

BUSINESS FOCUS: A new rule for independent contractors qualification PROPOSED UNDER THE FAIR LABOR STANDARD ACT (FLSA)

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The misclassification of workers as independent contractors has been a hot button issue with the state and federal Department of Labor(s) (DOLs) for years. Under the Fair Labor Standard Act (FLSA), the federal wage and hour law, non-exempt employees must be paid minimum wage and overtime at a rate of time and one half their regular rate for hours worked in excess of 40. Correctly classified independent contractors are not entitled to minimum wage and overtime pay under the FLSA, but making a mistake in the classification of workers can result in significant risk of litigation for a business.

The Trump Administration issued a new Independent Contractor Rule under the FLSA that was slated to take effect on March 8, 2021. The new rule is widely viewed as much more business-friendly, making it easier to satisfy the test to classify workers as independent contractors. The purpose in revising the U.S. DOL's interpretation of independent contractor status under the FLSA was "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy."

With the change in administration associated with President Biden's election, the U.S. DOL reverted course on the new independent contractor rule. On March 4, 2021, the rule's implementation was delayed and then withdrawn altogether on May 6, 2021. On March 14, 2022, in a challenge to those actions, the United States District Court for the Eastern District of Texas in *Coalition for Workforce Innovation v. Walsh*, 2002 U.S. Dist. Leis 68401 (E.D. Tex. 2022) resurrected the Trump-Era independent contractor rule. The ruling declared that the actions of the U.S. DOL to delay, and then withdraw the rule, violated the Administrative Procedures Act and were ineffective. As such, the rule became effective as initially planned.

At least on the federal level, this has been viewed as good news for businesses, who are subject to the rule now in effect under FLSA. If you are looking to hire independent contractors to address workforce issues, this is a more favorable rule. But for better or worse, change is on the way.

The U.S. DOL has announced that it will issue a new proposed rule for the classification of independent contractors. The proposed rule is expected to be announced sometime this fall. Once the proposed rule is announced, there will be an opportunity for employers and workers to provide comments before the rule becomes effective.

In addition to evaluating whether proposed workers satisfy the requirements of any FLSA independent contractor rule, businesses also need to assess whether the workers will pass muster under any other applicable tests, including but not limited to the applicable New Hampshire laws defining employment for the purposes of unemployment compensation (RSA 282-A:9) and defining employee for the purposes of NH wage and hour and workers' compensation laws (RSA 281-A:1).

Terri L. Pastori is a founding member of Pastori | Krans, PLLC in Concord, where she practices 360° employment law, representing businesses and employees.

The attorneys at Pastori | Krans, PLLC are innovative problem solvers who approach each dispute from a common sense, results-oriented objective. The firm concentrates in the areas of employment law, family law, mediation, and civil litigation (including employment law, business disputes, and personal injury).

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