former Standard

Courts have historically applied an economic reality test to determine whether a worker is properly classified as an employee or independent contractor. Under judicial precedent, the ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer, resulting in the worker being classified as an employee, or is *economically independent*, resulting in the worker being classified as an independent contractor. In analyzing economic dependence, courts have historically applied a totality-of-the-circumstances analysis, which evaluates several factors, none of which carry any predetermined weight.

Under the DOL's old rule, employers were instructed to analyze five economic reality factors in determining whether a worker was properly classified as an employee or independent contractor. Contrary to judicial precedent, two of the five factors identified by the old rule – the nature and degree of control over the work, and the worker's opportunity for profit or loss – were designated as "core factors" that were most probative and carried greater weight in the independent contractor analysis.

The DOL's Final Rule

The DOL's new rule attempts to bring DOL guidance back in alignment with judicial precedent by returning to the totality-of-the-circumstances analysis. Under this analysis, no factor has predetermined weight in assessing a worker's economic dependence. The new rule further identifies six factors to be considered in determining whether a worker is properly classified as an employee or independent contractor:

1. ***Opportunity for profit or loss depending on managerial skill***: whether the worker has opportunities for profit or loss based on managerial skill that affect the worker's economic success or failure in performing the work.

2. ***Investments by the worker and potential employer***: whether any investments by the worker are capital or entrepreneurial in nature.

3. ***Degree of permanence of the work relationship***: whether the work relationship is indefinite in duration, continuous, or exclusive of work for other employers.

4. ***Nature and degree of control***: whether the employer has control over the worker's work and the economic aspects of the working relationship.

5. ***Extent to which the work performed is an integral part of the employer's business***: whether the work performed is an integral part of the employer's business.

6. ***Skill and initiative***: whether the worker uses specialized skills to perform the work, and whether those skills contributed to business-like initiative.

Workers Cannot Waive Employee Status

A common question is whether a worker can voluntarily waive employee status and choose to be classified as an independent contractor. The FLSA does not allow such voluntary waiver. The DOL has made clear that, under the FLSA, a worker is an employee and not an independent contractor if they are economically dependent on the employer for work. While workers may choose which work opportunities are suitable for them, if a worker is an employee under the FLSA, they cannot waive FLSA-protected rights, including minimum wage or overtime pay.

No Impact on Other Worker Classification Laws

Importantly, the final rule only revises the DOL's interpretation of worker classification under the FLSA. It has no effect on other laws that use different standards for employee classification. For example, according to the DOL:

> "[T]he Internal Revenue Code and the National Labor Relations Act have different statutory language and judicial precedent governing the distinction between employees and independent contractors, and those laws are interpreted and enforced by different federal agencies. Similarly, this rule has no effect on those state wage-and-hour laws which use an 'ABC' test, such as California or New Jersey. The FLSA does not preempt any other laws that protect workers, so businesses must comply with all federal, state, and local laws that apply and ensure that they are meeting whichever standard provides workers with the greatest protection. See 29 U.S.C. 218."

What to Expect Going Forward

Early indications suggest the DOL's final rule may make it more difficult for workers in certain industries to be classified as independent contractors. Accordingly, the new rule is likely to be challenged in court in the coming months.

Regardless, businesses using independent contractors should review their worker classifications to determine whether they are consistent with the DOL's final rule. If an Independent Contractor Agreement is in place, businesses should consider whether updates are needed.

For more information about the DOL's final rule, please reach out to Tara Stingley, Sydney Huss, or another member of Cline Williams' Labor and Employment Law Section at www.clinewilliams.com.

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