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## District Court Reinstates Trump-Era Independent Contractor Rule

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Earlier this month, a Texas federal court held that the Department of Labor (DOL) violated the Administrative Procedure Act by delaying and withdrawing a Trump-era rule that allowed businesses to more easily classify workers as independent contractors. Siding with companies like Uber and Lyft, the court invalidated the DOL's withdrawal and reinstated the Trump rule.

The Trump administration issued its independent contractor rule in January 2021, and the rule was set to take effect in March 2021. The DOL, however, froze the Trump rule and then postponed its effective date with a rule of its own. Ultimately, the DOL issued a **final rule** that withdrew the Trump rule entirely.

The Trump rule significantly changed the test that courts use when determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act. Before the rule, whether an individual was considered an employee or an independent contractor was determined by courts and the DOL by weighing six factors:

1. The employer's versus the individual's degree of control over the work;
2. The individual's opportunity for profit or loss;
3. The individual's investment in facilities and equipment;
4. The permanency of the relationship between the parties;
5. The skill or expertise required by the individual; and
6. Whether the work is part of an integrated unit of production.

Asserting that courts and the DOL had inconsistently used these factors, the Trump rule condensed the analysis to weighing two key factors: (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. Under the Trump rule, only when these two factors are insufficient to answer whether the individual is an employee or independent contractor should the remaining four factors be considered.

According to the district court, the Biden DOL failed to provide the public with a meaningful opportunity to comment on the rule it had adopted to postpone the Trump rule. The notice-and-comment period for the postponement rule was 19 days, which the court found to be too short. Further, the court held that the DOL impermissibly limited the scope of comments by limiting comments to only the postponement itself rather than to the substance of the rule. The court then held that the DOL's withdrawal of the Trump rule was arbitrary and capricious because it failed to consider alternatives to rescinding it. In light of this, the Trump rule's two-factor analysis once again is the law.

Of course, the court's decision is not the final word. First, the Biden Administration may appeal the court's decision. Second, the Trump rule does not affect how states determine who qualifies as an independent contractor under their respective wage and hour laws. For example, employers in California still must meet the state's stringent "ABC test" in order to classify their workers and independent contractors. Nor does the rule redefine who qualifies as an independent contractor under other federal laws, such as the Internal Revenue Code or the National Labor Relations Act. Contact your Vorys lawyer if you have questions about independent contractors.