

## CLIENT ALERT

### The U.S. Department of Labor Repeals Trump-Era Independent Contractor Rule

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Effective May 6, 2021, the U.S. Department of Labor (“DOL”) has withdrawn a rule published on January 7, 2021, titled “Independent Contractor Status Under the Fair Labor Standards Act,” finding it “inconsistent with the FLSA’s text and purpose.” The DOL determined that this rule “would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent.” The DOL concluded as well that it “does not believe” that this rule “is fully aligned with the FLSA’s text or purpose, or with decades of case law describing and applying the multifactor economic realities test.” After the DOL delayed the effective date of this five-factor rule shortly after the Biden Administration took office, this action was widely expected.

The rule had been issued during the closing days of the Trump administration, and would have revised the test previously utilized by the agency to determine a worker’s status as an employee or independent contractor by applying a five-factor economic dependence test. Two of these five factors, considered “core factors,” examined the nature and degree of control that a worker exercised over key aspects of the performance of the work and the worker’s opportunity for profit or loss based on the exercise of initiative and/or management of investment. The three “non-core factors” were the amount of skill required for the work, the degree of permanence of the working relationship and whether the work is part of an integrated unit of production.

Prior to the Trump administration, the DOL had considered six factors, reflecting the economic relationship between the worker and the potential employer, relevant to the determination of a worker’s status, none determinative on its own: (1) the extent to which the work performed is an integral part of the potential employer’s business; (2) the workers’ opportunity for profit or loss depending on their managerial skill; (3) the extent of the relative investments of the potential employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the potential employer.

In withdrawing the rule, the DOL stated that the elevation of two factors of the economic realities test above all others “is in conflict with the Act, congressional intent, and longstanding judicial precedent.” Furthermore, the rule would have “improperly narrowed the scope of facts and considerations comprising the analysis of whether a worker is an employee for purposes of the FLSA or an independent contractor.”

What does this repeal mean for employers? In light of the delayed effective date of the prior Trump administration rule, most employers had not changed their classification practices based on the now-withdrawn January 7, 2021 rule. The DOL is currently not proposing any new independent contractor rule. It will for now continue to consider the “economic realities” test as the standard, while states and enforcement agencies apply their own standards regarding classification as an independent contractor or an employee. Stay tuned.

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