Legal Update Article

Department of Labor Issues Final Independent Contractor Rule

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The Department of Labor's (DOL) Wage and Hour Division has formally released a **Final Rule** defining "independent contractors" under the Fair Labor Standards Act (FLSA). The regulation provides that "an individual is an independent contractor, as distinguished from an 'employee' under the Act, if the individual is, as a matter of economic reality, in business for him or herself."

The regulation was published in the *Federal Register* on January 7, 2021, and is scheduled to take effect on March 8, 2021, 60 days after publication.

Economic Dependence Factors

The final regulation largely adopts the Notice of Proposed Rulemaking (NPRM) introduced September 25, 2020, with a few changes made in response to the more than 1,800 comments received on the NPRM.

Under the Final Rule, five distinct factors inform the "economic dependence" inquiry, none of which are dispositive. Nevertheless, the Final Rule gives the following two "core factors" the most weight:

1. The nature and degree of the worker's control over the work; and

2. The worker's opportunity for profit or loss.

The DOL considers these two factors to be most probative of economic dependence. The final regulation explains that these two factors are given greater probative value because, "if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."

If these two factors point to different conclusions as to the individual's status, the DOL explains that the other three (less probative) factors can help guide the analysis:

3. "[T]he amount of skilled required"

4. "[T]he degree of permanence" of the parties' work relationship

5. An analysis of whether the putative employee's work is "part of an integrated unit of production"

Emphasis is on the actual practices of the working relationship, not what the parties' contract may theoretically allow (such as rights reserved, but never exercised, by the putative employer).

Changes From Proposed Rule

In response to public comment, the Final Rule includes a new subsection stressing that

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additional factors not listed also may be useful criteria in determining an individual worker's status under the FLSA, to the extent they are probative as to whether the individual is in business for themselves or is economically dependent on an employer.

Additionally, in the Final Rule, the DOL revised language in the NPRM to more clearly articulate the difference between the "probative value" of a core factor, generally, and its weight in a particular case to emphasize that "greater probative value" does not always mean that the factor carries more weight.

Many commenters on the NPRM urged the DOL to add industry-specific examples to the Final Rule demonstrating how the newly refined economic reality test would apply. The agency largely declined the recommendation, noting that doing so would result in "an exhaustive treatise" and that it was impractical "to provide examples for every conceivable scenario." However, a new section to the Final Rule offers six examples that shed light on the various economic reality factors in different factual and industry scenarios.

Rule's Future is Uncertain

While the Final Rule is scheduled to go into effect on March 8, 2021, the Biden administration may try to delay, and ultimately block, it. Joe Biden is expected to issue a directive to all agencies to delay the effective date of any pending regulation that is not yet effective. Putting aside legal challenges to this directive, the Biden administration could issue a new rule, rescinding this Final Rule. Further, under the Congressional Review Act, the Democratic majority in the Senate and House could rescind the new rule with presidential approval.

Alternatively, the independent contractor Final Rule could face legal challenge, and the Biden DOL may not defend it.

Finally, the Final Rule makes clear that the standard adopted does not supplant state law or apply to other federal laws beyond the FLSA. Employers must consider state law variances, including states (like California) that apply a more demanding standard.

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Businesses should monitor further developments when determining whether a worker is properly classified as an independent contractor. If you have questions about how to classify individuals to ensure compliance with the FLSA, as well as other federal and state laws, contact a Jackson Lewis attorney.