NEWS & INSIGHTS

New independent contractor rule: What employers need to know

BY: STEPHEN J. FLEURY, JR. | INSIGHTS | ARTICLE

JANUARY 17, 2024

The U.S. Department of Labor has published its final rule setting forth a new six-factor test for determining whether workers may be classified as independent contractors. As expected, the new test will result in the USDOL recognizing fewer independent contractors, and more employees. The final rule takes effect March 11.

The final rule rescinds a prior 2021 multi-factor test that put significant weight on two factors – the nature and degree of control by the business over the work being performed and the worker's opportunity for profit and loss – in determining whether a worker is an independent contractor.

The new rule, which is very similar to a proposed rule issued in October 2022, scraps the mostly two-pronged test and mandates a six-step test where all steps carry equal weight.

Employers often prefer to use independent contractors to meet certain short-term needs through a flexible work arrangement. Now, businesses that use independent contractors must comply with the new worker-friendly test that likely will result in more independent contractors having to be reclassified as employees.

What to consider

According to the new rule, to designate a worker as an independent contractor, an employer must now consider:

Opportunity for profit or loss depending on managerial skill: Whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work.

Investments by the worker and the potential employer: Whether any investments by a worker are capital or entrepreneurial.

Degree of permanence of the work relationship: How long will the worker be at this business, though there is no designation of whether it should be measured in weeks, months, years or any set amount of time.

Nature and degree of control: This includes an employer's control over scheduling, supervision, setting prices of goods or services and ability to work for others.

Extent to which the work performed is an integral part of the potential employer's business: If this worker leaves the business, will there be a lasting effect on the company?

Skill and Initiative: Whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.

These six factors are not exhaustive. If their application, and the potential application of other relevant factors, indicates that a worker is economically dependent on the employer, then the worker is an employee, potentially entitled to health benefits, annual raises, workers' compensation and other perks traditionally bestowed by an employer on full-time employees.

What now?

There is no way around it – the new rule will be onerous to employers that use independent contractors. Under the new rule, there will still be many workers appropriately categorized as independent contractors, but a meaningful portion of the current independent contractor workforce now needs to be reclassified as employees. Even if a worker prefers to be an independent contractor at the time of their hire – and many do, for various reasons – classifying that worker as an independent contractor when they qualify under the new test as an employee could result in penalties and liability.

Also, current independent contractors will not be grandfathered in under the new rule and allowed to keep their current status. All workers must be classified according to the new rule. That gives employers two months to work on potentially reclassifying some or all of its current workforce or to change workers' duties and responsibilities to be able to keep them as independent contractors.

Employers should not delay in auditing their current workforce to ensure compliance with the new rule. If you have any questions about the rule or would like assistance in interpreting the rule for the proper classification of any of your workers, contact Steve Fleury, Rick Hackman or any of the attorneys in the Saxton & Stump Labor & Employment Group.

Related People

Stephen J. Fleury, Jr.

Related Services and Industries

Labor and Employment