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CHALLENGES EXPECTED TO LABOR RULE ADDRESSING CONTRACTOR/EMPLOYEE CLASSIFICATION

INSIGHT

The U.S. Department of Labor has officially adopted a rule that makes it more difficult for employers to classify workers as independent contractors, a change that could have profound effect on many industries, including health care, commerce, construction, as well as companies such as Uber, Lyft, Door Dash and others relying on gig workers.

The new "independent contractor" rule restores a multifactor analysis used to determine if a worker is an employee or an independent contractor, saying all factors should be treated equally. Those factors include "any opportunity for profit or loss a worker might have; the financial stake and nature of any resources a worker has invested in the work; the degree of permanence of the work relationship; the degree of control an employer has over the person's work; whether the work the person does is essential to the employer's business; and a factor regarding the worker's skill and initiative."

The rule, which takes effect March 11, 2024, replaces an Independent Contractor Rule used under President Donald Trump that gave greater weight to how much control workers have over their job duties and their opportunity for profit or loss.

The Department of Labor said the new rule will help companies determine whether employees should be considered independent contractors under the Fair Labor Standards Act. In a news release about the rule change, the department said the rule seeks to combat employee misclassification, which it called a problem that impacts workers' rights to minimum wage and overtime. Contractors considered in business for themselves are not eligible for the same minimum wage or overtime pay as employees, among other rights.

"Misclassifying employees as independent contractors is a serious issue that deprives workers of basic rights and protections," Acting Secretary of Labor Julie Su said. "This rule will help protect workers, especially those facing the greatest risk of exploitation, by making sure they are classified properly and that they receive the wages they've earned."

Classifying contractors as employees would be more costly for employers, possibly resulting in large job losses, as well as limiting options for contractors. Chamber of Progress, a trade group representing tech companies, published a study that found reclassifying contractors as employees would negatively impact an estimated 3.4 million gig workers, resulting in $31 billion in lost income.

The U.S. Chamber of Commerce quickly released a statement from Vice President of Workplace Policy Marc Freedman opposing the rule and threatening litigation.

"The Department of Labor's new regulation redefining when someone is an employee or an independent contractor is clearly biased towards declaring most independent contractors as employees, a move that will decrease flexibility and opportunity and result in lost earning opportunities for millions of Americans," he said. "It threatens the flexibility of individuals to work when and how they want and could have significant negative impacts on our economy. Making matters worse, the rule is completely unnecessary, as the department continues to report success in cracking down on bad actors that are misclassifying workers. The U.S. Chamber will carefully evaluate our options going forward, including litigation."

In addition, at least one U.S. Congress member, Sen. Bill Cassidy, a Republican from Louisiana, said he would try to repeal the rule.

NEW YORK'S RECENT SETTLEMENT WITH UBER AND LYFT

The friction between businesses and workers over worker classification has been debated for years, often resulting in litigation. The chasm widened with the rise of Uber, Lyft and other ride-share and delivery apps, as those companies operated with workers classified as independent contractors, drawing litigation throughout the country.

In New York, Attorney General Letitia James recently reached a $328 million settlement with rideshare companies Uber and Lyft after the New York Taxi Workers Alliance filed a complaint in 2020, alleging wage theft because the companies collected certain taxes and fees from drivers rather than passengers.

The attorney general's office determined Uber and Lyft deducted sales taxes and Black Car Fund fees from driver payments, instead of charging riders. (The Black Car Fund is a state surcharge to cover workers' compensation and insurance.) The companies also failed to provide certain benefits required by New York labor laws, such as sick leave.

The $328 million settlement includes Uber paying $290 million and Lyft paying $38 million into separate funds to be distributed to current and former drivers. More than 100,000 drivers are eligible for the distributions. The state set up a webpage for the Lyft and Uber settlement so drivers can get more information.

The rideshare companies also agreed to institute improvements in working conditions, including pay minimums and sick leave. Drivers will earn one hour of sick pay for every 30 hours worked. The pay minimum will be $26 per hour. (Drivers in New York City have received minimum pay since 2019 under regulations established by the Taxi & Limousine Commission.)

The ride sharing companies did not admit fault in reaching the agreement. And, the settlement left open the question of whether drivers are employees or independent contractors.

Despite the increase in litigation after the rise of ride-sharing companies, the Department of Labor said the new rule does not target any one industry. Representatives of those companies went public with statements that they do not anticipate the new Department of Labor rule resulting in a different classification for their workers.

Harris Beach's New York Labor and Employment attorneys are closely following this situation and related matters and will advise on any developments. Should you have questions about any of these developments or navigating these changes, please feel free to reach out to attorney Daniel J. Moore at (585) 419-8626 and dmoore@harrisbeach.com; attorney Daniel J. Palermo at dpalermo@harrisbeach.com and (585) 419-8964, or the Harris Beach attorney with whom you most frequently work.

■ AUTHORS

Daniel J. Moore
Member
(585) 419-8626
dmoore@harrisbeach.com

Daniel J. Palermo
Associate
(585) 419-8946
dpalermo@harrisbeach.com