



U.S. Department of Labor Announces Final Rule to Clarify Independent Contractor Status under FLSA

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On January 6, 2021, the United States Department of Labor (the “DOL”) announced a final rule clarifying the standard for determining employee versus independent contractor status under the Fair Labor Standards Act (the “FLSA”). The rule clarification is intended to simplify compliance and improve conditions for workers. The final rule includes the following clarifications:

1. Reaffirms the “economic reality” test to determine whether an individual is in business for him or herself or is economically dependent on a potential employer for work. The economic reality test is a multi-factor balancing test which primarily analyzes: the extent to which the services rendered are an integral part of the hiring party’s business; the permanency of the relationship; the amount of the worker’s investment in facilities and equipment; the nature and degree of control by the hiring party; the worker’s opportunities for profit and loss; the amount of initiative, judgment or foresight in open market competition with others required for the success of the worker, and the degree of independent business organization and operation.
2. Identifies and explains the two core factors that are most probative to determining whether a worker is economically dependent on someone else’s business or is in business for him or herself: (a) the nature and degree of control over the work; and (b) the worker’s opportunity for profit or loss based on initiative or investment.
3. Identifies three other factors to be considered in the analysis, particularly when the two core factors do not clearly indicate status: (a) the amount of skill required for the work; (b) the degree of permanence of the working relationship between the worker and potential employer; and (c) whether the work is part of an integrated unit of production.

4. Reaffirms that the actual practice of the worker and potential employer is more relevant than what may be provided contractually.

Importantly, the final rule clarifies that “the offering of health, retirement, and other benefits is not necessarily indicative of employment status,” but with the caveat that “providing a worker with the same employer-provided health or retirement plans on the same terms that the business also gives its own employees may indicate the worker is not an independent contractor but rather an employee.” This clarification opens the door for employers to offer benefits to independent contractors without necessarily triggering employee status. However, those benefits would likely need to be different, or at least distinguishable, from the benefits provided to employees to avoid putting independent contractor status in question.

Please note that the final rule applies to determining independent contractor status under the FLSA. The rule has no bearing on tests utilized by the Internal Revenue Service or under state law. The final rule is scheduled to take effect on March 6, 2021. Whether or not the rule goes into effect in its current form, or at all, remains to be seen. The final rule is considered to be employer-friendly and may be viewed as inconsistent with the incoming Biden Administration’s stated plan to strengthen employee rights. There remains a window of opportunity for the Biden Administration to withdraw the rule before it becomes effective or rewrite portions of it.

Stay tuned!

If you have any questions about the issues discussed in this Alert, please contact the following members of the [Labor & Employment](#), [Tax](#) and [Employee Benefits and Executive Compensation](#) Practice Groups.

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