When the Expected Occurs: White House Wipes Out Trump-Era Gig Economy Rule

Insights
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After a minor delay in the rulemaking process, the expected just occurred: effective today, President Biden's Department of Labor rescinded the gig economy regulation that would have made it easier to classify workers as independent contractors. We've seen this coming for some time now – in early January, in fact, we wrote a Legal Insight about how the future of the Trump-era Department of Labor's gig economy rule was "uncertain." What can you expect from this rollback and what does it mean for businesses and workers?

What Happened?

As reported by Bloomberg, Biden's Department of Labor (DOL) wiped out the gig economy rule under the Fair Labor Standards Act (FLSA), which included a five-factor "economic reality" test that was to be used to determine whether a worker was an independent contractor or an employee. As predicted, with the administration change, the DOL took a U-turn on this important issue once Marty Walsh took over as head of the department. Businesses once again are left to rely upon a cloudy analysis for determining whether gig economy workers – or any workers, actually – can safely be classified as independent contractors.

The decision came after the Department received thousands of comments from both sides of the debate, and its conclusion that the now-withdrawn rule was inconsistent with judicial precedent. You can visit this document to learn more about the Department's rationale.

What Does This Mean for Businesses?

For businesses, there are three takeaways from this development. First, as reported in a previous Legal Insight, business groups recently filed a federal lawsuit in Texas asking the court to invalidate the DOL's decision to scrap the Trump-era gig economy rule. Although this lawsuit is still pending, it is unclear whether we might see a national injunction that would block the new rule and reinstall the Trump-era gig economy rule.

Second, the DOL's rescission of the rule does not mean that there is now a "new rule" to classify gig economy workers. In fact, the Biden administration has not yet released a proposed rule or any type of replacement standard on how businesses should classify workers as employees or independent

contractors. Instead, the decision to rescind this rule means that the DOL has returned to its longstanding, and murky, multi-factor test.

Finally, after an interview last week regarding the withdrawal of the five-factor gig economy rule, it's possible that Labor Secretary Marty Walsh is telegraphing his intent to usher in new rulings from the Department, such as setting legal guidelines for how employers should treat workers – as well as conversations with companies to ensure workers have access to consistent wages, sick time, and health care, among other things. Therefore, it seems likely that this all means that the DOL will pursue a more worker-friendly version of the gig economy rule in the near future.

What Should We Do About This New Rule?

As of May 6, businesses across the country are left with the longstanding multi-factor test for determining correct worker classification. Businesses that rely on use of independent contractors are at substantial risk of having that classification challenged, by the DOL or in litigation, and should proactively take steps to mitigate the risk of a misclassification.

We will continue to monitor and report new developments. Sign up for our Fisher Phillips Insights delivered right to your inbox so you don't miss a thing. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Gig Economy Practice Group.

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James F. Glunt
Partner
412.822.6621
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