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Are Your Independent Contractors Really Your Employees?

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On January 10th, the U.S. Department of Labor (DOL) released its final rule changing the criteria for how it will classify workers moving forward.

This final rule will go into effect on March 11, 2024 and will have a major impact on the gig economy (meaning a labor market that relies heavily on temporary and part-time positions filled by independent contractors and freelancers).

The new rule rescinds a 2021 rule, which used a two-factor test to determine whether a worker should be classified as an independent contractor or employee. The previous rule placed greater weight on two core factors in making this determination: (1) control over the work and (2) opportunity for profit and loss.

Under the new rule, the DOL will use the economic reality test, the goal of which is to decide if the worker is economically dependent on the employer for work or is instead in business for themselves. While the test focuses primarily on six (6) factors, additional factors may be considered and no one factor is more important than the other. Instead, the totality of the circumstances of the working relationship will be considered.

The six (6) primary factors that the DOL will analyze are:

1. Opportunity for profit or loss depending on managerial skill

This factor primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making. Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising. Taking such actions, or having a real opportunity to take such actions but making a business decision not to (for example, because the potential profit to be gained may not justify the expense that would be incurred), indicates that the worker is an independent contractor.

2. Investments by the worker and the employer

This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor status.

3. Permanence of the work relationship

This factor primarily looks at the nature and length of the work relationship. Work that is sporadic or project-based with a fixed ending date (or regularly-occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs elsewhere indicates independent contractor status.

4. Nature and degree of control

This factor primarily looks at the level of control the potential employer has over the performance of the work and the economic aspects of the working relationship. Relevant facts include whether the potential employer controls hiring, firing, scheduling, prices, or pay rates, supervises the performance of the work (including via technological means), has the right to supervise or discipline workers, and takes actions that limit the worker's ability to work for others. Where the potential employer maintains more control over these aspects of the work relationship, this factor weighs in favor of employee status, and where the potential employer maintains less control over these aspects of the work relationship, this factor weighs in favor of independent contractor status.

5. Whether the work performed is integral to the employer's business

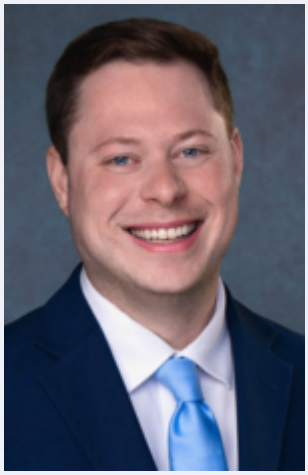
This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which indicates employee status. Where the work performed by the worker is not critical, necessary, or central to the potential employer's principal business, this indicates independent contractor status.

6. Skill and initiative

This factor primarily looks at whether the worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business. The fact that a worker does not use specialized skills (for example, the worker relies on the employer to provide training for the job) indicates that the worker is an employee.

The DOL press release can be found here, and the FAQs for the final rule can be found here.

If you have any questions about this rule or anything else labor & employment related, please contact your Knox Law attorney, or one of our Labor & Employment attorneys.



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