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DOL Officially Axes Independent Contractor Rule of Previous Administration

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05.07.2021

It's official – the U.S. Department of Labor has withdrawn the Independent Contractor Rule that was to become effective on May 7th. The rule – proposed by the DOL during the Trump administration – had overwhelming support from business groups, as it would have given companies greater flexibility in classifying workers as independent contractors rather than employees. The withdrawal comes as no surprise. The Biden administration had previously delayed the effective date of the rule pursuant to a regulatory freeze on rules finalized towards the end of the previous administration. Shortly after issuing the delay, the DOL announced its proposal to withdraw the rule altogether. To learn more about the rule, read our previous blog post explaining its content.

The DOL received over 1,000 comments in response to its notice of the rule 's proposed withdrawal. In addressing concerns from companies, trade associations, and business advocacy organizations that the DOL was attempting to eliminate the ability of employers to classify workers as independent contractors, the DOL stated that it "recognizes, and has always recognized, that there are bona fide independent contractors that do not fall under [the Fair Labor Standards Act]."

The rule's withdrawal triggers the agency's return to a multifactorial balancing test that, according to the DOL, has been used "for decades." A major reason given for withdrawing the Rule is that it would have departed from legal precedent. Federal and state courts, and the DOL itself, have historically used an "economic realities" test -- which considered a variety of factors but did not assign any of them more weight than others – to determine whether a worker is an independent contractor or employee under the FLSA. In departing from this multifactor test, the proposed rule would have elevated two "core factors" above the rest: (1) the nature and degree of control over the work and (2) the worker's opportunity for profit or loss.

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The rule's primary purpose in elevating the two factors was to provide more clarity to the regulated community. Many business groups commented that employers are currently uncertain how to classify a worker under the Department's economic realities test because they do not know how the DOL will evaluate all the different factors. In fact, the DOL's primary sub-regulatory guidance states that a whopping seven factors should be used in the analysis.

Under new leadership, the DOL now disagrees that the proposed rule would have provided greater clarity. Rather, given the rule's departure from court precedent, there is no telling whether courts would have deferred to the rule's guidance. This could create conflicts among courts, and between courts and the DOL. In the current view of the DOL, the rule could therefore have actually resulted in *greater* uncertainty for employers.

In any event, the proposed new rule is off the table. What could have been will remain a mystery as the new administration shifts DOL policy back toward more employee-friendly rules. Only time will tell whether the DOL intends to create new guidance or regulation on the topic. In its withdrawal, the Department did not propose any new regulatory guidance to replace the rule. For now, employers should take the opportunity to evaluate potential misclassification risks under the DOL's long-standing economic realities test. For more information on this topic, or assistance with compliance review, contact any of the attorneys in our Labor, Employment, and Employee Benefits group.

Tags: Independent Contractor, U.S. Department of Labor