



Business Groups Sue Feds In Effort To Revive Gig Economy Rule

Insights

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If a consortium of businesses have their way, the federal government will be forced to adopt and enforce the rule proposed by the Trump-era Department of Labor that was about to make it easier for businesses to classify their workers as independent contractors. In response to the Biden administration's recent action to permanently shelve the delayed rule and replace it with a rule widely expected to be far friendlier to workers and unions, the Coalition for Workforce Innovation filed a March 26 federal lawsuit in Texas asking the court to set aside the White House's recent U-turn and to immediately install the gig economy rule as the law of the land. What can you expect from this lawsuit and what does it mean for businesses across the country?

How Did We Get Here?

Before we look to the future, a brief recap of where we've been to date will be helpful to put this latest development in context. It came as no surprise when one of the final acts of the Trump Department of Labor was to finalize a gig economy rule addressing the misclassification issue. The rule was slated to ensure that the only workers classified as employees under federal wage and hour law would be those economically dependent on a hiring entity for work, using a five-factor test to make this determination. The two most critical factors that would have been examined were whether the individual controlled their work and whether they had an opportunity to impact their own profit and loss.

The effective date of the proposed rule was originally slated to be March 8, but the DOL first announced a 60-day regulatory freeze shortly after President Biden took office. The president had expressed admiration during his campaign for California's "clear, simple, and strong" three-prong "ABC test" to distinguish employees from independent contractors. He also promised to work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws (which could become federal law under the resurrected PRO Act). Moreover, he installed Marty Walsh – an avowed labor advocate – as his choice to lead the DOL, further cementing the idea that we would eventually see the Trump rule scrapped.

Sure enough, on March 11 the Department of Labor formally announced that it believed the Trump-era rule was inconsistent with standards set by the Supreme Court and the overall purpose of federal wage and hour law. It shelved that proposal and said it would come up with its own rule, announcing that it would accept public comments about the rule through April 12.

Shots Fired Through Federal Lawsuit

Rather than expressing their opinions through the comment-and-notice process, the businesses involved with the coalition decided to provide their thoughts through litigation. Their main argument: that the new Labor Department didn't provide a meaningful process or substantive justification for its decision to delay and then scrap the rule. The lawsuit claims that the agency's proposal to withdraw the rule after an improper delay in implementation – remember, it was supposed to take effect on March 8 – was not valid. It asks the court to issue a federal injunction that would not only halt the Biden DOL's process of developing a replacement rule but would install the Trump-era rule at once, indicating that the effective date should actually be considered March 8.

What's Next?


It wouldn't be unprecedented for a single federal court judge to upend an entire regulatory reversal and force into effect a prior administration's rule that had been scrapped by its predecessor. Several years ago, after the Obama administration finalized a pay data collection rule and the Trump administration blocked it before it could take effect, a consortium of supporters filed suit and convinced a court to breathe new life into the rule and order it into effect. We could see a similar dynamic unfold over the course of 2021 when it comes to the gig economy rule.

Of course, litigation is notoriously unpredictable, so we can't count on anything emerging from Texas that would revive the rule. Even if we do, this lawsuit could drag on for more than year before we see anything definitive from the court – or we could see a national injunction filed blocking the new rule and installing the Trump-era rule next month. Or the court could reject this effort while the DOL proceeds with its own rulemaking.

We'll monitor this lawsuit and provide updates as warranted. Sign up for our Fisher Phillips Insights delivered right to your inbox so you don't miss a thing.

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