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The U.S. DOL Issues Final Rule on Independent Contractor Classifications

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At a Glance

- On January 10, 2024, the U.S. Department of Labor published its Final Rule significantly changing the existing standard for the independent contractor classification under the Fair Labor Standards Act.
- This Final Rule rescinds the analysis promulgated in the final days of the Trump administration and, in keeping with the Biden administration's agenda, returns to an earlier and more worker-friendly version of that analysis.

On January 10, 2024, the U.S. Department of Labor (the DOL) published its Final Rule significantly changing the existing standard for the independent contractor classification under the Fair Labor Standards Act. This Final Rule rescinds the analysis promulgated in the final days of the Trump administration (the Trump Rule) and, in keeping with the Biden administration's agenda, returns to an earlier and more worker-friendly version of that analysis. In keeping with the back-and-forth or seesawing experience employers have become well-acquainted with over the last few administration shifts, employers who relied on the Trump Rule must now recalibrate to ensure their compliance with this Final Rule before it becomes effective on March 11, 2024.

Prior to the Trump Rule, courts and the DOL consistently applied an economic reality test to determine whether a worker was an independent contractor, as opposed to an employee. That test developed over time but essentially had six components: (1) opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the potential employer, (3) degree of permanence of the work relationship, (4) nature and degree of control

over the work performed, (5) extent to which the work performed is an integral part of the potential employer's business, and (6) skill and initiative. Historically, courts and the DOL did not weigh any of those components more heavily than any of the others.

During the Trump administration, however, the DOL created a formal regulation addressing the economic reality test which significantly shifted the analysis to the more employer-friendly side of the spectrum. The Trump Rule limited the economic reality test to five components (combining two of the above components into one), greatly narrowed one component, and gave much greater weight to two of the five components. If those two "core" components — nature and degree of control over the work being performed and the worker's opportunity for profit or loss — weighed in favor of a finding of independent contractor status, the Trump Rule provided that there was a "substantial likelihood" that the worker was an independent contractor. In such a scenario, the other three components carried little, if any, weight in the analysis.

As noted above, the Final Rule just announced is essentially a rescission of the Trump Rule and a shift back to the worker-friendly end of the spectrum. This return to the historic economic reality test restates the original six components with none of those weighing more heavily than any others.

In terms of practical guidance, employers who shifted their independent contractor classification analyses in the wake of the Trump Rule to focus on its "core" components must now reexamine those classifications to ensure their compliance going forward. Employers that did not change their classification analyses in the wake of the Trump Rule should already be compliant with the new Final Rule.

Looking to the bigger picture, this change is just another example of the legal shifts that employers have come to expect when a different party takes control of the White House. Depending on the outcome of the upcoming 2024 election, employers can either expect the recent slew of worker-friendly legislation and regulations to continue or to shift back towards decisions more favorable to employers.

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