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United States Department of Labor Finalizes Independent Contractor Rule

On January 10, 2024, the Wage and Hour Division of the U.S. Department of Labor issued its long awaited final rule, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act.*[1] The rule addresses how to determine whether a worker is properly classified as an employee or independent contractor under the Fair Labor Standards Act and overturns the March 8, 2021 Independent Contractor Rule.

According to the agency, "[t]his rule will help to ensure that workers who are employees are paid the minimum wage and overtime due to them, and that responsible employers that comply with the law are not placed at a competitive disadvantage when competing against employers that misclassify employees."

The final rule, which goes into effect on March 11, 2024, reinstates a test long known as the "economic realities" test, and rescinds the March 8, 2021 Independent Contractor Rule, which sought to give employers greater flexibility in determining the appropriate status of its workers, and provided generally that the actual practice of the parties was more relevant than what may have been contractually and theoretically plausible.

Specifically, the January 10, 2024 final rule revises the department's guidance by instituting a multifactor analysis that the agency says assesses the totality-of-the-circumstances to determine whether a worker should be considered an employee or is properly classified as an independent contractor. The ultimate inquiry is economic dependence, and the determination of independent contractor status is a matter of economic reality, and whether a worker is in fact in business for themself. The test looks specifically at six factors:

1. the worker's 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 to the potential employer's business; and
6. the worker's required skill and initiative.

While concerns about proper classification may be critical to all contractors, general contractors who may be removed from the classification decision nonetheless run risks particularly in localities that have wage theft statutes that impose direct liability on general contractors for unpaid wages of workers employed by downstream contractors. Nine states – California, Delaware, Illinois, Maryland, Minnesota, New Jersey, New York, Virginia, and West Virginia, plus the cities of Denver, Colorado and Washington, D.C. – have now enacted variations of such statutes. These state and local statutes impose varying degrees of direct liability on general contractors for misclassified independent contractors, as well as minimum wage, overtime, off-the-clock work, failure to provide meal breaks required by some state laws, and/or improper wage deductions.

While one of the goals of the final rule is to eliminate confusion and uncertainty caused by inconsistent court rulings and the March 8, 2021 Independent Contractor Rule, in reality, this rule may place pressure on the construction industry in particular, and most specifically, on smaller general and subcontractors who may employ many labor providers as independent contractors for numerous reasons, and now must learn to navigate a new set of rules. Please contact us if you have any questions regarding these new rules.

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[1] 89 FR 1638-1743: https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act.