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DOL Announces Plan to Issue New Independent Contractor Final Rule

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The U.S. Department of Labor (DOL) has announced its intention to issue a new final rule regarding the employee-vs.-independent contractor analysis under the Fair Labor Standards Act (FLSA). That announcement came by way of a June 3, 2022, blog post from Jessica Looman, Acting Director of the DOL's Wage and Hour Division. The current Independent Contractor (IC) Final Rule, issued during the previous administration and set to go into effect in March 2021, initially was delayed and then ultimately was withdrawn by the DOL in May 2021. However, in March 2022, a federal court in Texas held that the DOL's delay and withdrawal was unlawful, and that the current Final Rule has been in effect since its original March 2021 date. The DOL recently appealed that ruling, and the appeal is pending in the U.S. Court of Appeals for the Fifth Circuit.

Over the years, both the courts and the DOL had developed similar, yet somewhat varying, standards for determining whether an individual is an employee or an independent contractor, most of which focused on the "economic reality" of the relationship between the employer and the individual. Those standards were derived from six, non-exclusive factors originally presented by the Supreme Court in two cases decided on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The factors are:

- The employer's versus the individual's degree of control over the work;
- The individual's opportunity for profit or loss;
- The individual's investment in facilities and equipment;
- The permanency of the relationship between the parties;
- The skill or expertise required by the individual; and
- Whether the work is "part of an integrated unit of production."

Rather than treat the analytical factors as unweighted or affording them equal weight, the IC Final Rule elevates the comparative value of two “core” factors: “the nature and degree of the individual’s control over the work” and “the individual’s opportunity for profit or loss.” According to the IC Final Rule, when both of these factors support, or contradict, the existence of an independent contractor relationship, courts routinely have relied on them as controlling the determination. The IC Final Rule states that these factors are the “most probative” and therefore should be “afforded greater weight.” However, if these two factors are inconclusive, then three other factors should be considered: the skill or expertise required by the individual; the permanency of the relationship between the parties; and whether the work is “part of an integrated unit of production.”

The current DOL concluded that the IC Final Rule’s assignment of greater weight to two of the factors was inconsistent with the purposes and text of the FLSA and sought, ultimately unsuccessfully, to withdraw the Final Rule. Now, stating that it “remain[s] committed to ensuring that employees are recognized correctly when they are, in fact, employees so that they receive the protections the FLSA provides[,]” while “recogniz[ing] the important role legitimate independent contractors play in our economy,” the DOL has announced public forums in late June 2022 for both employers and employees to express their views on the independent contractor analysis, prior to the Department proceeding with the formal rulemaking process.

However, should the DOL eventually publish a new final rule, it would apply only to the analysis under federal law and would not affect how states (*e.g.*, California) determine who qualifies as an independent contractor under their statutes. Moreover, just as with the current IC Final Rule, a new final rule would not redefine who qualifies as an independent contractor under the Internal Revenue Code, the National Labor Relations Act, or other federal laws.

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