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e-update

Federal Government Issues New Rule for Employee v. Independent Contractor Determinations

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The Fair Labor Standards Act ("FLSA") generally requires covered employers to pay nonexempt employees minimum wage and overtime. One common issue employers encounter is whether a worker is properly classified as an employee or an independent contractor. Such classification is governed by Department of Labor regulations.

Since 2021, five factors were identified in Department of Labor regulations, with two of those factors considered "core factors" and given greater weight. In 2022, the Department of Labor published proposed regulations to update this multi-factor test.

Earlier this month, the Department of Labor finalized changes to the FLSA classification rule, which will go into effect on March 11, 2024.

IN THIS UPDATE

1 - NEW EMPLOYEE V. INDEPENDENT CONTRACTOR RULE



Under the new rule, six factors are considered: opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative. As with previous iterations of the rule, other factors may also be considered and actual practice is more important than how a worker is designated under a contract.

The revised regulations largely return to the pre-Trump Administration totality of the circumstances test by considering the six listed factors without any factors bearing extra or "core" weight. This all-encompassing approach may make the analysis more challenging for employers as it is highly fact specific. The change has also sparked speculation within legal circles that the new rule will be challenged in court, especially in light of an ongoing case which was paused during the new rule's development.

Fabian VanCott's Labor and Employment section has the experience to help you navigate the intricacies of worker classification and other employment challenges with confidence.

New Test

- Opportunity for profit or loss depending on managerial skill
- Investments by the worker and employer
- Degree of permanence of work relationship
- Nature and degree of control
- Extent work performed is an integral part of the employer's business
- Skill and initiative





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