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Locke Lord QuickStudy: Biden Administration's Withdrawal of Trump's Independent Contractor Rule: Just as ?Meaningless as the Rule It Withdrew

Locke Lord LLP

WRITTEN BY

Richard Reibstein

Earlier today, the U.S. Department of Labor formally issued a rule that withdraws the Trump Administration's regulation addressing the test for classifying workers as independent contractors or employees under the federal Fair Labor Standards Act. In a blog post the day before the Trump Administration regulation was formally issued, we noted "the regulation…would be 'much ado about (almost) nothing.'" To that end, we commented that, "unlike most regulations with hard and fast rules, the proposed regulation was in the nature of an administrative interpretation comprising the Labor Department's review of existing court decisions and its articulation of a preferred legal analysis … [that] courts would give little if any deference to." Our reaction to the Biden administration's new rule is no different. Of course, the issue of independent contractor status, especially in the gig economy, unfortunately has become so politicized of late that even legally meaningless acts by administrative agencies, which do not have the last say on who is or is not an independent contractor (only the courts do), have garnered outsized attention from stakeholders – and the independent contractor regulation is the quintessential example. The focus on the issue, now though, is likely to spur more companies to enhance their independent contractor compliance as discussed below.

What the New Rule Says Are Reasons for Withdrawing the Old Rule

The Labor Department's rule withdrawing the prior regulation is lengthy – 77 pages of text. But its conclusion is brief and confirms our view that judicial precedent, not administrative regulations, determine who is and who is not an independent contractor or employee:

Having considered the comments submitted in response to the [proposed new rule], the Department has decided to finalize the withdrawal of the Independent Contractor Rule. The Department believes that the Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent.

Today's rule then addressed the disparity between the Trump Administration's view of court decisions and the Biden Administration's reading of the same set of cases dealing with independent contractor status under the FLSA.

The new rule first finds that the "[prior] Rule's standard has never been used by any court or by [the Labor

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Department's Wage and Hour Division], and is not supported by the [FLSA]'s purpose or judicial precedent." To that end, it states that the Trump rule focused too much on the issue of "control" and, as such, made the standard more like the "common law" test used by the courts under the tax code and less like the "economic realities" test used for decades by judges.

The new rule also articulated that the old rule mischaracterized court decisions regarding another important factor in independent contractor determinations: whether the worker has an opportunity for profit or the risk of loss. In addition, it found that the old rule placed insufficient emphasis on the disparity between the amount of the company's investment in its business in and the investment by the worker and instead focused only on the latter.

The new pronouncement also notes that the old rule did not give due regard to judicial decisions that focus on the "centrality of a worker's work to the employer's business" and the old rule "downplay[ed] the employer's right or authority to control the worker."

The Biden Labor Department added that the old rule "would complicate rather than simplify the analysis for determining whether a worker is an employee or independent contractor under the FLSA," and did not consider how the old rule would have benefitted workers as a whole.

Analysis of the New Rule Withdrawing the Old

The new rule and old rule are akin to opposing briefs by lawyers for workers and businesses filed with a court considering the issue of whether workers are employees or independent contractors. Many courts considering that issue would undoubtedly agree with some of the arguments in support of the new rule and some in favor of the old rule.

In July 2015, during the Obama Administration, the Administrator of the Wage and Hour Division of the U.S. Department of Labor, David Weil, issued an Administrator's Interpretation that is, not surprisingly, consistent with the views expressed in the new rule. Dr. Weil has been nominated by President Biden to resume his position as Wage Hour Administrator, and it is likely he will issue guidance similar to his 2015 Interpretation.

Significantly, that Interpretation noted on the first page that *legitimate* independent contractor relationships "can be advantageous for workers and businesses." Dr. Weil also stated publicly during his tenure as Administrator that although an independent contractor relationship should not be used to evade compliance with federal labor law, "the use of independent contractors [is] not inherently illegal [and] legitimate independent contractors are an important part of our economy."

It remains to be seen if the Labor Department continues to subscribe to that tempered view, recognizing legitimate independent contractors and focusing only on intentional misclassification of employees as 1099'ers. Regardless of its view, though, the courts remain the ultimate arbiters of this issue..

While the new rule states that the old rule "failed to consider" whether it "would have benefitted workers as a whole," data addressing the views of those workers shows that those who are classified as independent contractors overwhelmingly prefer their work arrangements to traditional employment. See U.S. Bureau of Labor Statistics and also the assessment of the nonpartisan Government Accountability Office, as well as a respected

polling organization. All too often in matters such as these, the view of the most important stakeholder – the independent contractors themselves – are not given sufficient attention.

Withdrawal of the old rule also is not particularly meaningful in that it involves only one statute: the FLSA. The courts have stated repeatedly that test for independent contractor status under the FLSA is not the same as the classification test under the National Labor Relations Act, ERISA, or the Internal Revenue Code. And, of course, each state has its own set of laws governing independent contractor status and they contain a crazy quilt of rather diverse tests, only a few of which use the FLSA test.

Takeaway

Businesses that utilize independent contractors cannot help but be confused by the changing views at the U.S. Department of Labor. Companies that have used independent contractors in the past and plan to continue doing so in the future should consider enhancing their compliance with federal and applicable state independent contractor laws to minimize independent contractor misclassification exposure.

Many businesses already have done so by using a process such as IC Diagnostics™, which can serve to maximize compliance by creating sustainable independent contractor relationships in a customized manner.

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