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Electronic Alert

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The U.S. Department of Labor Has Issued Its Final Rule, Changing the Independent Contractor Test (Again)

By Andrew Schpak

On January 10, 2024, the U.S. Department of Labor published its final rule regarding the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA). The final rule replaces the 2021 Independent Contractor Rule (ICR) and aims to reduce the risk that employees are misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves.

Effective Date: The final rule is set to become effective on March 11, 2024, which allows businesses approximately two months to adapt to the revised standards.

Key Distinctions from the 2021 Rule: While sharing similarities with the 2021 ICR, the final rule introduces some notable distinctions. For example, unlike previous guidance, the final rule's analysis can be applied to workers in any industry. The final rule also returns to a totality-of-the-circumstances economic reality test, which now considers six factors as opposed to the previous rule which only considered five. These six factors include:

(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;
(5) extent to which the work performed is an integral part of the potential employer's business; and
(6) skill and initiative.

The final rule gives examples as to how to apply each of these factors. In contrast to the 2021 rule, no factor or set of factors is entitled to more weight than the others, with the focus instead being on the degree to which the worker is economically dependent on the company.

Interaction with Other Laws: It is important to note that the final rule only revises the Department's interpretation under the FLSA and does not impact worker classification under other laws at the federal, state, or local levels. For example, the Internal Revenue Code and the National Labor Relations Act have different statutory language and judicial precedent governing the distinction between employees and independent contractors, and those laws are interpreted and enforced by different federal agencies. Similarly, this rule has no effect on those state wage and hour laws, including those which use an "ABC" test, such as California.

Practically speaking, it will be harder for a worker to qualify as an independent contractor under the new test as compared to under the old test. As the effective date approaches, employers should

consider auditing their independent contractor relationships to confirm that their documentation and how those relationships operate in practice minimize the risk of worker misclassification claims.

For questions related to worker classification or the final rule, contact Andrew Schpak at 503-276-2156 or aschpak@barran.com.