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Employee or Independent Contractor: Understanding the DOL's New Worker Classification Rule, by Keith J. Gutstein, Esq. and Alisha Talati, Law Clerk, 3-6-2024

Employers will soon find it much harder to classify workers as independent contractors under the U.S. Department of Labor's ("DOL" or "Department") final rule that narrows the definition of independent contractor under the Fair Labor Standards Act (FLSA). This long-awaited final rule, effective March 11, 2024, revises the Department's guidance used to classify a worker's status as either an employee or independent contractor.

Specifically, the final rule rescinds the prior Independent Contractor Status Under the FLSA rule (2021 IC Rule), which was published on January 7, 2021. Instead, the final rule replaces the 2021 IC rule with a six-factor test for determining employee or independent contractor status. According to the DOL, such factors align with longstanding judicial precedent on which employers have previously relied to determine a worker's status.

New Six-Factor Test (eff. March 11, 2024)

The final rule includes the following six factors:

(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.

Prior 2021 IC Rule

The 2021 IC Rule identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor. Two of the five identified 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 most probative and carried greater weight in the analysis. The 2021 IC Rule stated that if these two core factors point toward the same classification, there is a substantial likelihood that a worker is classified accurately.

The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production. The DOL contends the final rule's six-factor analysis is more consistent with the FLSA as interpreted by longstanding judicial precedent.

The final rule provides detailed guidance regarding the application of each of these six factors. The final rule proposes the return of a totality-of-the-circumstances analysis in which no factor or set of factors among this list of six has a predetermined weight. In fact, additional factors may be relevant if such factors in some way indicate that a worker is in business for themself (i.e., an independent contractor), as opposed to being economically dependent on the employer for work (i.e., an employee under the FLSA), according to the DOL. Thus, one need not satisfy all the factors to qualify as either an employee or independent contractor.

It is important to note that the final rule only applies to classifications under the FLSA and not other federal or state laws. The DOL has released an FAQ to help provide more clarity on the new rule.

Steps Employers Should Consider

- Review and evaluate your current process for classifying workers and be prepared to make necessary changes once the law takes effect;
- Ensure you are properly classifying workers under federal, state and local laws, as the final rule only revises the Department's interpretation of the FLSA; and,
- Be prepared to make necessary adjustments to pay and benefits if the final rule turns workers previously classified as independent contractors into employees.

Kaufman Dolowich Can Help

If you need assistance reviewing or updating existing policies or practices concerning independent contractors or auditing existing relationships, Kaufman Dolowich's team of skilled labor and employment attorneys can help.