

whether independent contractors are in business for themselves or economically dependent on the potential employer for work.¹ ABC submitted comments² in support of the proposed rule. On Jan. 7, 2021, the WHD issued its final rule³, which simplifies and clarifies the factors for determining when a worker is an independent contractor versus an employee under the FLSA. Specifically, the final rule improves the certainty and predictability of the test by focusing it on two core factors: (1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss.⁴ Further, the test identifies three other factors that may serve as additional guideposts in the analysis, which include the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer and whether the work is part of an integrated unit of production.

The final rule is March 8, 2021. However, on Feb. 5, the WHD proposed to delay the effective date of the final independent contractor rule until May 7.⁵ The proposal indicates that the sole purpose of the delay is for the WHD to review and consider the rule as the Regulatory Freeze Memorandum⁶ and Office of Management and Budget Memorandum M-21-14⁷

⁸ WHD asserts that the proposed delay is reasonable 1 361.1/F2 12 Tf1

notice states that WHD will not consider comments on any issue other than the proposal to delay on the impact of the rule itself. No explanation is given for either of these arbitrary restrictions, both of which violate the APA.

Numerous courts have held that reducing the number of days for comments below 30 days (though 60 days is more common), requires good cause and substantial exigent circumstances to justify what is otherwise an unreasonably short period of time for public comments.¹¹ In *Omnipoint Corp v. FCC*

violate the APA where they purport to authorize agencies to arbitrarily delay the effective date of final rules without good cause.

Thus, in *Natural Resources Defense Council v. Abraham*,¹⁶ the court struck down an attempt by the Department of Energy to delay the effective date of a 2001 rule upon a similar change of administration, where the DOE relied on a president beginning of the Bush administration. The court concluded that the was invalid the

are seriously harmed every day that goes by without implementing the much-improved standard courts will ²² the administrative record and the final rule itself conclusively demonstrate that the current standard applied by WHD and the courts is impossible for most employers to understand or comply with.

4. Construction Industry Employers Will Be Irreparably Harmed by Any Stay of the Effective Date of the Independent Contractor Final Rule.

ABC is on record as strongly supporting the independent contractor final rule, which clarifies the interpretation of independent contractor status under the FLSA and promotes certainty for employers, independent contractors and employees.²³

Independent contractors are essential to many aspects of the construction industry. They provide specialized skills, entrepreneurial opportunities and stability during fluctuations of work common to construction. The multi-tiered, project-by-project contracting model has long been essential to cost-

Conclusion

The present notice allows insufficient time and inadequate explanation for ABC to provide more substantive comments on the issues raised therein. ABC encourages WHD to extend the time for comments after the notice itself is amended to provide detailed grounds for the otherwise unlawful action of staying the effective date of a final rule. The final rule must in any event be allowed to go into effect on March 8, 2021, because the WHD has failed to show good cause for delay.

Respectfully submitted,




Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel:

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, DC 20006