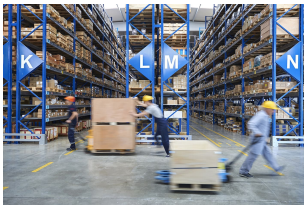

New DOL Rule Withdraws Trump-era Employee v. Independent Contractor Test in Favor of Historic Seven-Factor Test

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On May 6, 2021, the U.S. Department of Labor (DOL) issued a final rule that withdraws a Trump-era approach to categorizing workers as employees or independent contractors.

The Trump administration's categorization rule was finalized towards the end of the administration. It prioritized two primary factors to determine if someone was economically dependent on someone else's business or is in business for themselves—control over the work and opportunity for profit or loss. To the extent these two core factors were not determinative, the Trump administration's rule also considered three additional factors: 1) the amount of skill required for the work; 2) the degree of permanence of the working relationship; and 3) whether the work was part of an integrated unit of production.

The Trump rule was subsequently delayed in March by the Biden administration and then formally withdrawn on May 6. Additionally, two DOL opinion letters issued shortly after the Trump administration's rule was finalized (Opinion Letters FLSA 2021-8 and FLSA 2021-9) have also been withdrawn.

Following the withdrawal of the Trump administration rule, the DOL's previous seven-factor test remains in place. It is anticipated that the DOL will use this test as guidance to determine whether a worker is an employee or independent contractor until the DOL issues further guidance. The seven factors are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.

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- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

According to the DOL, these factors focus on the "economic reality" of an arrangement. The more control an employer exerts, the more likely the worker will be categorized as an employee. Employers will also need to keep in mind that different federal circuit courts utilize different tests to determine if a worker is an employee or an independent contractor.

The factors are more fully explained in the DOL's Wage and Hour Fact Sheet # 13.

Frost Brown Todd is here to help interpret and apply the DOL's rule to your specific arrangements. For assistance, please contact Neal Shah, Carl Lammers, Edward Rivin, or any attorney with Frost Brown Todd's Employee Benefits & ERISA or Labor & Employment practice groups.

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