

Department of Labor Withdraws Final Rule on Independent Contractor Status

May 17, 2021

On January 7, 2021, the U.S. Department of Labor (DOL) issued a final rule that clarified how employers should determine who is an independent contractor and who is an employee for purposes of the Fair Labor Standards Act (FLSA). However, the DOL has since withdrawn this Trump-era rule, effective May 6, 2021.

Independent contractors are not subject to the FLSA's minimum wage and overtime requirements. The DOL's January 7, 2021 final rule set forth an "economic reality" test broken down into five different factors to determine whether the worker is in business for him or herself (and thus an independent contractor not covered by the FLSA) or economically dependent on another (and thus an employee covered by the FLSA), and emphasized two "core" factors above the rest: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss. The rule was intended to bring clarity to an area of law that has not always been consistently articulated by courts or the DOL and it provided employers with more opportunity to classify workers as independent contractors.

According to the U.S. Secretary of Labor Marty Walsh, the withdrawal of the rule was intended to "help preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect."

The final rule was likely to have the greatest impact on industries such as the gig-economy. The Biden Administration has not demonstrated any intent to replace the rule. Employers should continue to refer to the multifactorial economic realities balancing test (which does not promote one factor over the others) that the DOL has traditionally used when classifying workers, as well as judicial rulings on this issue in their relevant jurisdictions.

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