LEGAL UPDATES

U.S. DOL Likely to Alter Employee vs. Independent Contractor Classification Rules Under FLSA

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Newly published guidance may mean it will be easier for employers to classify workers as independent contractors under the federal Fair Labor Standards Act (FLSA). On May 1, 2025, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) published guidance in the form of Field Assistance Bulletin (FAB) No. 2025-1, commenting on previous DOL rules and guidance dealing with how to classify a worker as an independent contractor compared to an employee for purposes of FLSA wage-and-hour compliance.

Past Rules and Guidance Concerning FLSA Independent Contractor Classification

Over the past few decades, administrative rule makers have published various forms of rules and guidance that place different emphases on what factors courts and companies should most consider when determining whether a worker is an employee or an independent contractor for FLSA purposes.

In 2008, WHD published guidance in the form of FLSA Fact Sheet #13, that laid out seven factors that courts should assess to determine whether a worker is an employee dependent upon their employer's business or an independent contractor engaged in business for themselves (the "economic realities test"):

1. How integral the worker's services are to the principal's business,
2. The permanency of the relationship,
3. The amount the worker has invested in facilities and equipment,
4. The nature and degree of the principal's control over the worker's work,
5. The contractor's profit and loss opportunities,
6. The amount of judgment and initiative a worker must use in open market competition to succeed, and
7. The degree of the worker's independent business organization and operation.

Related People

Rosalee McNamara

Partner

Kansas City

816.460.5604

rosalee.mcnamara@lathropgpm.com

Jay Harrington

Associate

Kansas City

816.460.5537

jay.harrington@lathropgpm.com

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WHD, in Opinion Letter FLSA2019-6 (2019), restated these factors as six factors in 2019:

1. The nature and degree of the potential employer's control;

2. The permanency of the worker's relationship with the potential employer;

3. The amount of the worker's investment in facilities, equipment, or helpers;

4. The amount of skill, initiative, judgment, or foresight required for the worker's services

5. The worker's opportunities for profit or loss; and

6. The extent of integration of the worker's services into the potential employer's business.

In 2021, under the first Trump administration, the DOL finalized an independent contractor rule, 86 Fed. Reg. 1168 (Jan. 7, 2021), that had the effect of making it easier for workers to be classified as independent contractors. The 2021 rule stated two factors that should carry the most weight in assessing whether a worker is an independent contractor:

1. The amount of control a principal exudes over the worker's work, and

2. The worker's opportunity for profit or loss.

The 2021 rule also listed three additional "guidepost" factors that courts should consider, along with the totality of the circumstances, if the two primary factors did not provide a clear answer:

1. The amount of specialized training or skill the worker had to obtain for the work that was not provided by the principal;

2. Whether the working relationship is indefinite/continual or definite/sporadic; and

3. Whether the work is part of an integrated unit of production.

As a result of the new 2021 rule, US DOL withdrew Opinion Letter FLSA2019-6 (2019).

In 2024, the DOL under the Biden administration published a new independent contractor classification rule, 89 Fed. Reg, 1638 (Jan. 10, 2024), that had the effect of making it more difficult for workers to be classified as independent contractors. The 2024 rule stated that courts should assess six factors when evaluating the totality of the circumstances to determine whether a worker is an employee or an independent contractor:

1. The worker's opportunity for profit and loss, beyond working more hours at a fixed rate;

2. Relative investments made by the principal and the worker by their own initiative;

3. The degree of permanence of the relationship;

4. The nature and degree that a principal exerts control over a worker beyond merely instructing compliance with legal requirements;

5. The extent to which the work is "integral" to the principal's business; and

6. Whether the worker demonstrates specialized skill in connection with a business-like initiative.

Moving Forward

Most recently, in FAB No. 2025-1, the WHD stated that it will not enforce the 2024 independent contractor rule during its FLSA investigations and will instead return to determining worker classification in accordance with the 2008 Fact Sheet #13 and Opinion Letter FLSA2019-6, which, as restated in Opinion Letter FLSA2025-2 on May 2, 2025, lists the following six factors to be used in assessing contractor versus employee classification:

1. The nature and degree of the potential employer's control;
2. The permanency of the worker's relationship with the potential employer;
3. The amount of the worker's investment in facilities, equipment, or helpers;
4. The amount of skill, initiative, judgment, or foresight required for the worker's services;
5. The worker's opportunities for profit or loss; and
6. The extent of integration of the worker's services into the potential employer's business.

Yet it is important to note that, currently, the 2024 rule still remains in effect with respect to private litigation – however, considering both the 2021 independent contractor rule that a Trump DOL previously published and the WHD guidance in FAB No. 2025-1, many suspect that the current DOL will soon issue more rule changes to offer further clarification about independent contractor classification.

Next Steps

Due to this change in guidance, now would be an opportune time for employers to review their use of independent contractors. For help determining whether your business's workers constitute employees or independent contractors under the FLSA, legal counsel should be contacted at your earliest convenience to assist in navigating this evolving legal landscape and to discuss other considerations to take into account based on state and local wage-and-hour laws and other common laws that help distinguish between employees and independent contractors. While it may be easier to classify workers as contractors under the FLSA going forward, numerous states and local governments could have more stringent rules that also need to be considered.

For more information on how this new guidance may affect your business, please contact Rosalee McNamara or Jay Harrington, or your regular Lathrop GPM attorney.