What We Know

ARTICLES & INSIGHTS

Department of Labor Proposes Withdrawal of Rules Clarifying Parameters of Employment Relationship

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ABOUT THE AUTHOR

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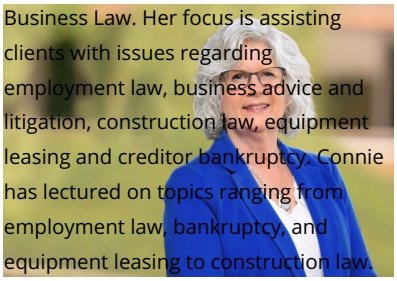

With a new Presidential administration comes a new Secretary of the United States Department of Labor (DOL), Boston mayor Marty Walsh. Walsh was a former union president and state representative before becoming mayor. The new administration also took immediate action to publish a notice on March 11 that the DOL is planning to withdraw a new rule that was issued by its Wage and Hour Division (WHD) on January 7. That rule had served to simplify the definition of what constitutes an independent contractor and was scheduled to become effective on May 7, 2021.

BACKGROUND

It has been more than 80 years since the federal Fair Labor Standards Act ("FLSA") codified the employment relationship as it relates to the payment of wages. Since that time, courts, agencies, and legal scholars had struggled with defining what relationships constitute independent contractor status, often with varying interpretations. While employees are entitled to the minimum wage, recordkeeping, and overtime pay provisions contained in the FLSA, contractors are not.

In recognition of the fact that the national landscape has changed dramatically over the years with the growth of the "gig" economy, the rule proposed on January 7 had sought to "codify a simple, clear approach that can be applied consistently nationwide" and to "simplify, clarify and harmonize principles the federal courts have espoused for decades" when determining what workers are employees covered by the FLSA. The rule was widely seen as favorable to employers.

The rule adopted an "economic reality" test to determine a worker's status as either an employee or an independent contractor; i.e., whether, as a matter of economic reality, the worker is dependent on a particular person, business, or organization for work or is in business for herself. This inquiry would be conducted through the application of five factors, with two of those factors – *the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss* – being provided greater weight than the other three factors, which evaluate the amount of skill required for the work,

the degree of permanence of the working relationship between the individual and the putative employer, and the extent to which the services rendered are an integral part of the putative employer's business.

REASONS FOR WITHDRAWAL

In announcing its proposal to withdraw the January 7 rule, the WHD questioned whether the rule "*is fully aligned with the FLSA's text and purpose or case law describing and applying the [traditional] economic realities test.*" The WHD also opined that the elevation of two core factors over other considerations might be inconsistent with decisions handed down by the United States Supreme Court and federal appellate courts which have held that no single factor is determinative of employment status and that courts should look at the totality of the circumstances surrounding the relationship. It is further evident from the WHD's March 11 announcement that its goal is to ensure the FLSA's reach is broad and comprehensive when it comes to the classification of workers as employees. It cited a report which found that 42% of "gig economy or platform workers" and 45% of "self-employed sole proprietors" make less than $20,000.00 a year and opined that the January 7 rule did not fully consider the cost of individuals losing FLSA protection when classified as independent contractors.

> *The Wage and Hour Division also determined that the joint employer rule failed to adequately consider the costs to employees who may lose FLSA protections under its analysis as its application may reduce the number of businesses currently considered to be joint employers.*

In recognition of the WHD's assessment that both rules "significantly weaken protections afforded to American workers under the Fair Labor Standards Act," the WHD also announced on March 11 a proposal to rescind a January 2020 rule concerning joint-employer status under the FLSA. The WHD determined that the joint employer rule failed to adequately consider the costs to employees who may lose FLSA protections under its analysis as its application may reduce the number of businesses currently considered to be joint employers. The joint employer rule had provided a four-factor balancing test to use in evaluating a joint employer scenario in which two or more entities benefit from an employee's work. This rule was vacated by a federal district court in September 2020 on the basis that the rule departed from the analysis that had previously been applied by various courts in order to focus on the amount of control exercised by the putative employers over the worker in question.

WHAT YOU NEED TO KNOW

The public will have until April 12, 2021, to submit comments on these two proposals at www.regulations.gov, at which point a final decision will be made about these two critical issues relating to worker status. The DOL has not offered any new regulatory guidance to replace the standards that the new rules the previous administration had introduced although it has sent a proposed draft of the joint employment rule to the White House for review and input. Unless and until the DOL issues new guidance, employers are well-advised to continue to rely upon the DOL's previous guidance as businesses that misclassify workers face exposure to significant liability under both state

and federal law.

In evaluating whether a worker qualifies as an independent contractor, the current DOL guidance remains in effect as the January 7 rule was never implemented. That guidance requires a review of seven factors in determining the nature of the relationship, each of which is *equally* weighted:

1. **NATURE AND DEGREE OF CONTROL BY THE EMPLOYER**
2. **WORKER'S OPPORTUNITY FOR PROFIT OR LOSS**
3. **WORKER'S INVESTMENT IN EQUIPMENT OR MATERIALS REQUIRED FOR HIS OR HER TASK**
4. **WHETHER THE SERVICE RENDERED REQUIRES AN ESSENTIAL SKILL**
5. **DEGREE OF PERMANENCE OF THE WORKING RELATIONSHIP**
6. **THE DEGREE TO WHICH THE SERVICES RENDERED ARE AN INTEGRAL PART OF THE EMPLOYER'S BUSINESS**
7. **WORKER'S DEGREE OF INDEPENDENT BUSINESS ORGANIZATION AND OPERATION**

As for the joint employer standard, until the DOL issues new guidance, it is recommended that businesses apply the standard adopted by numerous federal courts in evaluating whether a company is a joint employer of a worker:

1. **WHETHER THE COMPANY'S PREMISES AND EQUIPMENT ARE USED FOR THE EMPLOYEE'S WORK**
2. **WHETHER THE SUBCONTRACTOR HAS A BUSINESS THAT CAN OR DOES SHIFT AS A UNIT FROM ONE PUTATIVE JOINT EMPLOYER TO ANOTHER**
3. **THE EXTENT TO WHICH THE EMPLOYEE PERFORMS A DISCRETE LINE-JOB THAT IS INTEGRAL TO THE COMPANY'S PROCESS OF PRODUCTION**
4. **WHETHER RESPONSIBILITY UNDER A CONTRACT BETWEEN THE SUBCONTRACTOR AND THE COMPANY COULD PASS FROM ONE SUBCONTRACTOR TO ANOTHER WITHOUT MATERIAL CHANGE**
5. **THE DEGREE TO WHICH THE COMPANY OR ITS AGENTS SUPERVISE THE EMPLOYEE'S WORK**
6. **WHETHER THE EMPLOYEE WORKS EXCLUSIVELY OR PREDOMINANTLY FOR THE COMPANY**

If you have questions about these proposed rules or any other employment law-related matter, please call Connie Carrigan at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

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