New Independent Contractor Regulations Published by the U.S. Department of Labor

By: Shannon Johnson

Last week, the U.S. Department of Labor (the "DOL") announced a new rule, which will go into effect on March 11, 2024, establishing a six-factor analysis that businesses should use in order to properly classify independent contractors vs. employees. To businesses with past experience utilizing contractors, this "new" rule will not appear new at all – rather, it rejects a more recent rule published in 2021 that made it easier for businesses to classify their workers as independent contractors, and largely reinstates the long-standing "economic realities test" that was developed through Court precedent over the course of decades.

Summary of the Rule

Under the new rule (which you can review in full here), the DOL states that in assessing whether a worker is properly classified as an independent contractor by a company (the DOL refers to the hiring entity broadly as an "employer"), it will analyze the following six factors to determine whether, as a matter of "economic reality," a worker is not economically dependent on an employer for work and is truly in business for him or herself:

1. **Whether the worker has an opportunity to earn profits or suffer losses depending on the worker's own managerial skill.**

   The DOL provided a non-exclusive list of facts that may be relevant when considering this factor, including whether the worker has the opportunity to determine or can meaningfully negotiate the charge for the work provided; whether the worker can accept or decline jobs or assignments, or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their own business; and whether the worker has the right to make decisions to hire others, purchase materials and equipment, and/or rent space or buy real estate. No one factor is determinative and other factors may be considered.

   If a worker has no opportunity for a profit or loss through this analysis, the DOL finds this factor suggests that the worker is an employee. The DOL further clarified that the decision to work more hours (when paid hourly) or take more jobs (when paid a flat fee or fixed rate per job), where the employer controls the assignment of jobs or hours, generally does not reflect the exercise of managerial skill and will lean towards classification of the worker as an employee.

2. **The relative investments made by the worker and the employer.**

   Under this factor, the DOL will analyze whether the worker is investing in their own business or simply being hired as an employee to do a job. The DOL will consider "whether any investments by a worker are capital or entrepreneurial in nature." Investments that are capital or entrepreneurial in nature are those that generally support an independent business and serve a business-like function, such as increasing sales, increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.

   Costs paid by a worker to perform the job, such as the "tools and equipment to perform specific

jobs and the worker's labor," will not constitute evidence of capital or entrepreneurial investment and, according to the DOL, indicate employee status.

Investment made by the worker will be considered on a relative basis with the employer's investment in the overall business; however, the worker's investments do not need to be equal to the employer's investments, but "should support an independent business or serve a business-like function for this factor to indicate independent contractor status."

3. **The degree of permanence of the working relationship.**

In analyzing this factor, the DOL stated that where a worker is in a relationship of a definite, non-exclusive, project-based or sporadic duration, it weighs in favor of a finding of independent contractor status. Contractors may have "regularly occurring fixed periods of work," but "the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification."

This factor will weigh in favor of employee status where the relationship is continuous, indefinite or "at will." The DOL also clarified that "[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative," this would not indicate that the workers are independent contractors.

4. **The nature and degree of control by the employer over the worker.**

In evaluating the degree of control exercised by a business over a worker for purposes of determining contractor status, the DOL will continue to evaluate whether the employer controls scheduling, supervision and discipline over work performance (including the ability to assign work), and the worker's ability (or inability) to work for others. Further, an employer's control over "compliance methods, safety, quality control, or contractual or customer service standards that goes beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulation may in some—but not all—cases be relevant to the analysis of a potential employer's control if it is probative of a worker's economic dependence."

5. **Whether the work performed is an integral part of the employer's business.**

This factor considers whether the work is "critical, necessary, or central to the employer's principal business." In other words, if the employer "could not function without the service performed by the workers, then the service they provide is integral." The DOL noted that in most cases, if a potential employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are performing work that is integral to the potential employer's business.

6. **Whether the worker uses specialized skills and initiative to perform the work.**

The skill and initiative factor consider whether the worker uses specialized skills to perform the work, and whether those skills contribute to a business-like initiative. Where the worker does not use specialized skills or where the worker is dependent on training from the employer to perform the work, that leans towards employee status.

However, the DOL acknowledged that both employees and contractors can be skilled, so the mere fact that a worker is skilled does not indicate one status or another; rather, the focus is on whether the worker puts those skills to use with business initiative.

The DOL further stated the six factors are not exhaustive and additional factors may be considered if they are relevant to the ultimate question of whether workers are economically dependent on employers or in business for themselves. No specific additional factors are enumerated but this leaves some flexibility (and ambiguity) for courts to weigh other unidentified factors.

Next Steps

The DOL commentary on the new rule is lengthy and contains many specific examples, across a variety of industries, that illustrate how the new rule may be interpreted. This is a highly fact-specific inquiry that will vary greatly dependent upon your business, applicable laws and regulations in your industry, and the types of labor or skillsets your company needs. If you use independent contractors in your business, we are happy to discuss your company's specific situation in order to help ensure you are properly classifying your workers. Failure to properly classify your workers can result in violation of federal and state wage laws, including the Fair Labor Standards Act.

We do expect there to be significant challenges to the new rule. Business and certain industry groups are expected to make legal challenges to the rule; for example, the U.S. Chamber of Commerce immediately issued a statement in opposition to the rule that threatened litigation, and one U.S. Congress member (Sen. Bill Cassidy, R-LA) has said he will try to repeal the rule. In addition, the U.S. Supreme Court will decide two cases in the coming months that may weaken regulations issued by agencies like the DOL (*Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. U.S. Dept. of Commerce*).

For further information, the DOL also published an updated Fact Sheet that summarizes the new Rule and provides examples for each of the six factors.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the DOL's new regulations and how it may affect your business operations, contrators, or employees, please do not hesitate to contact me or any of the firm's employment law attorneys for further information concerning compliance for your specific situation.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the author, Shannon Johnson (sjohnson@sb-kc.com) 816.265.4139 or other attorneys in Seigfreid Bingham's Employment Law Group, including: John Vering (jvering@sb-kc.com) 816.265.4109, John Neyens (johnn@sb-kc.com) 816.265.4152, Mark Opara (mopara@sb-kc.com) 816.265.4140, Brenda Hamilton (bhamilton@sb-kc.com) 816.265.4103, Julie Parisi (jparisi@sb-kc.com) 816.265.4159, Christopher Tillery (ctillery@sb-kc.com) 816.265.4157, Katie Conklin (kconklin@sb-kc.com) 816.265.4114, Cody Weyhofen (cweyhofen@sb-kc.com) 816.265.4163, or your regular contact at Seigfreid Bingham at 816.421.4460.