



DOL Clarifies Definition of Independent Contractor

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The U.S. Department of Labor (DOL) issued a final rule on Jan. 6 clarifying who is an independent contractor versus an employee under the Fair Labor Standards Act (FLSA). The rule is slated to take effect March 8, although its future in the Biden administration remains uncertain.

"The rule is significant because it creates greater clarity and certainty for all stakeholders," said Steven Pockrass, an attorney with Ogletree Deakins in Indianapolis. The FLSA's minimum wage and overtime provisions don't apply to independent contractors, but court decisions as to who is an independent contractor under the FLSA have been inconsistent, he noted.

He added, "Although the conventional wisdom is that the Biden administration will want to scrap this rule prior to its effective date, predicting how everything will play out with respect to DOL rulemaking is never easy. That is a lesson that has been reinforced multiple times during both the Obama and the Trump administrations."

The new rule will reduce worker misclassification, stated Wage and Hour Division Administrator Cheryl Stanton. She added that the rule's examples also will provide greater clarity for the workforce.

"SHRM [the Society for Human Resource Management] believes workers and employers need more clarity to properly structure independent worker relationships and provide the flexibility and freedom to contribute to the economy," said Emily M. Dickens, SHRM chief of staff, head of government affairs and corporate secretary. "The Department of Labor's final rule on independent contractor status under the Fair Labor Standards Act successfully addresses this concern. SHRM stands ready to work with the incoming administration to strengthen important workplace relationships like these amid a changing workplace landscape."

SHRM had commented previously that "the business community and workers are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk," the rule noted.

The final rule also stated, "The importance of increased clarity is noted by a study coauthored and cited by SHRM that found human resources professionals' largest challenge concerning external workers that they would like to see resolved is the legal ambiguity regarding the use and management of external workers."

And the rule noted a SHRM survey that found 49 percent of external workers chose that work arrangement for the ability to set their own hours.

Economic-Reality Test

The rule reaffirms an economic-reality test to determine whether an individual is in business for himself or herself—an independent contractor—or is economically dependent on a business for work. Someone in the latter category would be an employee covered by the FLSA.

Under the final rule, two core factors are integral to determining whether someone is an independent contractor:

- The nature and degree of control over the work.
- The worker's opportunity for profit or loss based on initiative and investment.

Three other factors that may serve as additional guideposts in the analysis are:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production.

The actual practice of the worker and the business is more relevant than what may be contractually or theoretically possible.

Example of Rule's Application

The rule provided some examples of its application.

For example, suppose an individual is the owner and operator of a tractor-trailer and performs transportation work for a logistics company. The owner-operator substantially controls the key aspects of the work. But the logistics company has installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS. The company limits the owner-operator's speed to comply with federally mandated motor carrier safety regulations and to ensure that she complies with local traffic laws. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and her contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

Given that the owner-operator exercises substantial control over key aspects of her work indicates independent contractor status; the fact that the company has installed a device that limits and monitors the speed of her vehicle does not change this conclusion because the measure is implemented to comply with specific legal obligations and to ensure safety. Under the final rule, this would not constitute control that makes the owner-operator more or less likely to be an employee under the FLSA. Furthermore, the contractually agreed-upon delivery deadlines, incentives and penalties are typical of contractual relationships between businesses and would not constitute control that makes the owner-operator more or less likely to be an employee under the act.

[Related small-business resource: SHRM LegalNetwork (www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx?utm_source=shrm_article&utm_medium=shrm.org&utm_campaign=growth~legalnetwork~pressrelease)]

Rule's Significance

James Plunkett, an attorney with Ogletree Deakins in Washington, D.C., said the final rule "is certainly an interesting housewarming gift for the Biden administration, which will likely pause the effective date of the regulation while it evaluates how to respond to it. I don't think they will like it very much and will look for ways to scrap it."

But Michael Lotito, an attorney with Littler, said, "Today's economic reality is millions of workers must have maximum workplace flexibility. Many of those workers want to be their own boss. Properly structuring those engagement workplace relationships is of utmost importance. Practically, the DOL rule offers a defined road map as to how to accomplish that critical task during a time of workforce transformation."

He added, "The long-term viability of the rule rests on many technical Administrative Procedure Act requirements. Litigation is almost certainly a foregone conclusion." But, he predicted, "at the end of the day, the concepts in this rule will prevail because the American workforce requires it. Laws tend to lag behind an economic reality that exists in real life."

However, Susan Harthill, an attorney with Morgan Lewis in Washington, D.C., said that in light of the uncertainty over whether the Biden administration will accept or, as she thinks is likely, rescind or revise the final rule, "employers should wait and see what guidance the Biden DOL publishes before making any changes to their business arrangements."

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