

Alert | Labor & Employment



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A Return to Status Quo: The Biden Administration Withdraws the Trump Administration's Independent Contractor Rule

As discussed in our [Jan. 8, 2021 GT Alert](#) on this topic, on May 5, 2021, the Biden administration's Department of Labor (DOL) rescinded the Trump administration's Jan. 6, 2021, Independent Contractor Rule. The DOL's decision is effective as of May 6.

The Rule

During the final months of the Trump administration, the DOL fast-tracked an Independent Contractor Rule that adopted a five-part test that purportedly clarified, as opposed to altered, the federal landscape with respect to classification of workers as independent contractors not subject to the Fair Labor Standards Act's (FLSA) minimum wage and overtime protections. The DOL's newly endorsed test – which was cheered by the business community – consisted of two main factors and three guiding factors, to be evaluated in that order. The first two factors were:

- The level of control the individual has over his or her own work; and,
- The opportunity for profit or loss due to their own personal investment.

If, and only if, the analysis of the two main factors proved indeterminate regarding independent contractor status, the Independent Contractor Rule directed companies to weigh three guiding factors, which required evaluation of:

- the level of skill of the role involved;
- the permanence of the working relationship; and
- how the role in question relates to the company's overall business operation.

The Independent Contractor Rule also explained that companies could offer independent contractors certain employee benefits without impacting their classification status, provided the workers satisfied the five-part test's other provisions. Overall, the Independent Contractor Rule ran counter to the state-level trend discouraging the use of independent contractors and was viewed by many as a boon to gig economy employers.

The Department's Reasoning

On May 5, 2021, the DOL, which had previously stayed its enforcement, withdrew the Independent Contractor Rule, reasoning it was inconsistent with the FLSA's text and purpose and would be confusing and disruptive to businesses because it departed from longstanding judicial precedent. Specifically, the DOL explained:

- The Independent Contractor Rule improperly emphasized and elevated the level of control and opportunity for profit or loss as the core factors in determining employee status and departed from the multi-factor economic realities test that courts have used for decades.
- The Independent Contractor Rule impermissibly narrowed several factors from the economic realities test, and the narrowing or downplaying of these factors would have led to more workers being classified as independent contractors and not entitled to the FLSA's protections.
- The Independent Contractor Rule complicated rather than simplified the analysis for determining whether a worker is an employee or independent contractor under the FLSA because the test failed to align with the FLSA's broad scope and had never been applied by any court.

In addition to the above substantive issues with the Independent Contractor Rule, the DOL faulted the Independent Contractor Rule for not quantifying the Rule's costs, transfers, and benefits. The DOL also found that withdrawing the Rule would ultimately benefit workers as a whole because more workers would receive the FLSA's protections.

Key Takeaways

The uncertainty looming over the Independent Contractor Rule as a result of the change in administrations has ended. Employers now know that the analysis of worker classification under the FLSA has reverted to its prior iteration, effectively reestablishing the status quo. In the FLSA context, courts will continue to rely on the economic realities multi-factor test, which focuses on whether the worker is, as a practical matter, economically dependent upon the employer. In addition, employers should look to applicable state law when analyzing whether a worker is an independent contractor. Some states have employee-friendly worker classification tests that make it challenging for employers to classify workers as independent contractors under state law.

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