White and Williams LLP

Déjà vu – the Department of Labor's Final Rule on Worker Classification

Joseph M. Carr
Labor and Employment Alert
1.11.24

On January 9, 2024, the United States Department of Labor (the "Department") announced its final rule on classifying workers as employees or independent contractors under the Fair Labor Standards Act (FLSA). Effective **March 11, 2024**, the Department will again apply a totality-of-the-circumstances economic reality test to determine a worker's status as either an employee or independent contractor.

Four Scores and Some Years Ago

Since the 1940s, the Department and courts have applied an economic reality test to determine whether a worker is an employee or independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the hiring entity for work or is in business for themselves. If the former, the worker is an employee; the latter, the worker is an independent contractor.

In assessing economic dependence, courts have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or independent contractor, with no factor having more weight than another. Generally, those factors included the opportunity for profit or loss, investment, permanency, control, whether the work is an integral part of the business, and skill and initiative.

The 2021 IC Rule

On September 25, 2020, the Department published the Notice of Proposed Rulemaking ("NPRM") and request for comments on its proposed Independent Contractor Status under the Fair Labor Standards Act rule (the "2021 IC Rule"). Following the submission of thousands of comments, the Department issued its final rule in January 2021. Seeking to provide guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry, the Department identified five economic reality factors to guide the inquiry into a worker's status as either an employee or independent contractor.

Notably, two of the five factors, (1) the nature and degree of control over the worker and (2) the worker's opportunity for profit or loss, were designated as "core factors" that were the most probative and carried greater weight in the analysis. If these two core factors pointed towards the same classification, there was a substantial likelihood that the worker's classification was accurate. The three less probative non-core factors were (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship between the worker and the business, and (3) whether the work is part of an integrated unit of production. The 2021 IC Rule was generally considered independent-contractor-friendly.

Employee or Independent Contractor Classification Under the Fair Labor Standards Act

On October 13, 2022, the Department again published a NPRM regarding employee or independent contractor classification under the FLSA, proposing to rescind and replace the 2021 IC Rule. In its proposal, the Department explained its belief "that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by courts and departed from decades of case law applying the economic reality test." In particular, it found designating only two factors as "core factors" was improper given longstanding precedent.

The comment period on the proposed rule ended on December 13, 2022, with the Department receiving over 55,000 comments.

On January 9, 2024, the Department announced its final rule to "restore the multifactor analysis used by courts for decades, ensuring that all relevant factors are analyzed to determine whether a worker is an employee or independent contractor." The final rule defines "independent contractor" as a worker who, as a matter of economic reality, is not economically dependent on a hiring entity for work and is in business for themselves. This rule provides six factors that guide the analysis of a worker's classification, including:

1. Any opportunity for profit or loss;
2. The financial stake and nature of any resources a worker has invested in the work;
3. The degree of permanence of the work relationship;
4. The degree of control a company has over the person's work;
5. Whether the work the person does is essential to the business; and
6. The worker's skill and initiative.

Like the 2021 IC Rule, this rule permits the consideration of additional factors if they are relevant to the overall question of economic dependence. However, departing from the 2021 IC Rule, no one factor is more probative or given more weight than another. The final rule is effective on March 11, 2024.

While this final rule relatively restores the prior analysis applied by the Department and courts to determine whether a worker is an employee or independent contractor, businesses must also consider state laws applicable in their jurisdiction. For example, in California, Massachusetts, and New Jersey, workers are considered to be employees and not independent contractors unless the company can satisfy three conditions (known as ABC tests). In these jurisdictions it is more likely that workers will be deemed employees under the state law statutes.

In anticipation of the March 11, 2024 effective date, businesses should consider their classification policies and determine necessary revisions to maintain compliance. Companies should analyze how the new rule will impact their business, particularly in jurisdictions which do not already impose a more burdensome test under state law. As always, businesses should also consider engaging outside counsel to review their policies and contracts for guidance under the new rule.

Members of the Labor and Employment Group at White and Williams LLP are available to assist businesses understand the new rule on worker classification promulgated by the Department. If you have questions, please contact Joseph M. Carr, Associate (carrj@whiteandwilliams.com; 610.782.4907) or another member of the Labor and Employment Group.
For more developments on labor and employment, head to The Employment Law Counselor blog and listen to the latest Employment Law Counselor podcast on related topics.