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Employers Should Be Wary of Relying on New Independent Contractor Test

When the United States Department of Labor (DOL) unveiled a multifactor test to determine whether workers are employees or independent contractors on January 6, 2021 it generated wide discussion. If workers are classified as independent contractors then they are not covered by the Fair Labor Standards Act requirements, including minimum wage and overtime. But employers should think twice before relying on the rule.

Currently, the DOL considers an individual's employment classification through five or six different factors, weighed equally. Under the new rule, the DOL will focus on the "economic realities" test, which analyzes whether the individual is economically dependent on the employer for work.

In addition, the DOL would balance the following five factors: the nature and degree of the worker's control over the work; the worker's opportunity for profit or loss through personal initiative or investment; the amount of skill required in the work; the degree of permanence in the work relationship; and how integrated the worker's role is in the unit of production. The new rule also places greater emphasis on the first two factors — amount of control and opportunity for profit or loss—then the other three factors. The rule also states that an employer's "actual practices are entitled to greater weight than what may be contractually or theoretically possible."

The new rule also specifies that an employer may offer "health, retirement and other benefits" to an independent contractor without necessarily indicating employment status. The rule allows for payments into a worker's own health or retirement plans without invoking an employment relationship. The rule, though, cautions that this may not be true for all benefits and that an employer who offers the same employer-provided health or retirement plans as ordinary employees may indicate an employment relationship.

Although employers may benefit from application of the DOL's new test, they should not yet rely on it. After the recent presidential transition, the Biden Administration ordered a "freeze" on the rule, which was scheduled to take effect on March 8, 2021. The "freeze" opens several different options for the Biden Administration to modify, delay, or reject the new rule. Moreover, even if it were to be enacted, the rule applies only to statutes that the DOL administers—it does

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not affect other worker classification tests. Employers must still comply with tests used by other agencies, such as the IRS, and tests under state law, such as for unemployment insurance or worker's compensation.

If you have any questions about the new rule or how to properly classify your workers, please contact Rob Driscoll or your Reinhart attorney.