NCRA Government Relations update on new Department of Labor rule affecting independent contractors

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Background Information

Since prior to 2018, NCRA has been tracking state legislatures and the federal government's attempt to reclassify independent contractors as employees. In 2018 the California Supreme Court decided on a case, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* — which was later codified into law through California Assembly Bill 5 — that attempted to make it more difficult for employers to classify workers as independent contractors. The reclassification attempt outlined a list of factors known as the infamous ABC test that workers had to satisfy to retain their independent contractor status (you can read more about the case here). Fortunately, California later enacted an exemption for court reporters and captioners in the state to allow them to continue operating as independent contractors.

Since the *Dynamex* decision and California Assembly Bill 5, Congress has attempted to implement its own legislation seeking to reclassify employees as independent contractors but has been unsuccessful in its effort. First, in March 2021 *the Protecting the Right to Organize (PRO) Act* was introduced and passed in the House of Representatives. It was then referred to several U.S. Senate committees. In March 2021 NCRA Government Relations issued an action alert opposing Section 101 of the PRO Act. However, despite the bill being referred to the U.S. Senate in February 2022, the legislation had little movement and died in the 117th Congress.

In June 2022, because of the PRO Act's lack of passage, the Department of Labor (DOL) considered proposing a rule that seeks to reclassify independent contractors as

and a workers' forum to gather input regarding a prospective rule which you may read about here. NCRA Government Relations, along with many court reporters and captioners across the country, attended the forum and voiced their opposition to a prospective DOL rule.

In February 2023 it was still undetermined whether the DOL would issue a final rule about independent contractor classification. On Congress's end it again reintroduced the PRO Act, this time known as S. 567/H.R. 20, *Richard L. Trumka Protecting the Right to Organize Act of 2023*. However, Congress remained unsuccessful in passing the PRO Act.

Now, because of Congress's inability to reclassify independent contractors, the DOL published a final rule, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, that will go into effect on **March 11.** The rule is similar to its proposed rulemaking that was discussed in 2022.

The DOL's Rule *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*

In January 2024 the DOL published a final rule, **effective March 11,** that revises guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). The final rule rescinds the 2021 independent contractor rule issued under former President Donald Trump (2021 IC Rule) and replaces it with a six-factor economic reality test. In determining whether a worker is an employee or an independent contractor, the test takes into consideration:

(1) opportunity for profit or loss depending on managerial skill;

(2) investments by the worker and the potential employer;

(3) degree of permanence of the work relationship;

(4) nature and degree of control;

(5) extent to which the work performed is an integral part of the potential employer's business; and

(6) skill and initiative.

The test also considers additional relevant factors if they depend on whether the worker is economically dependent on the potential employer for work. It does not put weight on any one factor, but rather weighs the totality of the circumstances. The rule also defines

not economically dependent on an employer for work and are in business for themselves."

The DOL contends that the new rule is "more consistent with the Fair Labor Standards Act as interpreted by longstanding judicial precedent and that it will reduce the risk of employees being misclassified as independent contractors." Acting Labor Secretary Julie Su also stated that "Misclassifying employees as independent contractors is a serious issue that deprives workers of basic rights and protections. 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." It has also been mentioned that in finalizing this rule, the DOL's intent is to protect employees from being misclassified, such as rideshare drivers and certain gig workers.

What the Rule Means for You

It is important to note that the rule only revises the DOL's guidance on how to analyze whether a worker is an employee or an independent contractor under the Fair Labor

Standards Act. The rule does not adopt a stringent “ABC” test and does not impact independent contractor classification under state laws using the “ABC” test — and who have exemptions — including California, Massachusetts, and New Jersey. It must be noted that the rule as mentioned above is broad. While it may impact some independent contractors, the new test set forth is not as stringent as California’s AB 5 or the PRO Act.

Under the former rule, courts and employers could classify workers as independent contractors based upon just two factors. However, starting March 11, employers will need to be stricter about how they categorize their workers and will have to look at the totality of the circumstances before classifying workers as independent contractors.

If it is determined that a worker is misclassified, it may result in expensive penalties such as unpaid overtime, unpaid minimum wage, attorneys’ fees, and liquid damages. Additionally, if the IRS suspects an employer has intentionally misclassified an employee, it could potentially charge penalties for misclassification. It is essential that employers take precautions to ensure that new hires are properly classified and that workers who were hired as independent contractors did not become employees over time due to a shift in their work.

We anticipate this rule will likely encounter legal challenges in the near future.

Proper classification of workers can be confusing and worker misclassification can affect workers’ rights, overtime pay, and tax consequences. NCRA recommends that employers and firm owners should seek legal assistance to confirm that they are complying with all federal and state rules regarding employees or independent contractors under their direction. Any additional questions or concerns regarding the impact of the new rule should be directed to legal counsel.