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**US DOL FINAL RULE ON INDEPENDENT CONTRACTOR EXCLUSION UNDER THE FLSA**

On January 10, 2024, the US Department of Labor (DOL) published its final rule: "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (the "Rule"). Through the Rule, the DOL expands on the criteria that need to be analyzed to determine if an individual is an employee or an independent contractor for purposes of the Fair Labor Standard Act ("FLSA") only. Under other labor laws, whether federal or state, analysis of independent contractor status is not affected by the Rule. This means that if the individual is determined to be an employee and not an independent contractor applying the analysis included in the Rule, the determination would only apply to the FLSA's provisions, meaning whether weekly overtime and federal minimum wage must be paid. This does not apply, for example, to other labor and employment claims, such as unlawful discrimination, which other statutes cover. The Rule, which goes into effect on March 11, 2024, overturns the DOL's own 2021 Independent Contractor Rule, as follows:

1. Uses a multifactor, totality-of-the-circumstances analysis to assess whether an individual is an employee or an independent contractor under the FLSA;
2. Analyzes all factors without assigning a predetermined weight to a particular factor or set of factors;
3. Applies the longstanding interpretation of the "***economic reality***" test; and
4. Admits additional factors as relevant if they indicate whether the worker is in business for him or herself (i.e., an independent contractor) or economically dependent on the employer for work (i.e., an employee under the FLSA).

Of course, whether the new interpretative Rule will prevail depends on the courts, which may or may not agree with the DOL, especially since such a short time has elapsed since the 2021 Rule, where the DOL had given a completely different interpretation to the independent contractor doctrine.

Also, the new Rule might appear to affect Puerto Rico's Labor and Transformation and Flexibility Act, Law No. 4–2017, 29 LPRA § 122b ("Act 4"), as Act 4 provides that the economic reality test shall not be used to determine employee/independent contractor status in Puerto Rico. Act 4, by its plain language, allows for the economic reality test analysis to be used only if federal legislation enacted by Congress (or local statute enacted by the PR Legislative Assembly) so requires and then only as to the particular statute that is so amended. The new Rule is an interpretative regulation rather than new federal legislation. Thus, the Rule does not seem to amend Act 4. This, of course, will be up to judicial interpretation, although the plain text of Act 4 seems, in our opinion, quite clear.

Nevertheless, and to ensure compliance with the new DOL Rule, we recommend employers consider reviewing their independent contractor agreements to include language whereby the independent contractor (a) certifies it is not economically dependent on the company together with factual assertions by the contractor supporting that conclusion and (b) is required to notify the

principal of any change in circumstances that may alter this representation's accurateness, so that the principal may assess any risks associated with the contractor's modified circumstances.

If you would like to review existing independent contractor agreements and templates to determine if they should be amended, do not hesitate to contact your prime contact attorney at:


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