How Will the New DOL Final Rule Regarding Independent Contractors Impact Your Company?

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Let's start with the basics.

The new Department of Labor (DOL) Final Rule provides the following non-exhaustive six-factor test regarding whether a worker should be classified as an employee or an independent contractor for wage payment purposes:

1. the worker's opportunity for profit or loss depending on his/her managerial skill;
2. investments made by the worker vs. the potential employer/company;
3. the degree of permanence of the work relationship;
4. the nature and degree of control the company has over the work;
5. the extent to which the work to be performed is an integral part of the potential employer's business;
6. and the worker's skill and initiative.

There is also a seventh "catch-all" consideration – "any other relevant additional factors which in some way indicate whether the worker is in business for him/herself."

The DOL also issued a Frequently Asked Questions (FAQ) resource along with the new Final Rule to assist companies in assessing the six factors.

For instance, regarding **factor one**, the FAQ resource states that this factor focuses on the worker's business acumen and, as such, will involve consideration of facts such as who sets the amount the worker will be paid for the work to be performed. "The mere fact that a worker decides to make more or less money in total by accepting more or less work from a company based on a fixed rate of pay per hour or per job does not reflect 'business acumen' or managerial skill to indicate that he/she is an independent contractor."

Similarly, **factor two** will focus on the worker's "entrepreneurial or capital investments in his/her business." "The fact that a worker invests in his/her business by purchasing tools and other items because a company they are working for requires them to do so is not evidence of such investments and indicates employee status."

Factor three indicates an employment relationship when "the work relationship is indefinite in duration, continuous, or exclusive of work for other employers." Conversely, "when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for him/herself and marketing their services or labor to multiple entities," this factor indicates an independent contractor relationship. If a worker is not working on a continuous basis due to the seasonal or other unique sporadic nature of the company's business operations, this will not indicate an independent contractor relationship unless the worker also is exercising his/her own independent business initiative in determining whether or not they want to work for the company each year, etc.

Regarding **factor four**, the FAQ resource states that relevant facts include "whether the potential employer sets the worker's schedule, supervises the performance of the work (whether directly or using technology), explicitly limits the worker's ability to work for others, and/or reserves the right to discipline the worker." The fact that a company is required by law to control some aspects of a worker's work such as safety or licensing will not indicate employee status. Actions taken by a company which go beyond compliance with a specific law or regulation may indicate an "employer" level of control however.

Factor five does not rely on whether an individual worker is "key" or "integral" to the company's business but rather whether *the work* the individual performs is "key" or "integral" to the company's business operations. Thus, there is concern among companies which use "gig workers" such as Uber and DoorDash over this factor – as obviously, the work these workers perform is "integral" to these companies' business operations even though they usually are classified as independent contractors for wage payment along with all other purposes.

In applying **factor six**, the mere fact a worker is highly skilled does not indicate they are an independent contractor. Although certainly if the potential employer provides the training to prepare the worker to perform the highly skilled work, this will indicate employee status.

A few basics this new Final Rule does not change.

1. Having a worker sign a written agreement which states, “By signing below, I am agreeing I am an independent contractor/I am not an employee of X Company,” does not make them an independent contractor. The question of whether or not a worker is an “independent contractor” will be determined based on the factors described above as well as the “totality of the circumstances” surrounding your company’s relationship with them.
2. The same is true for trying to make this distinction by reflecting the worker’s annual earnings on a 1099 versus a W-2 – even if the worker asks your company to do this and you memorialize this request in writing. Issuing a 1099 does not make a person an “independent contractor” in the eyes of the DOL.
3. The mere fact someone only works for your company occasionally or part-time or even that they work for others/they do not work for your company exclusively also will not make them an “independent contractor.” As noted in **factor three** above, it is the “permanence,” not the *frequency* of the relationship which is to be considered in making this assessment.
4. Finally, the fact a worker may have been deemed to be an “independent contractor” for another purpose or even by another federal or state law or agency will not be binding on the DOL.

Where does this new Final Rule leave us?

The new Final Rule is slated to go into effect on March 11, 2024.

Interestingly, in the week since it was issued, one lawsuit has already been filed challenging the new Final Rule. It was designed to try to resolve the lawsuits which already were pending to challenge the 2021 version of it.

We also are in a federal election year. So, even if the new Final Rule goes into effect in March despite the pending legal challenge, it is anticipated that this Final Rule will be put on hold again if there is another transfer of power in 2025, just as there was following the Trump-Biden Administration transfer.

What should employers do now?

The overall focus of the above test is whether workers truly are in business for themselves or are economically dependent on one or a few other companies for their livelihood. Over the years, while the wording and emphasis of the independent contractor versus employee tests have changed, this is the core focus.

If someone is working for your company on a regular basis and what they do is part of the goods or services your company offers (as opposed to a providing a tangential service they also offer and provide on a regular basis to others), they have no choice regarding how they are paid, and your company provides them training or other detailed instructions, which are not required by law, regarding what it needs them to do, this person is more likely to be classified as an employee rather than an independent contractor.

We Can Help

As always, if you have questions regarding this new Final Rule or would like to discuss applying the above factors to particular workers, please feel free to contact Stacie Caraway or any other member of our Labor & Employment Law Practice Group.