Employee or independent contractor? DOL finalizes new rule

By [Michele C. Spillman]

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The United States Department of Labor announced a new final rule on January 6, 2021 regarding classification of workers as independent contractors under the federal Fair Labor Standards Act (FLSA). "Streamlining and clarifying the test to identify independent contractors will reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction and flexibility," said DOL Wage and Hour Division Administrator Cheryl Stanton. The rule takes effect on March 8, 2021, absent action by the new administration (more on that below).

The FLSA entitles employees, but not independent contractors (aka "freelancers," "gig workers," and "consultants"), to certain protections, such a minimum wage and overtime requirements. Classification of workers has long been a confusing issue for employers because neither the FLSA nor its regulations define "employee" or "independent contractor."

DOL has historically used the "economic reality" test to

determine whether a worker is an employee or independent contractor. Under the economic reality test, "[I]n the application of the FLSA 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." Department of Labor. (2008). *Employment Relationship Under the Fair Labor Standards Act* [Fact Sheet 13].

In applying the economic reality test, DOL relied on six factors developed by the U.S. Supreme Court. But these factors often proved difficult to apply and led to conflicting results across various employers and industries, making worker classification a moving target and a hotly debated issue.

The new rule reaffirms the "economic reality" test, but identifies and explains two "core factors" that are most probative to the question of whether a worker is in business for herself (an independent contractor) or someone else (an employee): (1) the worker's nature and degree of control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment.

DOL identified three other factors that "may serve as additional guideposts in the analysis, particularly when the two core factors do not point to the same classification": (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production.

Despite this clarification, worker classification remains a

very fact-specific inquiry. As DOL cautions, “the actual practice of the worker and the potential employer is more relevant than what may be contractually or theoretically possible.”

Whether the final rule will become effective as planned remains a question. President-Elect Biden has pledged to combat worker misclassification, and many predict he will freeze the rule when he takes office on January 20, 2021.

We will continue to post updates on new guidance from DOL and other federal agencies on our website. For more information, consult with a Phillips Murrah labor and employment attorney.

*With a background in both commercial litigation and labor & employment law, **Michele C. Spillman** represents employers in a wide variety of industries and provides advice and counsel on federal and state employment laws regarding discrimination, harassment, retaliation, medical leave requests and accommodations, and wage and hour issues.*

For more information on how this DOL guidance may impact your business, please call 214.615.6365 or email Michele C. Spillman.

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