The DOL Withdraws Trump Administration FLSA Independent Contractor Rule, Preserving the Status Quo . . . for the Moment

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Key Points:

- The DOL has withdrawn a final rule published in the waning days of the Trump administration that established a multifactor test for determining whether workers are employees or independent contractors under the FLSA.
- The rule was widely viewed as supporting the treatment of gig economy workers as independent contractors, but it had not yet taken effect, so the withdrawal means that current DOL regulations and interpretive guidance concerning contractor status remain in force and unchanged.
- The DOL criticized the rule as contrary to longstanding interpretations of the FLSA. It remains to be seen whether the DOL will take additional steps to narrow the circumstances under which workers may be treated as contractors, but its rationale for withdrawal could hinder its ability to codify a rigorous "ABC" independent contractor test in its regulations without an amendment to the FLSA.

On May 6, the U.S. Department of Labor (DOL) withdrew its Independent Contractor Rule, which was published in January—just days before the change in presidential administration—and which set forth new regulations containing a multifactor test for determining whether workers are independent contractors or employees. Our January alert about the Rule, which was set to take effect on May 7, 2021, is available here.

The DOL now "does not believe that the Independent Contractor 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."[1] In particular, the DOL criticized the Rule's elevation of two factors (the nature and degree of control over the work, and the worker's opportunity for profit or loss based on initiative or investment) as the "most probative" factors in determining employee status under the Fair Labor Standards Act (FLSA). According to the DOL, this approach to the economic realities test "is in conflict with the Act, congressional intent, and longstanding judicial precedent."[2] The DOL expressed its concern that "[a]ltering the focus of this analysis to two 'core' factors . . . risks excluding or misclassifying workers whose FLSA employment status is established under other facts . . . ."[3]

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The DOL also criticized what it sees as a failure to consider the potential employer's investments and the importance or centrality of a worker's work to the potential employer's business as relevant factors, as well as a "downplaying" of the importance of a potential employer's right or authority to control the worker.[4] According to the DOL, such "narrowing" of the facts considered relevant to employment status "would result in more workers being classified as independent contractors . . . ."[5] In its view, withdrawal of the Rule "will benefit workers as a whole" because more workers will qualify as employees entitled to the FLSA's protections.[6]

Because the DOL withdrew the Rule before it took effect and the Rule is not being replaced with different regulations, the practical consequence of the withdrawal is to preserve current DOL regulations and interpretive guidance concerning employment status under the FLSA. The DOL viewed replacement of the Rule to be outside the scope of this particular rulemaking process.[7] It therefore declined to address the substance of comments suggesting alternative rules, including the "ABC" test for employment status used in California and several other states.[8] The DOL's criticism of its Trump-era Rule, including its position that an independent contractor regulation could not depart from the economic realities test or conflict with existing precedent on the issue, may undermine any effort by the agency to adopt the ABC test in future rulemaking.[9]

Even in the absence of new regulations, the nature of the current test is such that the DOL has flexibility to emphasize (or deemphasize) certain factors in any particular situation. The DOL can therefore continue to promote an expansive view of FLSA coverage without revising its regulations, as it did in a 2015 interpretation that was later withdrawn by the Trump administration.[10] Of course, the persuasive impact on courts of such guidance will likely depend on the extent to which the guidance is viewed as political and likely to change as control of the White House shifts between Democrats and Republicans.

[1] *See* 86 Fed. Reg. 24307.

[2] *Id*. at 24309.

[3] *Id*.

[4] *Id*. at 24311.

[5] *Id*.

[6] *Id*. at 24317-18.

[7] *See id.* at 24307.

[8] *See id.*

[9] *See* https://joebiden.com/empowerworkers/ (last visited May 7, 2021) ("This epidemic of misclassification is made possible by ambiguous legal tests that give too much discretion to employers, too little protection to workers, and too little direction to government agencies and courts. . . . As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.").

[10] *See* U.S. Department of Labor Administrator's Interpretation 2015-1 (July 15, 2015) (withdrawn June 7, 2017).

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