Brothers Smith LLP
Attorneys at Law

Featured News

ALERT

DEPARTMENT OF LABOR ISSUES ITS FINAL RULE FOR DETERMINING "EMPLOYEE" OR "INDEPENDENT CONTRACTOR" STATUS UNDER THE FAIR LABOR STANDARDS ACT

Businesses and individuals have created increasingly complex relationships in order to perform a myriad of services in the current economy. Administrative agencies and courts charged with characterizing these relationships have struggled to come up with criteria for determining whether workers are "employees" or "independent contractors" for the purpose of enforcing labor and employment laws.

In California, workers are considered to be "employees" of a hiring entity unless the worker is: (A) free from the control and direction of the hiring entity in the performance of the work; (B) performing work outside of the course of the hiring entity's usual business; and (C) independently and customarily engaged in the same line of work being performed[1]. The law is designed to create a rebuttable presumption that workers are "employees." The California law is fairly well established and has been endorsed by the courts.

For workers outside of California or whose status is determined under federal law, however, a different analysis applies. The Fair Labor Standards Act ("FLSA") formerly did not include a definition of "independent contractor." In making this determination, the Department of Labor ("DOL") and federal courts applied an "economic realities" test, which examined various factors in order to determine whether the worker was "economically dependent on the employer for work." The Supreme Court stated that "employees are those who as a matter of economic realities are dependent upon the business to which they render service."

In 2021, the DOL attempted to clarify the rule by proposing a rule that identified five (5) factors to be considered in determining whether a worker was an "independent contractor," and further identified two (2) of the factors (the nature and degree of control over the work and the worker's opportunity for profit or loss) as "core" factors to the determination. Implementation of the 2021 proposed rule was delayed, and that rule is now rescinded in favor of a Final Rule which will take effect sixty (60) days after publication in the Federal Register. The new Rule will be enacted as 29

CFR 795.105[2] and 795.110[3].

In a truly "Back to the Future" move, the "new" Rule returns to the former "economic realities" analysis. The DOL is adopting guidance in regard to this rule that is essentially identical to the standard that it applied for decades prior to the 2021 Rule, which is derived from the same analysis that courts have applied for decades and have been continuing to apply. The final Rule provides guidance on how six (6) economic reality factors should be considered—opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative. In accordance with longstanding precedent and guidance, additional factors may also be considered if they are relevant to the overall question of economic dependence. Of particular note, the regulations set forth in this final Rule do not use "core factors" and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. As such, courts can and will accord different weight to different factors depending upon the particular facts of a given case or situation. And because courts are the ultimate arbiter of disputes regarding worker classification, it is difficult to anticipate with any certainty how different courts will weigh the various factors[4].

The DOL considered adopting the "ABC" test that California uses. The DOL decided, however, that the ABC test would be inconsistent with Supreme Court and federal appellate precedent interpreting and applying the FLSA. Therefore, the DOL declined to adopt the "ABC" test. Unlike California, the DOL's analysis does not place a "thumb on the scale" in favor of finding workers to be "employees."

TAKEAWAY – Whether and the extent to which the new Rule withstands the inevitable legal challenges remains to be determined. If the Rule survives, it provides factors that can be used in determining whether a worker is "economically dependent" on an employer, but how these factors will be weighed and evaluated will likely vary from court to court. Existing federal case law will continue to provide precedent and guidance.

---

[1] This is commonly referred to as the "ABC" test or the " *Dynamex*" test after the legal opinion that first set it forth. The law initially created exceptions for workers in the music/recording industry; insurance industry; healthcare industry; legal field; architectural field; engineering; accountancy; private investigations; investment advising; direct sales; sales of manufactured homes; and fishing industries.

[2] "Determining employee or independent contractor classification under the FLSA"

[3] "Economic reality test to determine economic dependence"

[4] We also note that the question of the amount of deference that courts will give to guidance promulgated by administrative agencies such as the DOL is currently pending before the Supreme Court.

Author

Horace W. Green

T 925.944.9700
hgreen@brotherssmithlaw.com

BROTHERS SMITH LLP provides its clients, professional advisors and its friends with up-to-date reports on recent developments in business, real estate, employment, estate planning and taxation.

Learn More

Stay Connected

Email Us

2033 North Main Street, Suite 720
Walnut Creek, California 94596
T 925.944.9700 F 925.944.9701

www.brotherssmithlaw.com