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DOL's Final Rule on Independent Contractor Classification Likely Is Not the Final Word

By Andrea M. Kirshenbaum and Jennifer N. Capozzola
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March 11 marked the effective date of the U.S. Department of Labor's (DOL) final rule (2024 IC Rule) for analyzing whether a worker should be classified as an employee or independent contractor under the Fair Labor Standards Act (FLSA). The 2024 IC Rule sets out a six-factor "economic reality" test.

While the DOL rule took effect as scheduled (in contrast to the NLRB joint employer rule that was struck down by a Texas federal court on March 8), multiple lawsuits stand in its path and lawmakers in both chambers of Congress are challenging the 2024 IC Rule under the Congressional Review Act. And if the 2024 IC Rule can run the gauntlet of congressional challenge and at least four lawsuits seeking its demise, a U.S. Supreme Court decision upending the *Chevron* doctrine of deference to administrative agency interpretations of statutes may be waiting for it at the end of the court's 2023-24 term.

A Brief History of DOL Attempts to Analyze Independent Contractor Status

Because the protections afforded by the FLSA apply to employees only, the test to determine whether a worker is an employee or an independent contractor has significant, real-world impact on workers and the businesses for which they perform work. Under the FLSA, employees must be paid minimum wage and, if they are not exempt, must be paid time and a half for all hours worked over 40 in a workweek.

The FLSA defines an employee as, "any individual employed by an employer." The statute, passed in 1938, nowhere defines or introduces the concept of an independent contractor. During the Obama administration, the Wage and Hour Division issued an administrator interpretation setting out a six-part economic reality test for determining whether a worker qualified as an

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employee or an independent contractor. None of the factors were determinative, however, with the ultimate inquiry focused on whether the worker was economically dependent on the employer under the totality of the circumstances or truly in business for themselves.

Following the change in the White House, the Trump administration withdrew the administrator's Interpretation. The DOL then went a step further in 2020, proposing a new five-factor test, which focused on two "core factors" that carried greater weight in the analysis: the nature and degree of control over the work; and the worker's opportunity for profit or loss. If both of those factors pointed to the same classification (i.e., employee or independent contractor), then the analysis ended. But if the results were inconsistent, the rule considered three other noncore factors: the amount of skill required for the work; the relationship's length or permanence; and the work's integration into the potential employer's operations. The DOL finalized

the rule in January 2021 (2021 IC Rule). Days later, the Biden administration sought to delay the rule, and then purported to withdraw the 2021 IC Rule. Legal challenges ensued (which are still pending) with the DOL ultimately issuing the 2024 IC Rule rather than withdrawing the 2021 IC Rule.

The Economic Realities Test

Not surprisingly, the 2024 IC Rule returns to a "totality-of-the-circumstances" analysis of six economic reality factors, none of which is "necessarily dispositive." The weight assigned to any one factor depends on the facts and circumstances of the particular relationship being analyzed. The six factors are the:

- Opportunity for profit or loss depending on managerial skill.
- Investments by the worker and the potential employer.
- Degree of permanence of the work relationship.
- Nature and degree of control.
- Extent to which the work performed is an integral part of the potential employer's business.
- Skill and initiative.

The 2024 IC Rule also provides that additional factors may be considered depending on if they show whether the worker is in business for themself, or whether the worker is economically dependent on the potential employer for work.

The DOL developed its six-factor "totality of the circumstances" approach with a stated intent of bringing it into alignment with the DOL's historical approach as well as federal court precedent. In this regard, the well-established body of federal court decisions that apply an economic-realities analysis to independent contractor determinations forms the foundation of the 2024 IC Rule. Federal courts by and large already use an economic-realities test when determining independent contractor status under the FLSA, although the factors considered, or the number thereof, can differ by circuit. It seems unlikely that the issuance of the 2024 IC Rule will cause those courts to turn away from their long-standing tests. In contrast, DOL investigators will of course follow the 2024 IC Rule for assessing compliance and when undertaking enforcement actions.

What Happens to the 2024 IC Rule If 'Chevron' Deference Is Overruled?

On Jan. 17, the Supreme Court heard oral arguments in two cases, *Relentless v. Department of Commerce* and its companion case *Loper Bright Enterprises v. Raimondo*, asking whether it should overturn the landmark 1984 administrative law case of *Chevron USA v. Natural Resources Defense Council*. In *Chevron,* the Supreme Court found that courts must defer to federal agencies' reasonable construction of ambiguous statutes they are directed by Congress to administer. If *Chevron* is overruled, however, the DOL will not be able to rely on deference to defend its 2024 IC Rule in any ongoing litigation challenging its enforcement.

White House Whiplash and Regulatory Pendulums

Businesses crave certainty and a legal landscape that is not continuously shifting beneath their feet. Yet that is not the current state of play. It likely will take time for the cases challenging the 2024 IC Rule to wend their way through the courts. In the interim, businesses should assess the impact of the 2024 IC Rule and determine whether to consider reclassification of any workers. Of course, the FLSA is a floor and therefore employers should determine whether more onerous tests apply in jurisdictions where they operate. Employers also should be on the lookout for the DOL's final rule increasing the salary level for employees to remain exempt under the FLSA, which is anticipated in April (as well as the legal challenges expected). In other words, employers should stay tuned as the wage-and-hour regulatory landscape remains dynamic in this presidential election year.

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