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Department of Labor Releases Final Rule Revising Its Interpretation of Who Qualifies as an Independent Contractor Under the FLSA

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The rule, scheduled to take effect on March 11, 2024, defines independent contractor status more narrowly than the rule published in 2021 by the Trump Administration. Today the U.S. Department of Labor released a final rule regarding who is an "independent contractor" under the Fair Labor Standards Act ("FLSA"), and thus not subject to the minimum wage and overtime requirements the FLSA applies to "employees." The rule defines independent contractor status more narrowly than the rule published in 2021 by the Trump Administration. It is scheduled to take effect on March 11, 2024. The rule largely hews to the Department's October 2022 proposal. It codifies a six-factor, totality-of-the-circumstances test for who qualifies as an independent contractor. Under the rule, independent contractor status will be determined by looking to the following factors: the worker's opportunity for profit or loss; the worker's investments; the permanency of the relationship; the degree of control by the employer over the worker; whether the work is an integral part of the employer's business; and the skill and initiative required to do the work. The test will not assign special weight to any of the six factors, and instead consider them "in view of the economic reality of the whole activity" in which the worker in question is engaged. Apart from jettisoning the framework of the 2021 rule—which relied on five factors, not six, and gave particular weight to "control" and the "opportunity for profit or loss"—the new rule makes important adjustments to how the traditional factors were applied in the 2021 rule. For example, DOL will consider the worker's investments on a relative basis with the employer's investments. The Department states, "if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themself," and, like the proposal, indicates that the "dollar values" of the company's and workers' investments should be compared. The rule also reformulates the factor in the 2021 rule concerning whether a worker's activities are part of an "integrated unit of production," changing it to an assessment of whether the activity is important or "central" to a business's operations, and rejecting many commenters' assertions that this factor will nearly always weigh in favor of employee status and thus is not a useful indicator of the appropriate classification. Additionally, the Department will consider a worker's "initiative" indicative of independent contractor status under several different aspects of its test. Many commenters disagreed with the proposed rule's provision that "[c]ontrol implemented by the employer for purposes of complying with legal obligations" and "safety standards" was "indicative" of employee status. In a notable change, the final rule provides that "[a]ctions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control." Still, the rule emphasizes that any action taken by the employer that goes beyond what is strictly required by law or regulation may be indicative of employee status. Moreover, the rule's "sole purpose" language may still allow consideration of actions taken to ensure compliance with legal requirements. The Department has also removed the provision of the 2021 rule that clarified that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible." Under the Department's new rule, a company's so-called

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"reserved" control can be more important than control the company actually exercises over workers. In its release, the Department acknowledges that the rule is an "interpretive" rule and asserts that the rule will be entitled only to "*Skidmore* deference" from the courts, rather than the more robust "*Chevron* deference" that sometimes is given to federal regulations. Nevertheless, the rule is a substantial departure from the 2021 rule it replaces and, by the Department's admission, the rule provides "broader discussion" of many factors than the Department has given before. Commenters representing a wide variety of industries and independent contractors have warned the Department that the rule could result in the misclassification of many independent contractors as employees and chill innovative and valuable work relationships to the detriment of established companies, startups, and workers alike. The new rule is likely to face litigation. A coalition of industry groups successfully challenged the Department's previous attempt to withdraw the 2021 rule, arguing among other things that DOL's action was arbitrary and capricious. That suit remains pending before the Fifth Circuit Court of Appeals. *See Coal. for Workforce Innovation v. Walsh,* No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022), *appeal filed*, No. 22-40316 (5th Cir. May 13, 2022). In addition to litigation, Senator Bill Cassidy (R-La.) announced that he will introduce a Congressional Review Act ("CRA") resolution to repeal the new rule, and Representative Kevin Kiley (R-Cal.) also stated that he would introduce a CRA resolution in the House. If passed by both houses of Congress, a CRA resolution would almost certainly be vetoed by President Biden.

The following Gibson Dunn attorneys prepared this update: Eugene Scalia, Jason Schwartz, Katherine Smith, Theane Evangelis, Michael Holecek, Jason Mendro, Andrew Kilberg, Alex Harris, Max Schulman, and Andrew Ebrahem*.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Administrative Law and Regulatory practice groups, or the following authors and practice leaders: Eugene Scalia – Co-Chair, Administrative Law & Regulatory Practice Group, Washington, D.C. (+1 202.955.8210, escalia@gibsondunn.com) Jason C. Schwartz – Co-Chair, Labor & Employment Practice Group, Washington, D.C. (+1 202.955.8242, jschwartz@gibsondunn.com) Katherine V.A. Smith – Co-Chair, Labor & Employment Practice Group, Los Angeles (+1 213.229.7107, ksmith@gibsondunn.com) Helgi C. Walker – Co-Chair, Administrative Law & Regulatory Practice Group, Washington, D.C. (+1 202.887.3599, hwalker@gibsondunn.com) **Andrew Ebrahem is admitted only in Virginia; practicing under the supervision of members of the District of Columbia Bar under D.C. App. R. 49.*

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