DOL FINALIZES NEW INDEPENDENT CONTRACTOR RULE

January 8, 2021 | Alert

On December 3, 2020, Burke Warren's Labor & Employment Group presented its Hot Topics Review for Employers and Business Owners. During the presentation, we reported that the U.S. Department of Labor (DOL) had proposed a new rule clarifying whether a worker should be considered an employee or an independent contractor (the "New Rule"). On January 6, 2021, the DOL finalized the New Rule.

U.S. Secretary of Labor Eugene Scalia said in a statement: "This rule brings long-needed clarity for American workers and employers. Sharpening the test to determine who is an independent contractor under the Fair Labor Standards Act (FLSA) makes it easier to identify employees covered by the Act, while recognizing and respecting the entrepreneurial spirit of workers who choose to pursue the freedom associated with being an independent contractor."

Categorizing a worker as an independent contractor, rather than an employee, may eliminate certain employer expenses and obligations, including but not limited to, employer payroll taxes, minimum wage and overtime obligations, insurance premiums and other benefits. Miscategorization of a worker, however, could lead to significant civil and potentially criminal liability. The analysis is complicated by the fact that the Internal Revenue Service (IRS), DOL and state agencies use similar, but different definitions and tests to determine if a worker is an employee or an independent contractor.

The New Rule reaffirms the "economic reality" test that has been employed by the DOL and Federal Courts to determine whether an individual is an employee or an independent contractor for FLSA purposes. The "economic reality" test asks whether an individual is in business for him or herself (independent contractor) or is economically dependent on a potential employer for work (FLSA employee).

RELATED PROFESSIONALS

Blake A. Roter

RELATED PRACTICE & INDUSTRIES

Labor and Employment

There are two "Core Factors": (1) The nature and degree of control over the work; and (2) The worker's opportunity for profit or loss based on initiative and/or investment. Three other factors assist the analysis, particularly when the two Core Factors are inconclusive: (1) The amount of skill required for the work; (2) The degree of permanence of the working relationship between the worker and the potential employer; and (3) Whether the work is part of an integrated unit of production. As a catch-all statement, "The actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."

There is bound to be legal interpretation of the New Rule in the coming years, for employers and workers to see if the New Rule will create any appreciable change. Every time a company or organization hires a new worker, the analysis regarding whether that worker is an employee or an independent contractor must be completed. Every employment decision must comply with state and federal laws.

For legal advice on a specific employment situation, contact the attorneys in the Labor & Employment Group at Burke, Warren, MacKay & Serritella, P.C.