Sills Cummis & Gross P.C.

Client Alert Employment and Labor

DOL Announces New Independent Contractor Rule

On January 9, 2024, the United States Department of Labor ("DOL") announced a new rule, effective March 11, 2024, that could impact countless businesses that use independent contractors. The new rule establishes a six-factor analysis to determine whether independent contractors are deemed to be "employees" of those businesses, and thus imposes obligations on those businesses relating to those workers including: maintaining detailed records of their compensation and hours worked; paying them regular and overtime wages; and addressing payroll withholdings and payments, such as those mandated by the Federal Insurance Contributions Act ("FICA" for Social Security and Medicare), the Federal Unemployment Tax Act ("FUTA"), and federal income tax laws. Further, workers claiming employee status under this rule may claim entitlement to coverage under the businesses' group health insurance, 401(k), and other benefits programs.

The DOL's new rule applies to the federal Fair Labor Standards Act ("FLSA") which sets forth federally established standards for the protection of workers with respect to minimum wage, overtime pay, recordkeeping, and child labor. In its prefatory statement that accompanied the new rule's publication in the Federal Register, the DOL noted that because the FLSA applies only to "employees" and not to "independent contractors," employees misclassified as independent contractors are denied the FLSA's "basic protections."

Accordingly, when the new rule goes into effect on March 11, 2024, the DOL will use its new, multi-factor test to determine whether, as a matter of "economic reality," a worker is truly in business for themself (and is, therefore, an independent contractor), or whether the worker is economically dependent on the employer for work (and is, therefore, an employee).

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While the DOL advises that additional factors may be considered under appropriate circumstances, it states that the rule's six, primary factors are: (1) whether the work performed provides the worker with an opportunity to earn profits or suffer losses depending on the worker's managerial skill; (2) the relative investments made by the worker and the potential employer and whether those made by the worker are to grow and expand their own business; (3) the degree of permanence of the work relationship between the worker and the potential employer; (4) the nature and degree of control by the potential employer; (5) the extent to which the work performed is an integral part of the potential employer's business; and (6) whether the worker uses specialized skills and initiative to perform the work.

In its announcement, the DOL emphasized that, unlike its earlier independent contractor test which accorded extra weight to certain factors, the new rule's six primary factors are to be assessed equally. Nevertheless, the breadth and impreciseness of the factors' wording, along with the fact that each factor is itself assessed through numerous sub-factors, make the rule's application very fact-specific. For example, through a Fact Sheet the DOL recently issued for the new rule, it explains that the first factor – opportunity for profit or loss depending on managerial skill – primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making, which will be influenced by the presence of such factors as whether the worker: (i) determines or meaningfully negotiates their compensation; (ii) decides whether to accept or decline work or has power over work scheduling; (iii) advertises their business, or engages in other efforts to expand business or secure more work; and (iv) makes decisions as to hiring their own workers, purchasing materials, or renting space. Similar sub-factors exist with respect to the rule's other primary factors and are explained in the **DOL's Fact Sheet**.

The rule will likely face legal challenges by business groups. Further, according to the online newsletter of the U.S. Senate Health, Education, Labor and Pensions Committee, its ranking member, Senator Bill Cassidy, has indicated that he will seek to repeal the rule. Also, in the coming months, the United States Supreme Court is expected to decide two cases that could significantly weaken the regulations issued by federal agencies like the DOL's new independent contractor rule, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. U.S. Dept. of Commerce*. We will continue to monitor these developments.[1]

[1] The DOL's independent contractor rule is not the only new federal agency rule being challenged. On January 12, 2024, the U.S. House of Representatives voted to repeal the NLRB's recently announced joint-employer rule, which we discussed in our **Client Alert of November 10, 2023**.

In the meantime, we recommend that businesses engaging or about to engage independent contractors take heed. Incorrect worker classification exposes employers to the FLSA's significant statutory liabilities, including back pay, liquidated damages, attorneys' fees to prevailing plaintiffs, and in some case, fines and criminal penalties. Moreover, a finding that an independent contractor has "employee" status under the FLSA may be considered persuasive evidence of employee status under other laws, such as discrimination laws. Additionally, existing state law tests for determining employee versus independent contractor status must also be considered. As always, Sills Cummis' Employment and Labor attorneys are available to provide guidance on these issues.

Our Sills Cummis Employment and Labor Practice Group
can assist employers regarding the issues raised in this alert.

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