



U.S. DEPARTMENT OF LABOR ISSUES A NEW RULE ON GIG WORKERS

On January 9, 2024, the U.S. Department of Labor (“DOL”) issued a new rule on how workers should be classified as independent contractors for purposes of determining coverage under the minimum wage and overtime provisions of the Fair Labor Standards Act. This new rule is a major revision of the 2021 rule that had been issued under the prior administration and was subject to much litigation before it became effective on March 8, 2021, under a court order.

This new rule, which will become effective on March 11, 2024, three years after the former rule was approved, was first announced in the DOL’s Notice of Proposed Rule Making on October 13, 2022. It includes a provision to rescind the prior rule. After much discussion and revision that included over 40,000 written comments and strong opposition from companies, the new final rule returns to the “totality of circumstances” test to analyze the economic realities of the employment relationship. Unlike the prior 2021 rule which gave great weight to two core factors – nature and degree of control over the work, and the worker’s opportunities for profit or loss – the DOL’s new rule provides that the factors to be considered in determining whether the worker is an independent contractor or an employee will not have a predetermined weight and instead will be considered in view of the economic reality of the whole activity.

This final rule provides for a broader discussion of how scheduling, remote supervision, price setting, and the ability to work for other employers should be considered under the control factor. It also allows for consideration of reserved rights (even if the employer does not necessarily exercise its reserved right to control the terms of employment) and removes from the 2021 rule the minimized relevance of retained rights. Under the

final rule, economic dependence is the ultimate inquiry as a matter of economic reality in determining whether the worker is in business for himself or herself. In making the independent contractor determination, there are six economic reality factors to be considered:

- Opportunity for profit or loss depending on managerial skills;
- Investments by the worker and the potential employer;
- Degree of performance of the work relationship;
- Nature and degree of control;
- The extent to which the work performed is an integral part of the potential employer’s business;
- Skill and administrative ability of the workers.

Of great importance to the operation of this new rule is the fact that there is no predetermined weight to be given to each factor. They are all to be given full consideration. According to the DOL, this updated rule will reduce the risk that employees are misclassified as independent contractors by their employers, while also providing consistent guidance for businesses to follow.

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