

COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

U.S. DOL Withdraws Federal Independent Contractor Rule

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Effective today, May 6, 2021, the U.S. Department of Labor (DOL) has withdrawn a final rule published in January 2021 that would have made it easier for businesses to classify workers as independent contractors under federal wage and hour law.

By way of background, prior to the now-withdrawn January 2021 rule, the DOL considered the following six factors, known as "economic realities" factors, to determine whether a worker was an independent contractor or an employee under the federal Fair Labor Standards Act (FLSA):

1. the degree of control exercised by the alleged employer over the worker;
2. the extent of the relative investments of the employer and the worker in the company's facilities and equipment;
3. the degree to which a worker's opportunity for profit and loss is determined by the employer;
4. the skill, initiative, and judgment required in performing the job;
5. the extent to which the work is an integral part of the employer's business; and
6. the permanency and duration of the relationship.

The now-withdrawn January 2021 rule attempted to narrow and streamline the old test by focusing the analysis on two "core" factors and three other "guidepost" factors. As of May 6, 2021, the January 2021 test no longer applies. The old six-factor "economic realities" test set forth above is now back in force, and will continue to apply unless and until the DOL or Congress creates a new independent contractor rule.

Employers should be advised that DOL's withdrawal of the January 2021 rule has no effect on any independent contractor tests established by state (as opposed to federal) wage and hour law. For example, the more stringent "A-B-

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C" independent contractor test required under Massachusetts state law remains in force. Under Massachusetts law, a business who wants to treat a worker as an independent contractor rather than an employee still must show that the work:

1. is done without the direction and control of the employer;
2. is performed outside the usual course of the employer's business; and
3. is done by someone who has their own, independent business or trade doing that kind of work.

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