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DOL Withdraws Independent Contractor Final Rule

Effective May 6, 2021, the U.S. Department of Labor, Wage and Hour Division (“DOL”) withdrew a final rule announced at the end of former President Trump’s term regarding worker classifications under the Fair Labor Standards Act (“FLSA”). The final rule had been previously scheduled to go into effect on March 8, 2021, but it was delayed following the election of President Biden.

The final rule would have modified the DOL’s interpretation of worker classification for the purpose of determining employment or independent contractor status. Under the FLSA, the economic realities test generally considers six factors: (1) the degree of the employer’s right to control the manner in which the work is to be performed; (2) the worker’s opportunity for profit or loss depending upon his or her managerial skill; (3) the worker’s investment in equipment or materials required for his or her task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer’s business.

The prior administration took a modified stance on the test by giving more weight to two “core factors,” namely the degree of control over workers and the workers’ opportunity for profit or loss. Now the DOL has returned to analyzing classification issues based on the totality of the circumstances under all factors. As the DOL explained, the prior rule impermissibly narrowed the economic realities test by disregarding several factors the courts and the agency had previously considered in the analysis.

Although the final rule never took effect, employers should take this opportunity to review their own worker classifications to confirm compliance under the FLSA. If you have questions about the independent contractor classification or the DOL’s interpretation of the same, please contact your Kutak Rock attorney or any of the attorneys in the [FLSA Litigation and Wage and Hour Defense Group](#) or [Employment Law Group](#). You may also visit us at www.KutakRock.com.

