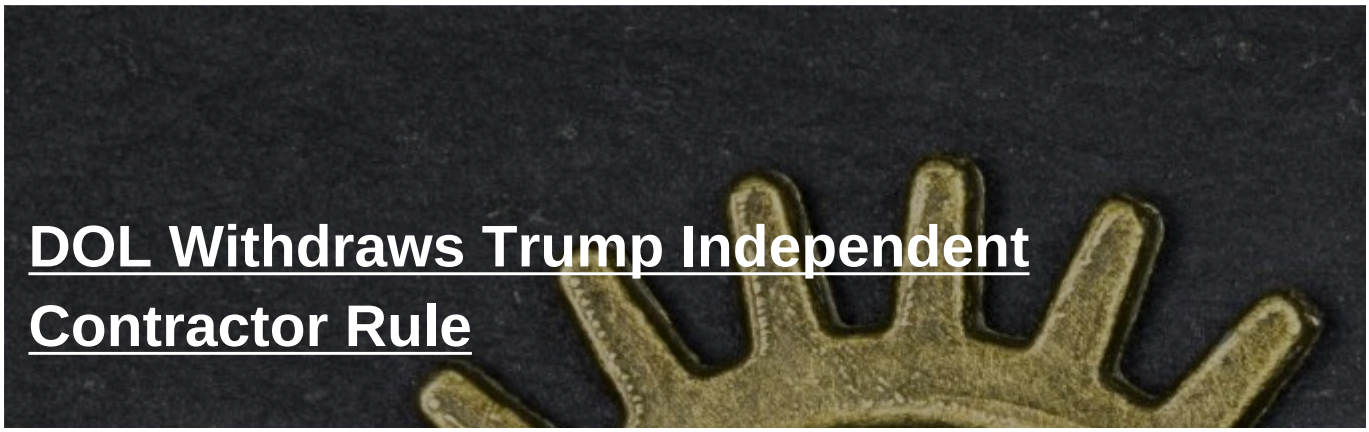

DOL Withdraws Trump Independent Contractor Rule

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On May 5, 2021, the U.S. Department of Labor (DOL) announced a final rule effective May 6, 2021 withdrawing an employer-friendly rule entitled “Independent Contractor Status under the Fair Labor Standards Act” that had been issued in the final two weeks of President Donald Trump’s term.

The rule issued by the Trump Administration listed 5 factors that should be considered in determining whether a worker was an employee or an independent contractor under the so-called “economic realities test” for purposes of coverage under the federal Fair Labor Standards Act (FLSA) which generally requires payment of the minimum wage and payment of overtime for non-exempt workers for hours worked over 40 in one week. The Trump rule gave two factors – (1) the nature and degree of the worker’s control over the work and (2) the worker’s opportunity for profit and loss based on initiative and investment – greater weight than the other three factors: (3) the amount of skill required for the work, (4) the degree of permanence of the working relationship between the worker and the potential employer and (5) whether the work is part of an integrated unit of production (or the individual works under circumstances analogous to a production line). An April 2019 opinion letter from the DOL giving guidance in the form of examples of the application of these principals has also been withdrawn by the DOL.

In withdrawing the Trump administration’s rule and opinion letter, the DOL stated that the Trump independent contractor rule was in tension with the FLSA’s text and purpose and relevant case law. The current DOL also took issue with the Trump rule’s prioritization of factors 1 and 2 above which was inconsistent with prior law that required a balancing and consideration of all 5 factors. Finally, the DOL noted that utilizing the Trump rule would result in more persons being deprived of the benefits of the

FLSA.

What to Expect Next

From a practical perspective, the final rule issued on May 6 essentially reverts back to the standard test for independent contractor status that has been in place for many years. Jessica Looman, the current wage regulator at the DOL, has told reporters that going forward, the DOL is planning to use the 7-factor "economic realities test" contained in DOL guidance issued in 2008 in U.S. DOL Wage and Hour Division fact sheet # 13 "in every case" where worker classification is considered by DOL.

The factors listed in Wage and Hour Division fact sheet # 13 are:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

We note that President Joseph Biden campaigned on a pledge to establish a federal ABC test for determining whether a worker is an independent contractor. The ABC test has been adopted in California and makes it very difficult to be categorized as an independent contractor because it presumes that an individual is an employee unless the company can demonstrate that the person is free from its control, performs work outside the company's line of business and operates as an independent firm. Variations of the ABC test are also in effect in Massachusetts, Illinois and New Jersey.

While we do not expect DOL to adopt a federal ABC test any time soon, we may see some version of it in the next four years. In the meantime, it appears that the DOL will likely be vigilant in enforcing the 7-factor test set forth in wage and hour fact sheet #13 set forth above. Employers are reminded that the classification of a worker as an employee or independent contractor is complicated and that the rules can vary depending on what state the work is performed in and on whether the context is employment for income tax purposes, unemployment taxes, employment under discrimination laws or wage and hour laws, or for workers compensation purposes. The consequences of mistakenly treating a worker as an independent contractor when the worker should have been classified as an employee can be quite costly and can lead to potential class action liability for unpaid wages, penalties, liquidated damages and attorneys' fees. Seigfreid Bingham stands ready to assist its clients in navigating the complexities of classification decisions and defending claims of alleged worker misclassification.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, John Vering (jvering@sb-kc.com), Mark Opara (mopara@sb-kc.com), Shannon Johnson (sjohonson@sb-kc.com) or other shareholders in Seigfreid Bingham's Employment Law Group, including:, John Neyens, Brenda Hamilton, Heath Hoobing, Julie Parisi, Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460.