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DOL PROPOSES NEW INDEPENDENT CONTRACTOR RULE LIMITING CONTRACTOR STATUS AND RESCINDING TRUMP RULE

In January 2021, the Department of Labor (DOL) during the Trump Administration published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (IC Rule) providing guidance on the classification of independent contractors in any industry. In 2021, the IC Rule identified five economic reality factors to guide the inquiry. Two of the five identified factors - nature and degree of control over the work and the worker's opportunity for profit or loss - were designated as "core factors" that are the most probative and carry greater weight in the analysis. The 2021 IC Rule stated that if these two core factors point towards the same classification, there is a substantial likelihood that it is the worker's accurate classification. The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production. The effective date of the 2021 IC Rule was March 8, 2021.

The current administration's DOL now believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose. Therefore, the DOL believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining an independent contractor status that is more consistent with the existing judicial precedent and the DOL's long-standing guidance prior to the 2021 IC Rule.

The new rule states that: "A determination of whether workers are employees or independent contractors under the Act focuses on the economic realities of the workers' relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for themselves." Section 795.105(a). The new economic reality test to determine economic dependence is listed in Section 795.110:

(a) Economic Reality Test

1. In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis.

2. The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence.

(b) Economic Reality Factors:

1. *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business to secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee.

2. *Investments by the worker and the employer*. This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment.

3. *Degree of permanence of the work relationship*. This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships.

4. *Nature and degree of control.* This factor considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer's control over the worker include whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the employer's control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose. Whether the employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. More indicia of control by the employer favors employee status; more indicia of control by the worker favors independent contractor status.

5. *Extent to which the work performed in an integral part of the employer's business*. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer's principal business.

6. *Skill and initiative*. This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.

Editor's Note - The current Trump-era independent contractor rule remains in effect at the current time, at least until the new proposed rule is implemented. The new rule broadens employee coverage status and lessens the ability of the employer to consider workers as independent contractors. Publication of the proposed rule in the Federal Register starts the comment period that remains open for 45 days and closes on November 27, 2022. Written submissions

may be submitted, identified by Regulation Identifier Number (RIN) 1235-AA43 and mailed to the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

STARBUCKS FORMALLY ACCUSES THE NLRB OF COLLUSION WITH UNIONS

As set forth in this newsletter recently, Starbucks has been the subject of a corporate campaign by unions to organize Starbucks employees and in the process claim the employer is a law violator and bad employer. In late August, Starbucks took an incredibly bold move publicly accusing the National Labor Relations Board (NLRB) of secretly colluding with the union organizing its workers to manipulate elections. The company wrote in a 16-page letter to NLRB officials that it had received inside information from a "career NLRB professional" supporting its allegations. The letter was sent to the NLRB Board members and to the NLRB General Counsel as well as Inspector General David Berry, requesting an investigation of the misconduct. Among other things, the letter says that NLRB officials gave union agents real-time confidential vote counts during mail balloting, illegally allowed in-person voting for certain workers, provided additional ballots, made individual voting arrangements, mishandled ballots, and tried to cover up its misconduct. A former NLRB General Counsel said that an investigation validating any of Starbucks' allegations would be "devastating" and a former NLRB Chairman said "I've never seen anything like this." Starbucks has previously alleged that the NLRB had violated its duty of impartiality by indicating to workers that it favored the union.

There is a possibility that the announcement could only have a public relations impact, but could cause the Inspector General to launch an investigation and attract the interest of Congress. Rep. Virginia Foxx (R-N.C.), who would likely head the Education and Labor Committee if the Republicans take the House in November's mid-term elections, suggested the panel should investigate the claims.

When ballots materialize without a postmark during the ballot counting, an NLRB employee allegedly falsely asserted that "Board protocol" allowed some workers to vote in-person at the agency's office. With the union leading in the ballot counting, an NLRB employee took a number of unopened ballots that were challenged by the union or Starbucks out of the room to photocopy in the Overland Park, Kansas election. The NLRB employee then signed the Starbucks' attorney's name to the ballot tally despite her objections.

Starbucks is asking the NLRB to suspend other mail-ballot elections until an investigation is done. It also wants future elections to be conducted exclusively in-person, as they were before the pandemic. Starbucks also claims that it has encountered "misconduct and the absence of neutrality" by NLRB agents in numerous unfair labor practice cases. Starbucks notes that the NLRB General Counsel and its offices often claim that Starbucks committed more than 100 "unfair labor practice" violations, even though none of these complaints to date have been proven.

Starbucks is taking steps to convince workers that they will be better off without a union, including operational changes to make jobs easier on its baristas, along with pay increases, which has caused the company to spend some $1 billion. The pay increases have been extended to non-union stores, but not union stores, because of the collective bargaining process necessary at the union stores. So far, more than 150 stores have voted to unionize.

ADMINISTRATION ANNOUNCES NEW DACA RULE

The Deferred Action for Childhood Arrival Programs (DACA), begun in 2012, offers the ability to work legally to some 600,000 undocumented persons who came to the U.S. as children. The Obama-era rule has been under legal attack and a court in Texas ruled the program was illegal and barred the federal government from accepting new applicants, although it permitted existing DACA recipients to continue relying on its protections. The judge stated, however, that the program wasn't properly implemented, and a new regulation was created to alleviate that concern, although it will not address all the court's concerns. The new rule would apply only to DACA renewal requests, not to new applications which are currently on hold pending the litigation. It takes effect on October 31, 2022. The program would continue to grant two years of deportation protection and a two-year work permit for a $495 fee. It will continue to apply only to people who came to the U.S. as children and have continuously lived in the country since 2007. The legality of the entire concept of DACA is still pending before the Fifth Circuit Court of Appeals, which is weighing whether the Department of Homeland Security has authority to establish broad enforcement exceptions like DACA at all.

On October 5, 2022, the U.S. Court of Appeals for the Fifth Circuit upheld the ruling that President Obama's program of Deferred Action for Child Arrivals (DACA) was illegal. The court ruled that the Obama Administration's 2012 memo creating the policy exceeded its statutory power and violated the Administrative Procedures Act. Since the Biden Administration in August issued a final rule attempting to maintain DACA, the Fifth Circuit opinion allows Dreamers to renew that status while litigation on the issue continues in the district court.

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