

DOL Issues Final Independent Contractor Rule

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On January 9, 2024, the Department of Labor (the “DOL”) promulgated a [final rule](#) to define the test for independent contractor status under the Fair Labor Standards Act (the “FLSA”). The rule rescinds the 2021 Trump administration’s more employer-friendly rule, marking the latest swing of the political pendulum. The final rule takes effect on March 11, 2024.

The final rule imposes a non-exhaustive six-factor “totality of the circumstances” test to determine whether workers qualify as independent contractors under the FLSA. The six factors that courts (and employers) must consider when making a classification are: (1) the worker’s opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of the potential employer’s control over the performance of the work; (5) the extent to which the work performed is an integral part of the employer’s business; and (6) the worker’s skill or initiative. Under the final rule, courts are permitted to consider factors in addition to those listed above.

Important highlights are as follows:

For purposes of the first factor, opportunity for profit or loss, the final rule simply evaluates whether the worker had the ability to decide whether to take or decline an opportunity for profit and loss, as opposed to whether the worker in fact took advantage of the opportunity.

For the second factor relating to worker investments, the final rule considers the worker’s capital or entrepreneurial investment as compared to the employer’s investment in the business, and whether the worker makes similar types of investments including investments in tools and equipment beyond performance of a particular job. Such an analysis includes whether the investment would permit the performance of more types of work, the reduction of costs or the extension of market reach, and thus could be evidence of independent contractor status.

Also notable is the DOL’s detailed instruction regarding the nature and degree of control the employer has over the worker’s work. For example, under the final rule, specific facts will be “relevant” to analyzing the control exercised by the employer over the worker’s work, such as whether the employer has reserved but unexercised rights which provide it with more control than it in fact asserts (e.g., a contract provision requiring a worker to wear a safety helmet at a worksite that is never used by the employer), and whether an employer electronically supervises the worker’s work. Importantly, the final rule expressly provides that an employer’s requirement that a worker comply with legal requirements governing the worker’s work is not indicative of control sufficient to find that the worker is an employee. But, per the DOL, if an employer’s mandate goes “beyond” legal compliance and “serve[s] the potential employer’s own compliance methods, safety, quality control, or contractual or customer service standards[.]” a finding that the worker is an employee may be appropriate.

The final rule also significantly reframes the question of whether the worker’s work is “an integral part of the employer’s business” to measure whether the worker’s function is integral to the business rather than whether any individual worker is integral to the business. If the work performed is “critical, necessary, or central” to the potential employer’s business, it is

more likely the worker is an employee. Conspicuously, the final rule does not provide guidance on how to determine what the employer's "principal business" is or what is "critical, necessary, or central to it."

Employers are encouraged to promptly engage with legal counsel to evaluate whether their current independent contractor classifications will be subject to challenge under the final rule, and to implement changes as necessary before the final rule takes effect in March 2024.

If you have any questions regarding the topics discussed in this article, please contact **Ellen M. Hemminger** at eheminger@vedderprice.com, **Peter Walrod** at pwalrod@vedderprice.com or any Vedder Price attorney with whom you have worked.

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