

Ax Of Trump DOL Guidance Dims Contractor Rule's Chances

By **Mike LaSusa**

Law360 (February 24, 2021, 3:19 PM EST) -- The Biden administration's rescinding of Trump-era guidance on when businesses can classify workers as independent contractors shows a dim future for the former president's proposed worker classification rule, experts told Law360.

The U.S. Department of Labor's Wage and Hour Division announced last week that it had rescinded a 2019 opinion letter regarding worker classification. That action came after the division had sought to delay the effective date of a rule containing a multifactor test for determining independent contractor status under the Fair Labor Standards Act. The DOL issues opinion letters in response to questions from parties about federal wage laws — they serve as legal guidance but are not binding.

The decision to pull the guidance that was issued by former President Donald Trump's DOL shows President Joe Biden is placing worker classification high on his list of policy priorities, said Veena Dubal, a professor at the University of California, Hastings College of the Law.

"This is a good sign that he's willing to move quickly on this issue," Dubal said. "This particular move may just be the tip of the iceberg for what we'll be seeing in the coming months."

Shifting Tests

The Trump-era guidance laid out a six-factor test aimed at discerning the "economic realities" of whether workers are employees or independent contractors, who aren't entitled to many legal protections and benefits that are mandated for employees, like minimum wage and overtime pay, paid sick time and family leave, and the right to unionize.

The related rule, which was finalized by Trump's DOL in the waning days of his administration, relies on the same legal analysis as the 2019 opinion letter. It emphasizes the control a person has over their work and their opportunity for profit or loss as a result of their personal investment.

Biden has said he favors implementing a three-part standard similar to the so-called ABC test laid out in the California state law known as A.B. 5, which focuses on whether workers are free from the hiring entity's control, work outside its "usual business," and "customarily" do the work they do for an employer as part of an "independent business."

Although Biden is dealing with political pressure on other wage and hour issues, like raising the

minimum wage and expanding paid sick leave amid the COVID-19 pandemic, Trump's approach to worker classification appears to be dead in the water, said former high-ranking DOL attorney Susan Harthill.

"It's highly likely that rule will never go into effect, and the Biden administration will revert to either the Obama-era [administrator's interpretation] or something even broader," said Harthill, now an employment partner at management-side Morgan Lewis & Bockius LLP.

Under former President Barack Obama, the DOL put out a type of guidance known as an "administrator's interpretation" that generally posited that most workers are employees under the broad definition of employment contained in the FLSA. The Trump administration pulled that guidance in 2017 before issuing its opinion letter and later the classification rule.

A Seesaw Effect

The regulatory seesawing of the last several years has created uncertainty for employers, said Louisa Johnson, a labor and employment partner at management-side firm Seyfarth Shaw LLP.

Given the uncertainty, the Biden administration's apparent intention to scrap the Trump-era classification rule is "shortsighted," Johnson said, adding that going back to the Obama-era administrator's interpretation wouldn't necessarily clear things up.

"They're not rulemaking," the Seyfarth partner said, referring to administrator's interpretations. "This was an area where rulemaking was really needed."

Worker misclassification has become a major political issue in recent years with the rise of the so-called gig economy. According to Dubal, that could put pressure on the legislative branch to take action on the issue, especially since addressing worker misclassification could have benefits for the overall economy, such as bolstering the coffers of hard-hit unemployment insurance programs and expanding workers' access to other benefits.

"There is hope in Congress for clarification on this gray area," the UC Hastings professor said.

In the absence of new guidance from the White House or legislation from Congress, employers have to deal with a patchwork of state laws and legal precedents set by federal appeals courts, attorneys said.

"You really start the analysis for an employer with, 'Where are your operations?'" Johnson said. "There really is no unified approach at the federal level."

--Additional reporting by Max Kutner and Vin Gurrieri. Editing by Robert Rudinger.