Morrison Cohen

Client Alert | January 24, 2024

DOL Publishes Final Rule on Independent Contractor Classification Under the FLSA

On January 10, 2024, the United States Department of Labor ("DOL") published its final rule on when a worker should be classified as an employee as opposed to an independent contractor under the Fair Labor Standards Act ("FLSA"). The new rule takes effect on March 11, 2024 and rescinds and replaces the Trump-era Independent Contractor Status Under the Fair Labor Standards Act rule (2021 IC Rule) which was put into effect three years ago. The new rule narrows the circumstances under which workers can properly be classified as independent contractors.

As background, the FLSA generally requires that employees be paid at or above the applicable minimum wage and be paid at the rate of 1½ times their regular hourly rate of pay for all hours worked in excess of 40 in any workweek. These requirements do not apply to independent contractors because they do not fall under the FLSA's definition of "employee." If a worker is deemed an employee under the FLSA, that worker cannot waive FLSA-protected rights. Thus, proper classification of service providers is important for employers in avoiding potential liability for unpaid wage claims.

Under the new rule, the test for determining whether a worker should be classified as an employee or independent contractor returns to the six-factor, "totality of the circumstances" analysis that was in place prior to 2021. Specifically, the following six factors are to be considered in determining independent contractor status:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the potential employer
3. Degree of permanence of the work relationship
4. Nature and degree of control by the business entity
5. Extent to which the work performed is an integral part of the potential employer's business
6. Skill and initiative

As the DOL notes, no single factor or set of factors is given predetermined weight, and additional relevant factors may be considered where they indicate whether the worker is in business for themself or economically dependent on the potential employer for work.

The new rule provides detailed guidance for examining each of the six factors. For example, with respect to the "degree of permanence of the work relationship" factor, the new rule weighs in favor of the worker being classified as an employee where the work relationship is "indefinite in duration, continuous, or exclusive of work for other employers." In contrast, this factor weighs in favor of the worker being classified as an independent contractor where the work relationship is "definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities."

Employers should familiarize themselves with the new rule and examine those in their workforce classified as independent contractors to ensure each member of their workforce is properly classified prior to March 11, 2024. While the new rule is not binding on the courts, it is likely to be cited as persuasive authority in independent contractor classification litigation throughout the country. Businesses should also keep in mind that this final rule does not affect other federal, state, and local laws that use different or more stringent standards of analysis with respect to employee classification.

Morrison Cohen

Key Contacts

Our Labor & Employment Law team is available to help employers navigate this new rule and to provide wage and hour counseling and litigation assistance with respect to potential classification issues under the FLSA as well as other applicable federal, state and local laws.

Jeffrey P. Englander
Partner & Co-Chair
D 212.735.8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
D 212.735.8736
kmarkel@morrisoncohen.com

John B. Fulfree
Partner
D 212.735.8850
jfulfree@morrisoncohen.com

Cassandra N. Branch
Associate
D 212.735.8838
cbranch@morrisoncohen.com

Alana Mildner Smolow
Associate
D 212.735.8784
amildner@morrisoncohen.com

Kayla West
Associate
D 212.735.8760
kwest@morrisoncohen.com