Outgoing Trump Administration Finalized (And Biden Administration Is Reviewing) Independent Contractor Classification Test

The U.S. Department of Labor (DOL) recently finalized a rule designed to clarify the distinction between an independent contractor and employee under the Fair Labor Standards Act.

Emphasizing that the "actual practice of the parties involved is more relevant than what may be contractually or theoretically possible," the DOL set out the following five factors in making the determination.

The first two factors are "core factors" and receive the most weight with respect to the determination:

1. ***Nature and Degree of Control over Work.*** If a worker exercises substantial control over key aspects of the performance of the work, including the worker's schedule, selection of projects, and work for other entities (including competitors), the worker is more likely a contractor. The DOL has indicated that requiring a worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does **not** constitute control.

2. ***Individual's Opportunity for Profit or Loss.*** The worker is more likely a contractor if the worker has an opportunity for profit and loss. A worker's potential for profit and loss depends upon the worker's exercise of initiative or management of the worker's investment in or capital expenditure on helpers, equipment, or material to further the work. If, instead, the worker only positively affects his or her earnings by working more hours or working faster, the worker is more likely an employee.

The remaining factors set out by the DOL for the determination are as follows:

3. ***Amount of Skill Required for the Work.*** This factor weighs in favor of contractor status if the work at issue requires specialized training or skill not provided by the potential employer. If, however, the job requires no specialized training or skill, or the worker is dependent on training provided by the potential employer, the factor would weigh in favor of employee status.

4. ***Degree of Permanence of the Working Relationship.*** This factor weighs in favor of contractor status if the work is, by design, definite in duration or sporadic. If, however, the work were indefinite in duration or continuous by design, the factor would weigh in favor of employee status.

5. ***Whether the Work Is Part of an Integrated Unit of Production.*** This factor weighs in favor of contractor status if the work is segregable from the potential employer's production process. For example, a freelance writer generally does not integrate into a publication's production process because the writer is not involved in assigning, editing, or determining the layout of articles. However, this factor weighs in favor of employee status if the work is a component of the potential employer's integrated production process for a good or service. For example, a newspaper editor may be part of an integrated unit of production.

Other factors may be relevant to the extent they indicate whether the workers are in business for themselves, as opposed to being economically dependent on an employer for work.

This final rule was set to go into effect on March 8, 2021. However, businesses should monitor possible legal developments with respect to the rule. Before taking office, President-elect Biden issued a press release announcing plans to freeze all Trump-era regulations that have not yet taken effect—specifically mentioning this independent contractor regulation. After taking office, President Biden's administration began a review of all new and pending regulations, including this one. As a result, this final rule may be suspended or replaced.

Further, Texas businesses considering changes to their staffing models should recognize that there are additional legal tests to consider when making contactor classification determinations. For example, the Texas Workforce Commission and IRS have their own multi-factor tests for determining whether individual workers are misclassified for unemployment and tax purposes. The National Labor Relations Board also has its own classification test.

In order to navigate these tests and reduce the likelihood that a business is subject to liability for back wages and penalties associated with misclassification, we recommend that potential employers contact legal counsel to assist in making classification determinations and structuring independent contractor arrangements.

For more information, please contact Andy Clark.