What Businesses Need to Know as DOL Seeks to Kill Trump-Era Gig Economy Rule (Again)

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The saga continues for companies that rely on a gig economy business model as the federal government just challenged a court order that recently restored a Trump-era rule that makes it easier to classify workers as independent contractors. On May 13, the Department of Labor (DOL) filed a notice of appeal with the federal district court in Texas that reinstated the rule. In 2021, the Biden administration first delayed then ultimately withdrew the rule. But the DOL failed to give the public a meaningful opportunity to comment on its decision to delay the Trump administration's rule or consider possible alternatives before rescinding it, according to the district court's March 14 order. For now, the Trump-era rule remains in effect – but that could change at the drop of a hat as the lawsuit works its way through the courts. What do you need to know as the litigation plays out?

Business Groups Support 'Economic Realities' Test

Two competing schools of thought have emerged about the proper legal standard to determine whether workers are independent contractors or employees. The Trump administration's rule looks to the "economic reality" of each workplace relationship by weighing five simple factors and determining whether the worker is in business for themselves (and thus a contractor) or economically dependent on the hiring entity (and thus an employee):

1. The nature and degree of the individual's control over the work;
2. The individual's opportunity for profit or loss;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship; and
5. Whether the work is part of an integrated unit of production.

Although the list is non-exhaustive and no single factor is dispositive, the first two points are identified as the "core factors" in the analysis and therefore are afforded greater weight than any other factor. So, if the economic realities test applies and the first two factors are both in favor of one status or the other (employee or contractor), the remaining factors will not be relevant in most cases under the federal Fair Labor Standards Act (FLSA).

The Trump administration noted that when evaluating the individual's economic dependence on the potential employer, "the actual practice of the parties involved" is more relevant than what may be

potential employer, "the actual practice of the parties involved" is more relevant than what may be contractually or theoretically possible. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, they are prevented from exercising such rights.

The final rule applying this flexible test was supposed to take effect in March 2021, but the DOL first announced a 60-day regulatory freeze shortly after President Biden took office. Then, on March 11, 2021, the department 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.

The coalition of businesses challenging the Biden administration's actions argued that the DOL violated the Administrative Procedure Act by failing to provide a meaningful process or substantive justification for its decision to delay and then scrap the rule.

The U.S. District Court for the Eastern District of Texas agreed and recently reinstated the Trump administration's rule with its original effective date of March 8, 2021. It is this decision that is now under attack from the current DOL.

Unions and Worker Advocates Support 'ABC' Test

Although the current administration has yet to propose its own new independent contractor rule, President Biden made clear during his campaign that he supports a California-like three-prong "ABC" test. A worker is considered an employee under the ABC test unless the hiring entity establishes all three of these prongs:

1. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
2. The worker performs work that is outside the usual course of the hiring entity's business; and
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

In California, the ABC test expanded the definition of "employee" under the state's wage orders – as well as certain other laws – and imposed an affirmative burden on companies to prove that independent contractors are being properly classified.

The ABC test makes it much more difficult for many companies to treat workers in California as independent contractors, and more difficult for businesses to hire smaller, entrepreneurial businesses. Even so, President Biden promised to work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws. Moreover, Secretary of Labor Marty Walsh has said he thinks gig workers should be classified as employees.

What's Next?

The 5th U.S. Circuit Court of Appeals will now consider the DOL's challenge to the district court's ruling reinstating the economic realities test. In the meantime, you should note that many states apply their own test to determining whether workers are independent contractors or employees under wage and hour laws. For example, California, New Jersey, Massachusetts, and other states have established their own systems that make it more difficult for companies to utilize contract labor for many jobs within their organization.

You should also recognize that, at the federal level, the National Labor Relations Board and other agencies may apply different tests than the DOL uses for FLSA cases. In fact, the NLRB announced that it intends to develop its own standard sometime in 2022 that will no doubt further complicate matters.

We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any member of our Gig Economy Practice Group.

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