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LEGISLATIVE ACTION ALERT

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Biden's Labor Department takes aim to cut down on number of 'independent contractors'

The US Department of Labor enacted a final rule on Tuesday, January 9, 2024 designed to safeguard workers from misclassification as “independent contractors” rather than “employees.” The new labor rule provides greater clarity for classification under the Fair Labor Standards Act (FLSA).

Generally, the FLSA guarantees employees minimum wage compensation, time-and-a-half for any overtime hours worked, and protections against workplace discrimination or employer retaliation. However, the FLSA does not extend these securities to independent contractors. As such, improper classification of employees as “independent contractors” can strip a worker of essential rights and expose them to exploitation.

The new rule reestablishes a previously used “totality-of-the-circumstances analysis.” More specifically, it outlines six factors useful to gauge economic reality and describes how these factors should be considered in worker classification. The six factors are: (1) opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the potential employer, (3) the degree of permanence of the work relationship, (4) the nature and degree of

control, (5) the extent to which the work performed is an integral part of the potential employer's business, and (6) skill and initiative.

The new rule annuls the 2021 Independent Contractor Rule, which heavily prioritized considering only two factors – the nature and degree of control over the work and the worker's opportunity for profit or loss – in determining whether a worker is an independent contractor. Under the new rule, all six factors should be considered equally. According to the US Department of Labor, the new rule “aligns with longstanding judicial precedent on which employers have previously relied to determine a worker's status as either an employee or independent contractor.” It will take effect on March 11, 2024.

Acting Secretary of Labor Julie A. Su said in a post on X that the rule “will help create a level playing field for businesses, protect workers from wage theft caused by classification, and affirm the vital role true independent contractors play in our economy by allowing them to thrive.” She also described labor protections as “a promise of a floor beneath which no one should be forced to live and work.”



U.S. DEPARTMENT OF LABOR
News Release

**US DEPARTMENT OF LABOR ANNOUNCES FINAL RULE ON CLASSIFYING WORKERS
AS EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE
FAIR LABOR STANDARDS ACT**

Rescinds 2021 independent contractor rule; replaces it with analysis consistent with caselaw

WASHINGTON – The U.S. Department of Labor today announced a final rule to help employers and workers better understand when a worker qualifies as an employee and when they may be considered an independent contractor under the Fair Labor Standards Act.

The rule provides guidance on proper classification and seeks to combat employee misclassification, a serious problem that impacts workers' rights to minimum wage and overtime pay, facilitates wage theft, allows some employers to undercut their law-abiding competition and hurts the economy at-large.

"Misclassifying employees as independent contractors is a serious issue that deprives workers of basic rights and protections," explained Acting Secretary of Labor Julie Su. "This rule will help protect workers, especially those facing the greatest risk of exploitation, by making sure they are classified properly and that they receive the wages they've earned."

The guidance provided by the final rule aligns with longstanding judicial precedent on which employers have previously relied to determine a worker's status as either an employee or independent contractor. The new rule will preserve essential worker rights and provide consistency for entities covered by the Fair Labor Standards Act.

The new "independent contractor" rule restores the multifactor analysis used by courts for decades, ensuring that all relevant factors are analyzed to determine whether a worker is an employee or an independent contractor. The rule addresses six factors that guide the analysis of a worker's relationship with an employer, including any opportunity for profit or loss a worker might have; the financial stake and nature of any resources a worker has invested in the work; the degree of permanence of the work relationship; the degree of control an employer has over the person's work; whether the work the person does is essential to the employer's business; and a factor regarding the worker's skill and initiative.

The rule separately rescinds the 2021 Independent Contractor Rule that the department believes is not consistent with the law and longstanding judicial precedent.

In crafting the new rule, the department's Wage and Hour Division considered feedback provided by stakeholders at forums in the summer of 2022 and during the comment period after the proposal's announcement in October 2022. The final rule takes effect on March 11, 2024.