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The DOL Issues New Rule on Independent Contractor Classification

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On January 9, 2023, the U.S. Department of Labor (“DOL”) issued a new final rule, “Employee or Independent Contractor Classification under the Fair Labor Standards Act,” aimed at clarifying the distinction between employees and independent contractors under the Fair Labor Standards Act (“FLSA”). The final rule takes effect on March 11, 2024, and it vacates the 2021 Independent Contractor Rule, which the DOL deemed inconsistent with established laws and judicial principles.

The final rule is designed to bring the DOL’s guidance in line with the text and purpose of the FLSA and existing judicial precedent. The DOL’s stated goal is to reduce the risk of misclassification of employees, which not only negatively impacts workers, but creates significant legal exposure for employers, including hefty penalties, back pay for unpaid overtime, liquidated damages, and attorneys’ fees.

Under the final rule, there are six factors for analyzing whether a worker is an employee or an independent contractor:

- The worker’s opportunity for profit or loss depending on managerial skill;
- Investments made by the worker and the employer;
- The degree of permanence of the work relationship;
- The nature and degree of control over the performance of the work;
- The extent to which the work performed is an integral part of the employer’s business; and
- Use of the worker’s skill and initiative.

No single factor automatically determines whether a worker is properly classified as an employee or an independent contractor. Instead, the factors must be weighed according to the totality of the circumstances.

The final rule does not affect the analysis for determining worker classification under other laws, such as the National Labor Relations Act or state wage and hour laws.

Significance for Employers

The introduction of the new final rule necessitates that businesses review and potentially revise their practices related to worker classification. Here are some key pieces of advice for businesses to consider:

Understand the Criteria: Familiarize yourself with the criteria outlined in the new final rule for determining whether a worker is classified as an employee or an independent contractor. This includes evaluating factors such as the nature of the work relationship, financial considerations, control over work, and the significance of the worker's role to your business.

Review Current Practices: Conduct a comprehensive review of your existing workforce and evaluate the classification of all independent contractors. Ensure that your classifications align with the new final rule's guidelines and criteria.

Maintain Records: Keep detailed records of worker classifications, agreements, and any related communications. Maintaining accurate and thorough documentation can help demonstrate compliance with the new final rule and mitigate potential risks.

Consider Implications on Operations and Costs: Assess the potential impact of the new final rule on your business operations, costs, and overall workforce management strategies. Be prepared to make necessary adjustments to mitigate any adverse effects and capitalize on opportunities for improvement.

Consider Applicable State Laws: Familiarize yourself with applicable state wage and hour laws, which may provide more protections for workers than the FLSA.

Seek Legal Counsel: Given the complexities surrounding worker classification and the potential legal implications of misclassification, consider consulting with legal professionals experienced in employment law to review your practices and provide guidance.

By taking a proactive and informed approach, businesses can effectively navigate the complexities of independent contractor classification, mitigate risks, and ensure compliance while promoting a positive and compliant workplace environment.

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