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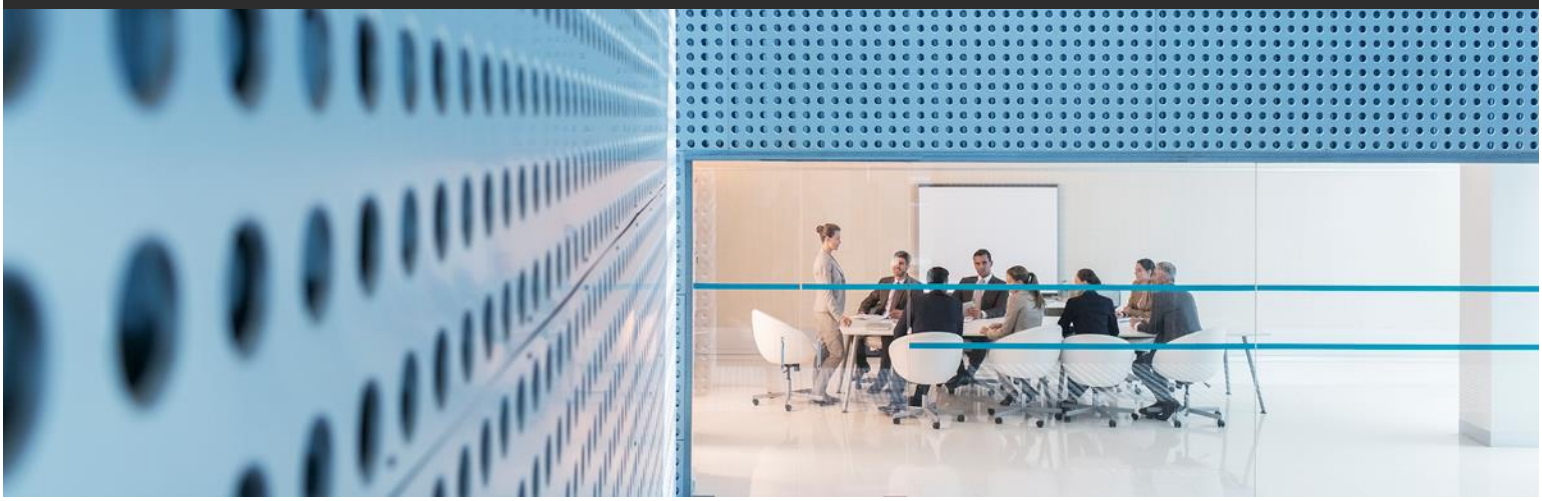

January 2021

Department of Labor Issues Final Rule for Identifying Independent Contractors in an Employer's Workforce

Following up on its proposed rule issued in September 2020, on Jan. 6, 2021, the Department of Labor (DOL) issued its final rule on worker classification. The final rule, effective March 8, 2021 (60 days from publication in the Federal Register), changes little from the DOL's proposed rule but adopts a five-part test that purportedly clarifies, as opposed to alters, the federal landscape with respect to classification of workers as independent contractors not subject to Fair Labor Standards Act's minimum wage and overtime protections. The final rule runs counter to the current state-level trend of adopting and/or entertaining the enactment of laws and/or regulations that discourage the use of independent contractors. Apart from the DOL's adoption of a multifactor test, which appears to make it easier for companies to label workers independent contractors, the final rule goes further, expressly indicating companies can offer independent contractors certain employee benefits without impacting their classification status, provided the workers satisfy the multifactor test's other provisions.

Breaking Down the Test

The DOL's new five-part test comprises two main factors and three guiding factors, to be evaluated in that order. If the two main factors considered together point to independent-contractor status (or employee status), companies may rely on that determination and need not consider any of the three guiding factors.

The two main factors focus on determining whether the worker in question is her own business, as opposed to a part of the company's business:

(1) The level of control the individual has over his or her own work; and,

(2) The opportunity for profit or loss due to their own personal investment.

If, and only if, the analysis of the two main factors prove indeterminate, the rule directs companies to weigh three guiding factors, which require evaluation of:

(1) the level of skill of the role involved;

(2) the permanence of the working relationship; and

(3) how the role in question relates to the company's overall business operation.

To help in this assessment, the DOL has included useful examples of how its test applies to impacted industries, including among others, truck driving, journalism, and household repair.

Employer Provision of Benefits Is Not an Indicator of Employee Status

The DOL's standardized multifactor test generally adheres to already established federal jurisprudence concerning the employee-or-independent-contractor question while "sharpening" the inquiry into "five distinct factors, instead of the five or more overlapping factors used by most courts and previously the department." In January 2019, the National Labor Relations Board adopted an independent contractor classification test that, like the DOL's, identifies an individual's "entrepreneurial opportunity" for profit or loss as the primary signal of whether s/he is more akin to a small-business operator than an employee. What is new is the DOL's inclusion in its final rule of language that makes clear that "the offering of health, retirement, and other benefits is not necessarily indicative of employment status." The DOL apparently included this language in response to concerns that many employers resisted providing benefits to independent contractors because they feared doing so would serve as proof of employee status. Although the DOL did not go so far as to say employers may provide contractors with any and all benefits, and made clear that the offering of certain benefits to employees and contractors alike could still be strong proof of employment status, it nevertheless gave employers a go-ahead to offer contractors certain if not slightly different benefits from those offered to employees, provided the workers still satisfy the factors associated with the new rule. This could prove useful to companies engaged in highly competitive industries, like trucking, where such benefits are a powerful recruiting tool.

Takeaway Lessons

The DOL's final rule on worker classification, a seemingly pro-employer development, may be short-lived for a variety of reasons. First, state governments are increasingly focused on worker classification disputes; while companies may believe certain workers readily satisfy the DOL's new multifactor test, they still must evaluate their classifications under applicable state law. In states that adopt the ABC test, compliance with the DOL's rule may be helpful, but it is not determinative. Moreover, because the final rule does not truly become "final" for 60 days, there is ample opportunity for the incoming Biden administration to withdraw it. Lastly, the Equal Employment Opportunity Commission stated in its five-year strategic enforcement plan that it too may try to provide clarification around employers' increasing use of independent contractors and similar employment configurations. Accordingly, even if the new

administration does not withdraw the DOL's final rule, other federal agencies could soon undermine the rule's seemingly pro-employer lean.

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