

LEGAL NEWS FOR YOUR BUSINESS

February 2024

Employment Alert

DOL RELEASES NEW WORKER CLASSIFICATION RULE

Out with the old...in with the new. On January 10, 2024, the U.S. Department of Labor (“DOL”) released a new final rule (the “**new rule**”) regarding classification of workers under the Fair Labor Standards Act (“FLSA”). The new rule replaces a Trump administration rule and returns to a six-factor test in determining whether, as a matter of law (regardless of any label or agreement), a worker is an employee or an independent contractor. This matters very much *to all employers, large and small*, because the FLSA applies to all employers. Furthermore, state wage laws, including North Carolina’s Wage and Hour Act, are modeled on and/or incorporate portions or aspects of the FLSA. An employer’s misclassification of a worker as an independent contractor when the worker is legally an employee can have very expensive consequences.

What's Different About the New Rule?

The previous rule determined classification based on two core factors: (1) the nature and degree of a worker’s control over the work; and (2) the worker’s opportunity for profit and loss. The new rule, however, has returned to a pre-2021 six-factor determination process. The Economic Reality Test evaluates multiple factors to determine appropriate classification:

1. The worker’s opportunity for profit or loss.
2. Relative investments by the worker and the potential employer.
3. Permanence of the work relationship, considering the nature and duration of the relationship.
4. Degree of control the potential employer has over the worker. This factor includes control over the worker’s schedule, supervision of the worker’s performance, and how much influence the worker has over pricing and marketing. Importantly, the new rule strictly considers whether the potential

employer *has the ability to control* these factors, rather than whether it *chooses to exercise control* over these factors.

5. Whether the work performed by the worker is integral to the potential employer's business.
6. Whether the worker must possess specialized skills or relies on training provided by the potential employer.

How Do the Changes Affect Employers?

While the previous rule was considered more business-friendly, the new rule makes it more likely that workers will be determined to be employees, rather than independent contractors. Worker classification may affect the worker's compensation structure, benefits options, and tax obligations. Additionally, workers classified as employees may be subject to additional employment laws and regulations, including overtime and minimum wage requirements.

The new rule becomes effective on March 11, 2024. Employers should act now to determine whether their worker classifications will be affected.

If you have questions about your or your employees' classification under the new rule, please contact any member of Gardner Skelton's employment team.

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INCREASED EEOC FOCUS ON DISCRIMINATION AND HARASSMENT AGAINST TRANSGENDER EMPLOYEES

The Equal Employment Opportunity Commission ("EEOC") is ramping up its focus on addressing discrimination and harassment against transgender employees. In August 2023, the EEOC announced its new Strategic Enforcement Plan for fiscal years 2024-2028. In the Strategic Enforcement Plan, the EEOC outlined an increased focus in preventing and addressing discrimination and harassment against multiple categories of individuals, including employees with mental health concerns, racial minorities, and LGBTQ+ individuals.

The EEOC remains committed to those goals, and reminded the public of that when they announced a settlement with a New York pizzeria. According to the EEOC's allegations, the owner of the pizzeria and multiple other staff members discriminated against their transgender coworker and harassed him when they made remarks about how he "wasn't a real man," asked about his genitalia and transition, and repeatedly purposely misgendered him. As part of the settlement, the pizzeria agreed to pay \$25,000 and to undergo training on federal anti-discrimination employment laws, among other terms.

The settlement is a reminder to employers of the importance of having and enforcing EEO policies, both to protect employees and shield themselves from liability. Federal law

prohibits employers from discriminating against employees on the basis of sex, including sexual orientation and gender identity. To comply, and to protect all employees from discrimination and harassment based on protected characteristics, employers should institute and enforce EEO policies and keep apprised of updates to anti-discrimination employment laws.

If you have questions or concerns about your company's EEO policies, please contact any member of Gardner Skelton's employment team.



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