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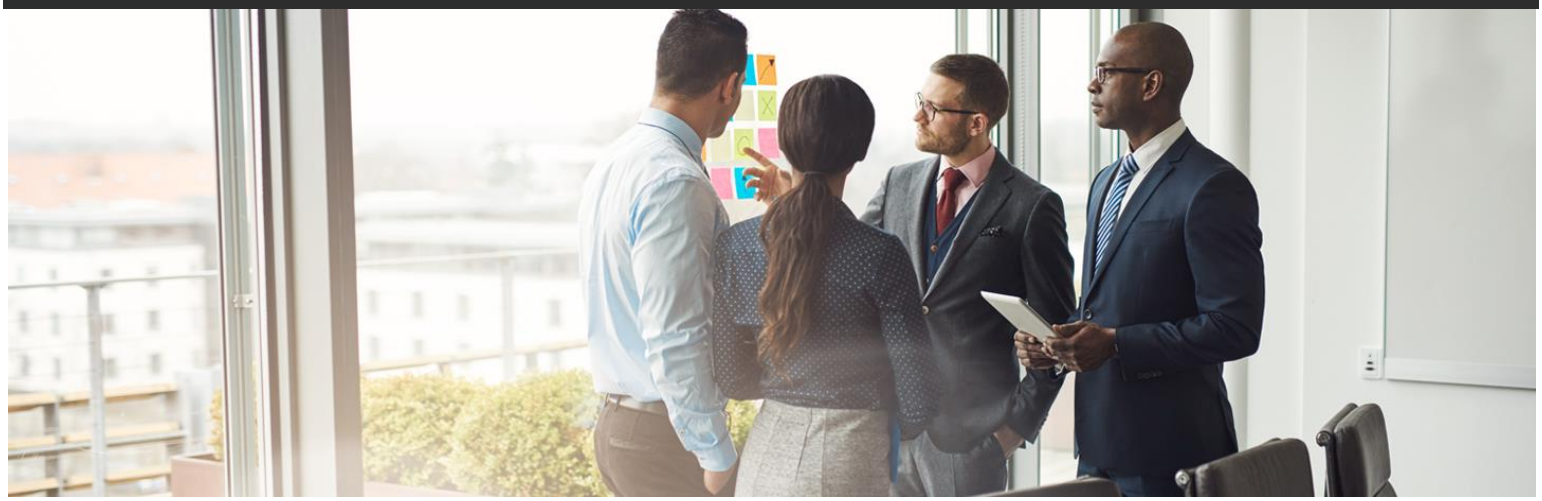

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DOL Unveils Final Independent Contractor Rule

On Jan. 9, 2024, the U.S. Department of Labor (DOL) released a long-awaited final rule concerning when employers can classify workers as independent contractors under federal law. This is the final version of the Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA), which DOL proposed in October 2022. It establishes a six-factor test for determining whether a worker is an employee or an independent contractor. The final rule was published in the Federal Register Jan. 10, 2024, and takes effect March 11, 2024.

The final rule rescinds the Independent Contractor Status Under the Fair Labor Standards Act rule (2021 IC Rule), which DOL published Jan. 7, 2021 (see GT Alert), and replaces it with an analysis for determining employee/independent contractor status that is more consistent with longstanding judicial interpretations. The 2021 IC Rule focused on "core factors." DOL explained in its October 2022 proposal that it believed the 2021 IC Rule did not fully comport with the FLSA's text and purpose as courts have interpreted it and departed from decades of case law applying the economic realities test. Instead of using the "core factors" set forth in the 2021 IC Rule, the final rule returns to a totality-of-the-circumstances analysis of the economic realities test, in which the factors do not have a predetermined weight and are considered in view of the economic reality of the activity as a whole. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor. Notably, the final rule does not adopt an "ABC" test, which permits an independent contractor relationship only if all three factors in a three-factor test are satisfied.

The final rule continues to affirm that a worker is not an independent contractor if they are economically dependent on an employer for work. Consistent with judicial precedent and DOL's interpretive guidance before 2021, the final rule applies the following six factors to analyze employee or independent contractor status under the FLSA, and no single factor is dispositive:

1. **Worker opportunity for profit or loss**: Considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker (1) determines or meaningfully negotiates their pay; (2) accepts or declines jobs or has power over timing; (3) advertises their business; and (4) makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, employee status is suggested.

2. **Worker and potential employer investments**: Worker investments that are capital or entrepreneurial in nature indicate independent contractor status, as they generally support an independent business and serve a business-like function (e.g., increasing the worker's ability to do different types of work, reducing costs, or extending market reach). Examples of worker costs that do *not* evidence capital or entrepreneurial investment, suggesting employee status, include (1) tools/equipment to perform a specific job; (2) labor; and (3) costs the potential employer imposes unilaterally on the worker. If the worker is making similar investment types as the potential employer (even if smaller), independent contractor status is suggested.

3. **Work relationship permanence**: When the work relationship is indefinite in duration, continuous, or exclusive of work for other employers, employee status is suggested. When the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities, independent contractor status is suggested.

4. **Employer control over work**: Considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship, i.e., whether the potential employer sets the worker's schedule, supervises performance, or explicitly limits worker ability to work for others; whether the potential employer uses technological means to supervise work performance (via a device or electronically), reserves the right to supervise/discipline workers, or places demands/restrictions on workers preventing them from working for others when they choose. This factor also considers whether the potential employer controls economic aspects of the working relationship, including control over prices or rates for services and the marketing of the services or products provided by the worker. Control is *not* indicated if a potential employer acts solely to comply with a specific, applicable federal, state, tribal, or local law or regulation.

5. **Extent to which work performed is integral to employer business**: Measures whether the worker function is integral to the business rather than whether any individual worker is integral to the business. When the work performed is critical, necessary, or central to the potential employer's principal business, employee status is suggested. When the work performed is not critical, necessary, or central to the potential employer's principal business, independent contractor status is suggested.

6. **Use of worker skill and initiative**: Considers whether the worker *uses* specialized skills to perform the work and whether those skills contribute to entrepreneurial initiative. If a worker uses specialized skills, this indicates independent contractor status. Employee status is indicated

if the worker depends on potential employer training or does not use specialized skills. Where the worker brings specialized skills to the work relationship, this itself does not indicate independent contractor status because both employees and independent contractors may be skilled workers.

According to DOL, the new rule is different from the 2021 IC Rule and is now consistent with the approach federal courts have generally employed for decades:

- Returns to a totality-of-the-circumstances economic realities test, where no single factor or group of factors is assigned any predetermined weight;
- Considers six factors (instead of five), including the investments made by the worker and the potential employer;
- Provides additional analysis of the control factor, including a detailed discussion of how one should consider scheduling, supervision, price-setting, and the ability to work for others when analyzing the nature and degree of control over a worker;
- Returns to DOL's longstanding consideration of whether the work is integral to the employer's business (rather than whether it is exclusively part of an "integrated unit of production");
- Provides additional context to some factors; and
- Omits a provision from the 2021 IC Rule that minimized the relevance of an employer's reserved but unexercised rights to control a worker.

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