



Bloomberg Law Reports DOL Misclassification Rule Could Be In Jeopardy

Insights

8.14.20

A report by [Ben Penn](#) in [Thursday's Bloomberg Law](#) casts serious doubt about whether the Department of Labor will proceed with a misclassification rule before the end of this presidential term. [We reported last month](#) that the July 1 regulatory notice issued by the DOL announcing an impending regulation for determining independent contractor status under federal wage and hour law was good news for gig economy companies. Such a rule would almost certainly provide a flexible standard permitting typical gig economy businesses to classify their workers as contractors under federal law. And the cherry on top was the news ([also broken by Ben Penn at Bloomberg](#)) that the agency was aiming to fast-track the rule to be completed by year's end, insulating it from the possibility that a new administration voted into the White House this Election Day could quickly reverse course. But yesterday's news casts a pall over this hopefulness and brings gig economy companies back to earth with the realization that we may not see such a proposed rule anytime soon.

According to Penn, internal conflict over the legality of the rule "and concerns that the November election's results could doom the project" have stalled the rulemaking process. Besides the fact that some within the agency believe that the FLSA misclassification test can't legally be altered by rule but only by regulation, the other danger stems from a federal law that permits a newly convened Congress to disapprove of any rule finalized in the last 60 legislative days of 2020. [As Bloomberg reports](#), there are three realistic scenarios this November that could impact the misclassification rule:

- **Trump reelection:** If Trump wins reelection in November, the DOL could publish the final rule whenever it wants, with no time pressure to overcome. And if the agency rushes to get the rule finalized before the election, it would obviously survive into the president's second term.
- **Biden election and Republicans retain Senate majority:** The DOL would have to move quickly and finalize the regulation in the final weeks before the inauguration, but danger would remain that litigation could hold up implementation of the rule.
- **Biden election and Democratic takeover of Senate:** This is the wildcard that many in the current administration and the business community are concerned about. If the current DOL acts quickly and jams a new misclassification rule through the regulatory process in the coming months, the Democrats could use the Congressional Review Act once they take control of the Senate in January to not only invalidate any such rule but also bar a future DOL from issuing another regulation in substantially the same form.

another regulation in substantially the same form.

As Penn reports, it's this third scenario that has led some to start cautioning "agency leaders that political developments may soon create a situation where shelving the initiative would be the best course for employers." [You can read his entire article here.](#) Stay tuned for an exciting few months.

Related People



Richard R. Meneghello

Chief Content Officer

503.205.8044

[Email](#)