

Uncertainty Surrounds New DOL Contractor Rule

By **Mike LaSusa**

Law360 (January 6, 2021, 9:27 PM EST) -- The U.S. Department of Labor has finalized a long-awaited rule that aims to clarify the criteria for classifying workers as either employees or independent contractors, but developments in the political arena cast a shadow of uncertainty over the rule's future, experts said.

The DOL rule finalized Wednesday, just two weeks before President Donald Trump is set to leave office, lays out an "economic realities" test to determine if a worker is an employee under federal law. If the worker is not "economically dependent" on their employer, they can be labeled an independent contractor, which means they're not entitled to things like minimum wage and overtime pay, paid sick time and family leave and the right to unionize.

Two core factors of the test examine the control that a person has over their own work and the opportunity for profit or loss as a result of personal investment. If a decision can't be made based on those two factors, the test looks at the amount of skill required for the position, the permanence of the working relationship and how integrated the worker's role is to the organization's overall operation.

But the rule, which is set to take effect in early March, could be upended under the incoming administration of President-elect Joe Biden.

Ryan Morgan, the co-chair of the employee rights group at worker-side firm Morgan & Morgan PA, said it's "par for the course" for new administrations to seek to torpedo their predecessor's lame-duck regulatory moves, pointing out that the Trump-era rule replaces a less business-friendly standard that former President Barack Obama's administration had set out. But he said the back-and-forth could complicate potential judicial challenges.

"Courts are not receptive to flip-flops," he said. "I still don't know what ultimate weight it will carry with courts."

Senior officials from the Department of Labor declined to comment Wednesday in response to reporters' questions about how the Biden administration might handle the issue. The Biden transition team did not respond to requests for comment.

The rule won praise from business groups, including the U.S. Chamber of Commerce, which issued a statement Wednesday calling it "an important step" while urging Congress to "go even further" by adopting legislative changes to the federal worker classification regime.

However, it may not be prudent to plan on the rule actually taking effect, said Susan Harthill, a partner at management-side firm Morgan Lewis & Bockius LLP who formerly served as the DOL's deputy solicitor for national operations.

"I don't see any way this rule will survive," Harthill said. "I don't think employers should be making any changes to their business arrangements in reliance on this rule."

One way the rule could be undone is through Congress. Under the Congressional Review Act, lawmakers can overturn regulations within 60 legislative days of when they are issued.

Harthill said Democrats might try to use the CRA to nix the independent contractor rule.

"That's something that the Biden White House and Congress will have to strategize about and communicate about," Harthill said.

While the CRA is one possible avenue toward reversing the rule, the White House has the power to undo the rule all by itself, noted Travis Gemoets, a partner with management-side firm Jeffer Mangels Butler & Mitchell LLP.

"These rule changes that require acts of Congress — they take up time, and I think they could detract from other more pressing goals that do require both houses to agree," he said.

Cathy Ruckelshaus, general counsel of the worker advocacy group National Employment Law Project, said the rule is "highly unlikely" to survive the Biden administration, suggesting the incoming DOL leadership might delay the effective date of the rule while it works on a new version.

"We have no way of predicting what's going to happen, but I imagine this is a top priority for the incoming Department of Labor," she said.

Gemoets said he thinks a rule change could take more time.

"Is this going to happen in the first month, or six months, or year of the Biden presidency? I would say no," he said. "Only after other policy goals are fulfilled is this going to happen."

-- Additional reporting by Jon Steingart and Vin Gurreri. Editing by Abbie Sarfo.