January 18, 2024

Department of Labor Issues Final Rule on Worker Classification

As was widely expected, on January 10, 2024, the U.S. Department of Labor (DOL) published its Final Rule changing the test used to determine worker status as either an employee or an independent contractor under the Fair Labor Standards Act (FLSA), the federal law that establishes the minimum wage and the overtime pay requirements for most employers. In doing so, the DOL rescinded the Trump Administration's 2021 Rule on the subject, largely returning to the Obama administration's interpretation of the "economic realities" test used to classify workers for FLSA purposes.

In ASTA's comments to the proposed rulemaking filed with DOL in late 2022, we expressed support for the 2021 Rule and urged DOL to not revert to the methodology utilized by the Obama administration, an unweighted "totality-of-the-circumstances" approach analyzing six factors of engagement, namely: 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 [engaging party's] business; and 6) skill and initiative. The Final Rule further stipulates that the above factors are not exhaustive, meaning that any other facts or circumstances which bear on the worker's economic dependence on the engaging party can also be considered.

In contrast, the analysis adopted under the 2021 Rule evaluated just five factors and accorded greater weight to two factors – the degree of control and the worker's opportunity for profit or loss – deemed most probative in determining the worker's status. The greater emphasis on the control element also brought the DOL test closer in line with that used by the Internal Revenue Service for tax purposes, reducing the likelihood of inconsistent determinations at the federal level.

It is significant to note that the Final Rule does not reflect adoption of the even more rigorous "ABC" test that some states, such as California and New Jersey, utilize when classifying workers for state purposes. Unlike the ABC test, where businesses must satisfy all three elements of the test to classify workers as independent contractors, no single factor alone is determinative under the economic realities test.

From the perspective of businesses reliant on contracted labor, including many travel agencies, the

Final Rule represents a definite, if modest, step backwards as it de-emphasizes the degree of control factor of the analysis. Returning to the Obama-era interpretation also means less certainty for businesses that their worker classifications will be upheld if challenged in the courts and increases the likelihood of conflicting determinations at the federal level. ASTA cited these points, among others, as reasons why DOL should have left the 2021 Rule in place. Fortunately, however, because historically travel agencies have not been targeted for aggressive misclassification enforcement efforts, those that continue to observe the recommended best practices for engaging independent contractors, and did not encounter difficulty prior to 2021, are unlikely to find their operations significantly impacted going forward.

Barring a legal challenge, congressional action or other unforeseen delay, the Final Rule becomes effective on March 11, 2024. While not the outcome ASTA had recommended, it is worth noting that DOL referenced ASTA's position by name four times in the Final Rule, a clear indication that our viewpoints were considered and the voice of the travel advisor community is strong. As always, ASTA will continue to monitor the situation and keep its members apprised of any developments as they occur.

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Questions? Please contact us at ASKASTA@asta.org.