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Department of Labor's New I.C. Rule No Longer on Ice: What Employers Need to Know About Determining Independent Contractor Status Under the Fair Labor Standards Act

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Introduction

After receiving over 55,000 comments regarding the proposed rule introduced in 2022, the U.S. Department of Labor (DOL) finalized a new independent contractor test under the Fair Labor Standards Act (FLSA). The rule addresses how to determine whether a worker is properly classified as an employee or independent contractor under the FLSA. This six-factor test is non-exhaustive, looks to the totality of the circumstances, and weighs all factors equally. The final rule goes into effect March 11, 2024. This rule should provide employers with more consistency between the analysis applied by the majority of courts and the DOL. However, while Florida's wage and hour laws generally defer to the FLSA's analysis of when a worker is considered an employee or an independent contractor, employers still need to be mindful of any other state laws that provide stricter tests to determine worker classifications.

The Six-Factor Test.

The DOL's final rule provides the following six-factor analysis:

1. Opportunity for profit or loss a worker may have;
2. Financial state and nature of any resources a worker has invested in the work;
3. Degree of permanence of the work relationship;
4. Nature and degree of control a potential employer has over the person's work;
5. Whether the work the person does is an integral part of the potential employer's business; and
6. The worker's skill and initiative.

While this new rule provides a clearer approach than the guidelines previously issued by the DOL, it is non-exhaustive and other factors can be relevant to the analysis of economic dependence.

The Road from Previous Guidelines to this Final Rule.

The FLSA never defined the term independent contractor. Thus, the courts have developed an analysis over time which looks at economic realities. The ultimate question looked at whether, as a matter of economic reality, the worker is economically dependent on the employer for work (an employee) or is in business for themselves (an independent contractor). The test followed a totality of circumstances approach, and no factor had a predetermined weight.

In January 2021, the DOL published a new rule that departed from the longstanding economic realities test. The 2021 rule identified five economic reality factors to guide the inquiry. Two of the five factors – the nature and degree of control over the work and 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 factors pointed to the same classification, the analysis ended. The 2021 rule stated it was highly unlikely that the other three non-core factors could outweigh the combined probative value of the two core factors.

In October 2022, the DOL issued a new proposed rule. The proposed rule sought to rescind the 2021 rule and return to the original totality of circumstances approach with a new six-factor test. The DOL explained its belief that retaining the 2021 rule would be confusing and result in a disruption to workers and employers due to its departure from longstanding case law. After receiving approximately 55,400 comments on the proposed rule, the DOL concluded it was appropriate to rescind the 2021 rule and establish an analysis for determining independent contractor status under the FLSA that is more consistent with established judicial precedent and the DOL's longstanding guidelines. The final rule will take effect on March 11, 2024.

What are Some Differences Between the Proposed and Final Rule?

The final rule closely follows the proposed rule. However, some details differ. In the final rule, actions taken to comply with specific, applicable laws and regulations can be viewed as evidence of control unless the actions are performed for the "sole purpose of compliance." Actions taken by potential employers that go beyond legal compliance and instead serve the potential employer's own compliance methods or contractual standards that exceed what is required by specific, applicable laws or regulations may be indicative of control.

Regarding the test's second factor, addressing investments, the DOL will examine relative investments to determine whether the worker is making "similar types of investments" as the potential employer to suggest that the worker is operating independently. This differs from the proposed rule which compared investments on a dollar-for-dollar basis, and if the potential employer invested more, then the worker was likely an employee.

Additionally, the final rule clarifies the approach for analyzing the profit and loss factor. The final rule states that some of a worker's decisions affecting the amount of pay a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status.

Why Does This Matter to Employers?

The FLSA requires that covered employers pay nonexempt employees at least the federal minimum wage for every hour worked and overtime for all hours worked over 40 in the workweek. Additionally, the FLSA prohibits employers from keeping employee tips, requires employers to provide reasonable break times and a place for covered nursing employees to express breast milk at work, and requires employers to "make, keep, and preserve" certain records regarding employees. All of these protections apply to employees. Since independent contractors fall outside of the FLSA's broad concept of employment, that law does not require employers to provide these protections for a worker who is classified as an independent contractor.

Implications resulting from misclassification of workers can be costly. Employers run the risk of exposure to back pay, overtime, and liquidated damages if it is determined an employer misclassified an employee as an independent contractor. In respect to the recordkeeping

obligation for hours worked, if employers do not keep adequate records for a worker it believes to be an independent contractor and is subsequently challenged, the lack of records may be deemed as a presumption that the employee's testimony regarding their hours worked is more credible. Thus, in light of this new rule that DOL investigators will follow for audits and other compliance actions, employers should review their classification practices and ensure any workers designated as independent contractors meet the standards of the DOL's new test.

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