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Biden DOL Revokes Trump Era Gig-Economy Rule

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On Wednesday May 5th, the Department of Labor (DOL) officially revoked a Trump-era rule that had it gone into effect would have created a new independent contractor test. The DOL revocation comes in the eleventh hour as the Trump-era rule was set to take effect on May 6th.

The Trump-era rule, published in the final days of the Trump administration, would have been a significant departure from the “economic reality” test previously in use. While the rule still involved a multi-factor approach, it had two “core factors” that would be determinative in most cases and would have made it easier to classify workers as independent contractors rather than employees. The now revoked rule had significant support from corporations, including gig-economy companies such as Uber and Instacart.

With the Trump-era rule revoked, in determining whether an individual is properly classified as an independent contractor the Department of Labor will return to the seven-factor test it’s which has been used for the past decade. See WHD Fact Sheet #13 (July 2008). Those seven factors are:

- 1) The extent to which the services rendered are an integral part of the principal's business;
- 2) The permanency of the relationship;
- 3) The amount of the alleged contractor's investment in facilities and equipment;
- 4) The nature and degree of control by the principal;
- 5) The alleged contractor's opportunities for profit and loss;

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6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and

7) The degree of independent business organization and operation.

Perhaps the most notable difference from the Trump-era rule is the lack of “core factors.” Instead, the DOL will weigh all seven factors to determine if a worker is an independent contractor or employee.

Under this multi-factor test, in many cases a worker is more likely to qualify as an employee. That designation carries significant requirements for the employer including compliance with the Fair Labor Standards Act (FLSA) and being subject to the non-discrimination laws that protect employees. Misclassifying a worker as an independent contractor could have significant consequences, including back pay and liquidated damages for FLSA violations. This is particularly troublesome for gig-economy companies, which typically avoid FLSA minimum wage and overtime requirements by designating workers as independent contractors.

Please contact your Butzel Long attorney for assistance reviewing your workers’ designation as employees or independent contractors.

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