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Employers Should Stop and Take Heed of Misclassifying Workers in 2024 under New DOL Rule

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The Department of Labor (DOL) has paid increasing attention to worker classification under the Biden Administration, causing uncertainty and unease among businesses using independent contractors. As of January 9, 2024, the DOL announced a final rule on worker-employer classification status under the Fair Labor Standards Act (FLSA), making classification of independent contractors more difficult (the 2024 IC Rule). The 2024 IC Rule will be published in the *Federal Register* on January 10, 2024, be effective March 11, 2024, and have an almost immediate impact on the way companies conduct business.

The DOL foreshadowed its increased policing of employee misclassification in a published Notice of Proposed Rulemaking on October 13, 2022 (the 2022 Proposed IC Rule). Therein, the DOL proposed replacing the Trump Administration-published 2021 rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule) with a broader totality-of-the-circumstances framework for analyzing worker-employer relationships.

The 2024 IC Rule rescinds the 2021 IC Rule and implements a totality-of-the-circumstances multi-factor analysis to determine workers' classification statuses. This framework requires businesses to evaluate six (6) economic factors for every independent contractor to determine if the worker is classified correctly:

- Worker's opportunity for profit or loss, depending on managerial skill;
- Investments made by the worker and the employer;
- Degree of permanence of the work relationship;
- Nature and degree of control over performance of the work;
- Extent to which the work performed is an integral part of the employer's business;
- Use of the worker's skill and initiative.

These factors are not exhaustive, and each factor must be considered in conjunction with the others. No factor holds greater importance or weight than another factor (unlike in the 2021 IC Rule, where control over the work and opportunity for profit or loss were given greater weight). We expect a flood of fact-intensive decisions interpreting the language under these six (6) economic factors.

Some differences exist between the 2022 Proposed IC Rule and the 2024 IC Rule. For example, the 2024 IC Rule states that actions taken by the potential employer for the sole purpose of complying with specific, applicable federal, state, tribal, or local law or regulation does not indicate "control." The 2024 IC Rule also advises that costs to a worker that are unilaterally imposed by the potential employer are not "investments" indicative of independent contractor status. These revisions, among others, were made after 55,400 comments were received in response to the 2022 Proposed IC Rule.

The 2024 IC Rule is likely to have a wide-spread impact on businesses in all industries, including, but not limited to, healthcare, construction, transportation, trucking, and on-demand delivery platforms. Businesses with gig workers should pay particular attention to the changes currently being unrolled. To assist potential

employers in complying with the 2024 IC Rule, the DOL has already provided a list of [Frequently Asked Questions](#). Until then and beginning March 11, 2024, businesses must carefully analyze worker status with the understanding that the 2024 IC Rule makes classifying workers as independent contractors more difficult.

After an audit, employers may find that independent contractors should be classified as employees under the FLSA, and businesses must pivot to ensure compliance as quickly as possible. Otherwise, misclassification may result in expensive litigation, damages, and liability. Businesses and employers should also be aware of the ongoing interagency cooperation practiced by the DOL, because an audit under the Wage & Hour Division could have a broader impact beyond misclassification of independent contractors.

Should you have any questions on this topic, reach out to [Christie M. Hayes](#), [Chelsea N. Hayes](#), or any member of Baker Donelson's [Labor & Employment Team](#).