USDOL seeks to overturn two proposed FLSA rules: Independent Contractor Rule and Joint Employer Rule

By Byrona J. Maule and Phoebe B. Mitchell

In January, the United States Department of Labor (DOL) issued a notice of proposed rulemaking regarding the classification of independent contractors. Now, just months into President Biden's term, his administration seeks to overturn both this proposed rule and the DOL's final rule regarding joint employers.

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Independent Contractor

The proposed independent contractor rule, discussed at length here, significantly changed the legal analysis involved for employers deciding how to classify their employees. In stating

its intention to rescind the new independent contractor rule, the DOL stated that the new "economic reality test," which is not used by courts or the department, is not supported by longstanding case law or the text of the Fair Labor Standards Act (FLSA). Further, the DOL commented that the new rule minimizes the traditional factors utilized by courts in classifying workers, making it less likely to establish that a worker is an employee under the FLSA. Worker classification is an important issue for employers as it determines which workers are entitled to benefits and the overtime protections under the FLSA.

The DOL did not provide guidance on a replacement for the proposed rule. President Biden has stated his support for a uniform independent contractor test modeled after California's "ABC" test. The "ABC" test considers a worker to be an employee unless their employer establishes all three of the following:

1. The worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of such work and in fact;
2. The worker performs work that is outside of the "usual course" of the hiring entity's business; and
3. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the type of work performed for the company.

Joint Employer

The DOL's joint employer rule clarified an employee's joint employer status, such as when an employee performs work for his or her employer that simultaneously benefits another individual or entity. The rule, which took effect on March 16, 2020, was subsequently challenged by 17 states and the District of Columbia in a lawsuit filed in the Southern District of New York. The lawsuit claimed that the new joint

employer rule violated the Administrative Procedure Act. The Southern District of New York agreed, holding that the new rule was contrary to the FLSA.

The March 16, 2020 final rule included several elements that were not consistent with the DOL's prior joint employer rule, including:

- a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
- a provision that an employee's economic dependence on a potential joint employer does not determine whether it is a joint employer; and
- a provision that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FSLA more or less likely.

Jessica Looman, the DOL Wage and Hour Division Principal Deputy Administrator stated that "The Wage and Hour Division's mission is to protect and respect the rights of workers. Rescinding these rules would strengthen protections for workers, including essential front-line workers who have done so much during these challenging times."

The DOL is seeking public input until April 12, 2021 on its proposal to rescind these two rules.

Phillips Murrah's labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients regarding the DOL's new rules.

Byrona J. Maule is a Director and litigation attorney who represents executives and companies in a wide range of business and litigation matters with a strong emphasis on employment matters.

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