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# The Upcoming Independent Contractor Regulations

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The U.S. Department of Labor has drafted a regulation governing the status of workers as independent contractors (ICs) or employees under the Fair Labor Standards Act (FLSA), and the new rule is reportedly undergoing White House review. A notice of proposed rulemaking is expected to be issued soon. Will the proposed regulation have any legal significance, or can you disregard it? Businesses, worker organizations, and commentators have gotten dizzy over the past ten years by the back-and-forth changes to federal regulations regarding the FLSA's test for IC status. The Obama administration's guidelines were overwritten by the first Trump administration's regulations, which were then overwritten by the Biden administration's regulations, which are likely to be overridden soon by the upcoming proposed regulations by the second Trump administration.

Why should businesses that use ICs disregard the legal significance of upcoming regulations? And why should worker organizations take comfort that the anticipated regulations will not alter the legal landscape for IC compliance and misclassification? First, the Labor Department does not decide IC status under federal law; the federal courts do. Each of the federal appellate circuits has, for decades, articulated its own tests for IC status, and each of those tests is roughly similar to each other. Second, the past regulations by both the first Trump administration and the Biden administration were little more than an interpretation of selected federal appellate court decisions, yet the courts routinely apply their own judicial precedent and do not need an agency to interpret their opinions.

If, as expected, the new regulation again is simply an interpretation of court decisions by the current administration, it too will likely be disregarded by the federal courts. Indeed, no court has yet relied upon any of the prior Labor Department regulations in deciding the merits of an IC misclassification case. Third, most litigation in the U.S. alleging IC misclassification is based at least in part on state laws, and federal regulations have no impact on the various state law tests for IC status. Nonetheless, the upcoming regulation should prompt prudent businesses to enhance their IC compliance in the manner discussed in the "takeaway" at the end of this article.

**The Prior Interpretations and Regulations**

Few legal issues have been so blatantly subjected to political ping pong at the federal level over the past 10 years than the status of workers as ICs or employees.

**The Obama Administration Interpretation**

On July 15, 2015, during the tail end of the Obama administration, the Wage and Hour Administrator of the U.S. Department of Labor issued an "Administrator's Interpretation" on IC status providing comprehensive guidelines on IC status under the FLSA. As we noted in a blog post that day, the new Interpretation "contains nothing new, different, or dramatic." We added: "In fact, the new Interpretation does little more than restate the same… factors that have historically been applied by the Labor Department and that can still be found on its website." We commented that the new Interpretation, however, placed far greater emphasis than do the courts on "a worker's 'economic dependence' on the business that has engaged his or her services," a factor that favors employee status. We observed that, by doing so, the Interpretation overlooked governing judicial precedent.

**The First Trump Administration's Regulation**

In early June 2017, less than five months after the start of the Trump administration, the Labor Department withdrew that Administrator's Interpretation and thereafter began working on the issuance of a formal rule on IC status. On Jan. 6, 2021, only two weeks before the conclusion of the first Trump administration, the Labor Department issued a final rule governing IC status under the FLSA. The 2021 rule noted that the courts typically examine five factors to determine IC status, but expressly stated that two factors should be given greater weight: (1) the nature and degree of the individual's control over their work; and (2) the individual's opportunity for profit or loss.

The regulation referred to those as "core factors" and pronounced that the remaining three factors, referred to as "non-core" factors, should be given less importance: the amount of skill required for the work; the degree of permanence of the working relationship; and whether the work is part of an integrated unit of production.

Notably, the illustrations in the final 2021 rule issued by the first Trump administration focused on factual scenarios and court decisions that favored IC status. As we observed in a blog post on the day the final regulations were issued, "unlike most regulations with hard and fast rules, th[is] 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." We predicted that, as a result, "courts would give little if any deference to it."

**The Biden Administration's Regulation**

In May 2021, only four months after the start of the Biden administration, the U.S. Department of Labor issued a rule that withdrew the Trump administration's regulation on IC status. That rule was immediately challenged in court. Meanwhile, the Biden Labor began its own version of a regulation governing IC status. On Jan. 9, 2024, the Labor Department issued a new final rule on IC status under the FLSA. It rejected the Trump administration regulation that gave greater weight to two factors and instead focused on a "totality-of-the-circumstances" approach in which none of the factors have a predetermined weight.

The most meaningful impact of this approach was the Biden administration's effort to place more weight on one of the three "non-core" factors: whether the work is integral to the employer's business. This factor almost universally favors employee status, thereby causing many courts to give it less weight than the other factors used

to determine IC status. As we noted in our blog post on the day the Biden regulation was issued, “it is unlikely the courts will change their precedent and give more weight to that factor.” No courts have relied on that 2024 rule in deciding if a worker is an IC or employee.

There have been as many as five lawsuits seeking to enjoin the Biden 2024 rule, but all have been paused after the second Trump administration filed court papers in those cases advising the courts that it was seeking to rescind the 2024 rule issued by the Biden administration.

**The Upcoming Second Trump Administration Regulation**

It is anticipated that the current Trump administration’s rule on IC status under the FLSA will mirror to a large extent the approach taken five years ago in the regulation issued by the Labor Department in the first Trump administration—a rule that was essentially the Trump administration’s interpretation of court decisions, with emphasis on the two “core” factors identified in the 2021 rule. If so, one should expect that the courts will continue to ignore Labor Department regulations on IC status and instead follow their own well-established precedents.

Another reason why the anticipated IC regulations will have an insignificant impact legally is that the position of the U.S. Department of Labor on the issue has virtually no influence on state laws, which vary considerably on the test for IC status. The overwhelming number of state laws permit the legitimate IC arrangements, although a few state laws strictly curtail all types of IC relationships. Thus, the upcoming federal regulation will not likely impact the legal status of the nearly 12 million U.S. workers who identified themselves as engaged in an IC relationship, according to a November 2024 study by the U.S. Department of Labor.

**Conclusions and Takeaways**

Many commentators will likely report that this upcoming regulation on IC status under federal law will increase the use of ICs by many businesses, including the gig economy, which is one industry sector that makes great use of workers that companies classify as ICs. Another industry that will likely welcome the new regulation is transportation, which relies heavily on owner-operators, who transport companies classify as ICs.

That industry has been the subject of countless IC misclassification lawsuits by certain state agencies and plaintiffs’ class action lawyers in courts around the country. It is anticipated, however, that the issuance of the new regulation on IC status will have no meaningful impact on the end-result of IC misclassification lawsuits, the bulk of which are brought under state law in whole or in part.

For companies that rely on the use of ICs, prudence suggests that the issuance of the new regulation governing IC status of workers should not be treated as some type of assurance that their IC relationships will more likely withstand scrutiny under federal and state laws governing IC status. Plaintiffs’ class action lawyers and state government agencies will hardly be deterred by a new federal IC rule that will have little to no impact on IC misclassification cases.

Rather, the renewed focus on IC status should serve as an impetus for companies using ICs to enhance their compliance with IC laws, particularly state laws governing IC status. Companies seeking to do so may wish to use a process that structures, documents, and implements IC relationships to maximize IC compliance in a customized

and sustained manner.

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