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Rewriting the Route: Changes to DOL Independent Contractor Rule

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In March 2024, the U.S. Department of Labor ("DOL") released a new standard to determine when a worker is properly classified as an independent contractor under the Federal Fair Labor Standards Act ("FLSA"). The new standard rescinded previous DOL guidance that, some argue, made it easier for a worker to be classified as an independent contractor. The DOL's new standard will impact all companies in the transportation industry, but will likely have more far-reaching effects for motor carriers.
While the DOL's prior independent contractor rule prioritized two "core factors" for evaluating a worker's status as either an employee or an independent contractor – (1) the nature and degree of the potential employer's control over the work, and (2) the worker's opportunity for profit or loss – the new rule uses a utilizes a six-factor economic realities test. This new analysis places greater emphasis on the worker's entrepreneurial efforts and ability to operate independently from the employing entity. Going forward, the primary inquiry is whether the worker is economically dependent on their employer or in business for themselves.

The DOL's New Six-Factor Test

The DOL now utilizes a six-factor economic realities test. The test looks at the facts of each case individually and it does not place greater weight on any particular factor. The six factors are:

> **1. Opportunity for profit or loss depending on managerial skill.** This factor considers whether the worker exercises managerial skill that affects their economic success or failure in performing the work. Does the worker negotiate pay for work? Does the worker accept or decline jobs? Does the worker choose the order and/or time in which the jobs are performed? Does the worker market or advertise? Does the worker make decisions to hire others or purchase materials and equipment? The answers to these questions are pertinent to this first factor.
> **2. Investments by the worker and the potential employer.** This factor considers whether the worker makes any capital or entrepreneurial investments and whether those investments are similar to those made by the employer. Greater investment and resource allocation by the employer favors employee status. Whereas greater investment and resource allocation by the worker favors independent contractor status.

3. Degree of permanence of the work relationship. Indefinite or continuous work relationships for a single entity tend to indicate employee status, while work relationships with a definite duration, relationships that are project-based, or simultaneous relationships with more than one entity may support independent contractor status.

4. Nature and degree of the potential employer's control. This factor considers the employer's right to control the manner in which the work is performed. The right to exercise more control over a worker favors employee status, whereas an inability to exercise control over the performance of the work favors independent contractor status. Importantly, actions taken by the potential employer solely for purposes of legal compliance are not indicative of control.

5. Extent to which the work performed is an integral part of the potential employer's business. This factor considers whether the work performed is critical, necessary, central to, or identical to the employer's principal business. If so, this factor weighs in favor of employee status.

6. Whether the worker uses specialized skill and initiative. When a worker uses specialized skills to perform work and does so in connection with "business-like initiative," this weighs in favor of independent contractor status.

The DOL may also evaluate additional factors if they impact whether a worker is economically dependent on the employer for work. The DOL has published a FAQ related to the new rule.

Other Independent Contractor Tests and the Disappearance of Chevron Deference

Since the DOL is a federal agency interpreting the FLSA, companies should keep in mind that the rule only applies on a federal level when dealing with FLSA. Other independent contractor tests may apply, such as tests under the Internal Revenue Code, the National Labor Relations Act, and/or state-specific laws governing employee classification. Consultation with competent legal counsel is recommended.

The DOL's new rule is already complicated, especially considering how it interacts with other state and federal laws. The U.S. Supreme Court's recent decision in *Loper Bright,* which overturned the long-standing Chevron deference standard, adds more uncertainty. The *Loper* decision could impact how courts apply the new independent contractor rule. Additionally, the DOL's independent contractor tests often change as political administrations come and go. These tests are a clear example of the DOL interpreting the FLSA's definition of "employee," which can be seen as ambiguous. In a world without Chevron deference, the DOL's interpretation could be challenged more frequently.

Potential Ambiguity, Particularly for Motor Carriers

Many transportation and logistics companies use independent contractors in various roles; however, motor carriers in the U.S. rely heavily on the independent contractor model. As a result, the DOL's new six factor test could impact commercial truck drivers substantially.

It's no surprise that many modern commercial truck drivers are owner-operators: that is, the drivers own or lease the trucks they drive and then contract with companies to provide motor carrier services. These owner-operators have traditionally been classified as independent contractors under the FLSA. But the new six factor test could inject some uncertainty.

For instance, the second factor provided by the DOL looks at “whether any investments by a worker are capital or entrepreneurial in nature." What if the owner-operators are leasing their trucks from the motor carriers themselves? According to the DOL, leasing a truck to provide driving services may be a capital investment or entrepreneurial in nature, even if the truck is leased from a trucking company instead of an independent third party. But, the DOL's evaluation of this factor is nuanced: whether the driver has a choice in accepting the employer-sponsored lease, whether the driver can consider independent financing options, whether the employer requires the driver to work for a minimum amount of time, and whether the lease ultimately leads to the driver's ownership of the truck are all factors that would help determine the driver's classification.

The fourth factor, the nature and degree of control, is also not as cut-and-dry as it appears. In the prior iteration of the DOL's independent contractor rule, the nature and degree of the potential employer's control over the work was one of the two “core factors" for evaluating a worker's status. While it would be easy to assume that this factor is well developed and implemented, the new rule makes it clear that “the facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis." Traditional factors such as supervision over the worker, the worker's ability to work for others, and the worker's ability to set pricing are still important aspects of the analysis.

Under the new rule, the ability to control compliance issues is also an important consideration. According to the DOL, “actions 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." However, the DOL also indicates actions “that go beyond compliance" with those laws and instead serve the employer's own compliance methods, safety, quality control, or contractual or customer service standards, may indicate control of the worker and thus employee status.

The fifth factor, the extent to which the work performed is an integral part of the potential employer's business, is also worth noting because of its potential impact on owner-operators. This factor considers whether the work performed is critical, necessary, central to, or identical to the employer's principal business. Obviously, if the potential employer could not function without the workers' services, then the service they provide is integral. But does that mean that all owner-operator drivers are employees of the carriers with whom they are engaged? Probably not. As explained by the DOL, the fifth factor is just one part of a multi-factor analysis that looks at the totality of the circumstances presented in each case.

What Are the Takeaways?

While some companies may wait to evaluate their workforce under the DOL's new independent contractor test in the hope that a political shift in November will effect the rule's future application, the *Loper Bright* decision may minimize such impacts.

Many companies, regardless of their industry, are erring on the side of caution when dealing with workers subject to the FLSA. From a risk mitigation perspective, companies would be best served by: (1) assessing whether workers currently classified as independent contractors may be employees under the new rule; (2) considering the new rule's factors when hiring new workers, structuring the relationship, and drafting agreements; and (3) consulting with legal counsel if it is unclear whether a worker should be classified as an employee or an independent contractor.