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BIDEN ADMINISTRATION'S FINAL RULE REGARDING INDEPENDENT CONTRACTOR CLASSIFICATIONS HAVE SIGNIFICANT IMPLICATIONS FOR THE TRUCKING INDUSTRY

January 16, 2024: Written by Joseph G. Harraka, Jr., Esq., Anthony J. Vizzoni, Esq. & David Frankel, Esq.

Any trucking company or other business that employs independent contractors needs to be aware of and familiar with new guidelines that were recently adopted by the Department of Labor ("DOL") which specifically employs new factors in determining a worker's job classification under the Fair Labor Standards Act ("FLSA"). The new final rule, which becomes effective March 11, 2024, replaces the 2021 Independent Contractor Rule which identified five economic reality factors to guide the inquiry into a worker's status as an employee versus an independent contractor. Two of the five identified factors under the 2021 Independent Contractor Rule – the nature and degree of control over the work and the worker's opportunity for profit or loss – were designated as core factors carrying significant weight in the determination process.

Over the opposition of many influential industry associations, including national and local trucking associations, the Biden Administration has elected to rescind the 2021 Independent Contractor Rule over the more confusing and stringent final rule that may ultimately lead to confusion amongst trucking company owners as to which workers qualify as independent contractors and which workers are to be classified as employees. Notwithstanding a worker's election to be legitimately classified as an independent contractor in performing services for a company, the worker will be classified as an employee if the worker is, as a matter of economic reality, economically dependent on the work of the company.

Effective March 11, 2024, under the FLSA, an "economic realities test" will be used to determine a worker's classification status. That test focuses on the economic realities of the worker's relationship with the worker's potential employer and whether the worker is either economically dependent on the potential employer for work or instead is in business for himself or herself.

In rescinding the 2021 Independent Contractor Rule, the DOL noted that no one factor or subset of factors is necessarily dispositive of a worker's classification, and the weight to give each factor may depend on the facts and circumstances of the particular working relationship that is at issue. Unlike the 2021 Independent Contractor Rule which expressly provided for two key factors, employers will now be forced to guess which of the seven factors may bear greater weight, thus creating much uncertainty for companies.

The test to determine a worker's economic dependence on the potential employer now includes the evaluation of the seven factors set forth below to determine the economic realities of the subject working relationship.

(1) Opportunity for profit or loss depending on managerial skill.

Determine whether the worker:

- can determine or negotiate pay;
- accepts or declines jobs and chooses when the jobs are performed;
- engages in efforts to expand their business or secure more work; and/or
- makes decisions to hire others, purchase materials, and equipment, and/or rent.

(2) Investments by the worker and the potential employer.

Consider whether investments by the worker are capital or entrepreneurial in nature.

(3) Degree of permanence in the work relationship.

- If the work relationship is indefinite in duration, continuous, or exclusive of work for other employers, then the worker is more likely to be classified as an employee.
- If the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities, then the worker is more likely to be classified as an independent contractor.

(4) Nature and degree of control.

The more control by the potential employer over the following the more likely the worker will be classified as an employee:

- The setting of the worker's schedule,
- The supervision of the performance of the work,
- The explicit limiting of the worker's ability to work for others;
- The ability of the potential employer to discipline workers, and/or
- The control over prices or rates for services and marketing of services.

(5) Extent to which the work performed is an integral part of the potential employer's business.

This factor weighs in favor of the worker being classified as an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being classified as an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.

(6) Skill and initiative.

- If a worker does not use specialized skills in performing the work, or where the worker is dependent on training from the potential employer to perform the work, then the worker is more likely to be classified as an employee.
- If a worker brings specialized skills to the work relationship, and the worker uses those specialized skills in connection with business-like initiative, then the worker is more likely to be classified as an independent contractor.

(7) Additional factors.

Additional factors may be relevant if they provide insight as to in whether the worker is in business for himself, as opposed to being economically dependent on the potential employer for work.

This change in the laws may lead to independent contractors being reclassified as employees for FLSA purposes. As the trucking industry relies heavily on the use of independent contractors, we are anticipating trucking companies may be on the high priority list for DOL scrutiny on worker classifications under the new final rule. This is unfortunate and concerning as a determination of misclassification can result in severe consequences, notwithstanding the important role that independent contractors play in the success of trucking companies throughout the country.

Knowing that the worker classification of status can be a daunting situation for trucking company owners and their management teams, establishing and following best practices based on the final rule criteria is essential. For further guidance, please feel free to reach out to the Trucking and Logistics Team at Becker LLC:

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