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Independent contractor rule proposal spurring angst, confusion

By Doug Bailey

Trade groups and employee advocates are singing “Out with the new, in with the old,” in reaction to the federal government’s recent efforts to once and for all define an employee versus an independent contractor, a move which industry advocates say could cause a significant reduction in the number of independent advisors serving consumers.

After a protracted process and court battles, the Department of Labor unveiled a new set of rules on Jan. 10 that has been met with resistance, confusion, ambiguity, and continued legal action by labor organizations who want the government to abandon the new rules in favor of previous iterations.

The rules include a six-factor test of the “economic reality” of the relationship between workers and employers. Among other things, the test asks whether the worker depends on the potential employer for continued employment or is operating an independent business. The result determines coverage under federal wage-and-hour laws.

'New host of requirements'

“An economic realities test puts a whole new host of requirements on American employers,” said Rob Wilson, President of Employco USA, a national employment solutions company. Wilson says that the term has a simple meaning: If a person is financially dependent on an employer for work, then they are an employee.

“Employers will have to look at their staff and ask questions like: ‘Can this person profit (or loss) based on their acumen and skill set?’ If they can’t, this points to the fact that they are an employee, not an independent contractor,” said Wilson. “Will they be able to apply what they do for your company to other ventures? That is a key question. Does their work for you allow them to expand their market reach and their ability to create other streams of revenue?”

Last week four groups, the Coalition for Workforce Innovation (CWI), Associated Builders and Contractors (ABC), Associated Builders and Contractors of Southeast Texas (ABCSETX), and the Financial Services Institute (FSI), filed a motion asking the courts to lift the stay of its previous appeal and remand the case to the U.S. District Court for the Eastern District of Texas. The plaintiffs are asking the court to consider whether the Labor Department’s “final rule” classifying employees and independent contractors complies with procedures to lawfully replace and rescind the 2021 independent contractor rule.

Until 2021, the DOL had never defined “independent contractor” through its regulations. Instead, it offered only informal guidance. In 2021, the department finalized a new rule but then sought to delay its implementation after the election of a new administration. Later it moved to withdraw the rule entirely. After business groups challenged the delay and the withdrawal, a federal district court held that both actions violated the Administrative Procedure Act. It held that the 2021 rule was still in effect. Rather than simply withdrawing the rule again, the DOL issued a new one that rescinded the 2021 rule and, in its place, adopted the new six-factor test.

The trade groups again cried foul and returned to court.

New rule erases certainty

“The 2021 independent contractor rule gave independent financial advisors a sense of certainty that their choice to operate as independent contractors would be preserved under FLSA,” said FSI President & CEO Dale Brown. “Now, in light of the DOL’s new independent contractor rule, that certainty has been erased and replaced by unnecessary risk and ambiguity.”

Independent financial advisors, Brown said, rely on their independent contractor classification as they build their businesses within communities, pay their own taxes and expenses, hire staff and serve the interests of their clients.

“It’s going to be very complicated…,” Wilson said. “Many employers will be confused, and so will independent contractors. It’s going to cause a headache until the new regulations are better understood.”

While generally seen as favorable to workers, the new rules could threaten the classification of many financial advisors and cause a huge reduction in the number of independent advisors serving consumers, advocates say.

The CWI’s Chairman, Evan Armstrong, said the new 2024 rule “still falls short” of requirements.

“For this reason, legal options are the most effective way to block this final rule from creating uncertainty in this area of law and undermining opportunities for independent work across the economy.”

The DOL’s new rule is set to take effect in March.

“The Biden administration cannot be allowed to undermine flexible work opportunities for millions of Americans who choose to work independently,” said Ben Brubeck, Associated Builders and Contractors vice president of regulatory, labor and state affairs. “It is unfortunate that the U.S. Department of Labor is replacing the commonsense 2021 final rule with an ambiguous and difficult-to-interpret standard for determining independent contractor status. Regrettably, the confusion and uncertainty resulting from the final rule will cause workers who have long been properly classified as independent contractors in the construction industry to lose opportunities for work and the freedom to choose how they work.”

The Fifth Circuit will now decide whether to remand the case to the Federal District Court where additional filings and arguments will take place to determine the legality of the 2024 rule.

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