

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **DOL scraps FLSA independent contractor rule**

On January 7, the Trump DOL issued a rule clarifying when a worker is an employee covered by the Fair Labor Standards Act or an independent contractor. It sought to simplify worker classification by adopting an “economic reality” test to determine worker status under federal wage law. On May 6, the Biden DOL withdrew the rule in its entirety.

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**Authors**

Nancy Vary, JD

Amy J. Heinze

#### **Background**

Independent contractors — unlike employees — are not entitled to minimum wage or overtime pay under the Fair Labor Standards Act (FLSA). Because the federal wage law does not clearly define who is an “employee,” courts have applied different tests to decide whether an employer-employee relationship exists.

On September 25, 2020, the DOL proposed a rule that would apply a multifactor “economic reality” test for determining employee status under the FLSA. The five-factor test focused on two “core factors” — the nature and degree of the worker’s control over the work and the worker’s opportunity for profit or loss based on initiative or investment — making it easier to classify workers as independent contractors. (See our [September 29, 2020 FYI](#).)

On January 7, the DOL issued its final rule on classifying “[Independent Contractor Status under the Fair Labor Standards Act](#).” The final rule, which was scheduled to go into effect on March 8, adopted the proposed test for determining whether workers are employees or are independent contractors in business for themselves.

#### **Final rule withdrawn**

On March 4, the Biden administration’s DOL delayed the effective date of the final rule for 60 days, or until May 7. On March 12, it published a notice of proposed rulemaking (NPRM) to withdraw the rule

altogether. In support of withdrawal, the DOL said the rule's standard has never been used by any court or by the Wage and Hour Division.

On May 6, the DOL withdrew the final rule, saying it was not “fully aligned with the FLSA’s text or purpose, or with decades of case law describing and applying the multifactor economic realities test.” Business groups have challenged both the delay of the final rule’s effective date beyond March 8 and its subsequent withdrawal in federal court. The lawsuit is ongoing.

## In closing

The DOL’s early actions signal that worker classification will be a priority for the Biden administration. In light of this, businesses should carefully review their relationships with workers and service providers as increased scrutiny of independent contractor determinations and an uptick in FLSA enforcement activity are expected.

### **COVID-19 Compliance check-in**

Buck’s latest version of the **COVID-19 Compliance check-in** is updated to reflect the retirement, health, labor and employment issues facing employers now. Review the checklist to help your team manage priorities and determine next steps.

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