

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

JANUARY 11, 2024

U.S. Department of Labor Announces Final “Independent Contractor” Rule

As we previously reported [here](#), on Oct. 11, 2022, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking that would revise the analysis for determining independent contractor status under the Fair Labor Standards Act (FLSA or Act). On Jan. 9, 2024, the DOL announced its final rule.

The DOL final rule provides guidance on proper classification and seeks to reduce the risk of employee misclassification, a serious issue that deprives workers of basic rights and protections afforded under the Act and creates potential liability for employers.

For historical context, the standard for independent contractor classification under the FLSA was consistent from the 1940s until 2021. During that time, federal courts and the DOL applied the “economic realities” test, which analyzed whether a worker is economically dependent on the employer for work or if they are in business for themselves. Courts considered six factors, including: (1) the degree of an employer’s control over the manner of work performed; (2) the worker’s opportunity for profit or loss depending on their managerial skill; (3) the worker’s investment in equipment or materials or employment of others; (4) whether the work performed required special skills; (5) the permanency of the working relationship; and (6) whether the services rendered were integral to the employer’s business. No one factor controlled the analysis, rather the totality of the circumstances were considered.

Under former-president Donald Trump, the DOL changed the longstanding rule on March 4, 2021 (the 2021 Rule). The 2021 Rule deemed the degree of control and opportunity for profit factors as “core” factors, granting them more weight in the analysis. It also limited consideration of whether services were integral to an employer’s business and instead considered whether a worker’s services were an integrated unit of production. The DOL cited the need for greater certainty than the economic reality test allowed and determined the “core” factors were most important for determining economic dependence of a worker on an employer. In practice, the 2021 Rule made it easier to classify workers as independent contractors, alleviating employers’ obligations under the FLSA.

The new rule rescinds the 2021 Rule and returns to the original economic realities standard, which focused on the working relationship between the worker and his or her employer and was more consistent with the FLSA and longstanding judicial precedent.

Under the new rule, the ultimate inquiry is one of “economic dependence,” meaning whether a worker qualifies as an independent contractor will depend on whether, as a matter of economic reality, the worker is in business for him or herself. The new rule focuses again on the six factors

as tools to guide the totality-of-the-circumstances analysis to determine economic dependence. Importantly, the new rule takes effect on March 11, 2024.

If you have any questions about the information contained in this memo, please contact [Adam Mastroleo](#), [Sam Brewster](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are in regular contact.

