

Federal Court Reinstates Trump Era Independent Contractor Test Rule

Labor & Employment Law Update

By Sara Zorich on March 17, 2022



On March 14, 2022, Judge Marcia Crone of the U.S. District Court for the Eastern District of Texas ordered that the Trump administration's rulemaking regarding the Fair Labor Standards Act's (FLSA) Independent Contractor Test (specifically Title 29, Part 795 of the Code of Federal Regulations) be reinstated effective March 8, 2021. The

court ruled that the Department of Labor's delay and subsequent withdrawal of the rule was a violation of the Administrative Procedure Act (APA). It is unclear whether the Department of Labor will appeal the Texas court's decision to the Fifth Circuit Court of Appeals.

Thus, the current federal test to determine whether a person is properly classified as an independent contractor, as opposed to an employee, is located in the Federal Register posted on January 7, 2021. Look on Page 1246 of the Federal Register for a complete list of the new Sections 29 CFR 795.100-795.120.

This rulemaking was implemented by the Trump administration to help simplify the independent contractor test. Under the new regulations, there are two "core factors" to be reviewed to determine whether a person is an independent contractor vs. an employee, and if those two factors lean the same way, that is how the person should be classified. If the core factors do not provide for the same result, then three "other factors" are reviewed to make the determination.

Two Core Factors:

1. The nature and degree of control over the work.
2. The individual's opportunity for profit or loss.

Other Factors:

1. The amount of skill required for the work.
2. The degree of permanence of the working relationship between the individual and the potential employer.
3. Whether the work is part of an integrated unit of production.

Note, this standard is only applicable under the Fair Labor Standards Act. Many states have their own independent contractor tests which are more stringent than the federal test. Further, courts generally disfavor independent contractors and it will ultimately be up to a judge to decide whether an individual should be designated as an independent contractor or employee in any given case. Thus, companies should continue to carefully analyze any independent contractor designations they are making.

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