Gig Worker-Friendly Independent Contractor Test Withdrawn by Department of Labor

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Effective May 6, 2021, the U.S. Department of Labor (DOL) withdrew the agency's Trump-era rule that for the first time established a test for independent contractor status in a federal regulation. The Trump rule was published on Jan. 7, 2021, and was set to go into effect on March 8, 2021. (See our prior articles explaining the Trump rule here and here). However, the DOL under President Biden proposed to delay the rule from taking effect, and on May 5, 2021, announced its withdrawal.

The Trump DOL's rule reduced and streamlined the factors considered to determine if a worker is an employee or an independent contractor. Most significantly, it highlighted two "core factors" that should be considered more strongly than others: 1) the nature and degree of the worker's control over their work; and 2) the worker's opportunity for profit or loss based on initiative and/or investment. The Trump DOL said that the now-withdrawn rule would have "streamlin[ed] and clarif[ied] the test," which would "reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction and flexibility."

However, in its news release, the Biden DOL essentially said the Trump rule would do just the opposite, citing reasons it withdrew the rule that included: 1) it was "in tension" with the text and purpose of the Fair Labor Standards Act (FLSA), "as well as relevant judicial precedent;" 2) the two core factors would have "undermined" the longstanding approach to balance all factors in the test and view them under a totality of the circumstance, which would have 3) improperly narrowed the facts considered resulting in workers losing FLSA protections.

The Trump DOL's final rule discussed the need to address independent contractor classification in the growing and norm-altering "gig economy." However, Marty Walsh, the Biden administration's Secretary of Labor, said that "[b]y withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop the erosion of work

protections that would have occurred had the rule gone into effect." In an interview with Reuters, Walsh stated "We are looking at it but in a lot of cases gig workers should be classified as employees..."

After his comments, the stock of gig worker giants Uber and Lyft took a hit, and more recently, Walsh told Yahoo Finance that he meant to say that gig workers "deserve good pay, good benefits, opportunities for health care and unemployment and all the rest." He went on to say that there will be further conversations about "different economies in our country" because those workers are hurting from the pandemic just as more traditional workers are. [Seen here]

The DOL's initial delay of the independent contractor rule, prior to its withdrawal, has been challenged in court by business groups, but that lawsuit is ongoing and the court has not prevented the withdrawal.

The withdrawal means the test that has traditionally been used by the DOL, and its many versions used by federal courts, will continue, creating less certainty for companies about the proper classification of workers. And the department appears to have clearly signaled that independent contractor classification, especially in the gig economy, will be of particular interest to it in the coming months and years.

The DOL's current test is designed to determine the economic reality of whether the worker is in business for him/herself. It considers the following factors, none of which are given greater weight than the others:

1. The nature and degree of the potential employer's control;
2. The permanency of the worker's relationship with the potential employer;
3. The amount of the worker's investment in facilities, equipment, or helpers;
4. The amount of skill, initiative, judgment, or foresight required for the worker's services;
5. The worker's opportunities for profit or loss; and
6. The extent of integration of the worker's services into the potential employer's business.

If you have questions about this or any other related issues, please contact the Nexsen Pruet Employment & Labor Law Team.