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White House Clears Independent Contractor Final Rule

Law and the Workplace on **January 4, 2024**

On January 2, 2024, the Office of Information and Regulatory Affairs (OIRA) completed its review of the U.S. Department of Labor's final rule on independent contractor classification under the Fair Labor Standards Act. The rule now heads back to DOL for publication in the Federal Register, and it is likely to take effect 60 days after such publication.

We expect the final rule to mirror the proposed rule DOL published in October 2023, codifying in a new 29 C.F.R. Part 795 the agency's "general interpretations for determining whether workers are employees or independent contractors under the FLSA" and utilizing a multi-factor "economic realities" test similar to the one used by many federal courts (and by DOL prior to the Trump administration).

IORA is part of the Office of Management and Budget (OMB), an agency within the Executive Office of the President that, among other responsibilities, reviews draft proposed and final regulations under Executive Order 12866 prior to their release.

Once published in the Federal Register, there are a limited number of actions that would prevent the final rule from becoming effective—all of which are unlikely to occur. For example, under the Congressional Review Act (CRA), any member of Congress can issue a joint resolution disapproving an agency's final rule once it is submitted to Congress for review (which typically happens at the time of publication in the Federal Register). If the joint resolution of disapproval is approved by a simple majority of both houses of Congress and signed by the President, or if Congress overrides a presidential veto by a two-thirds majority in both chambers, the rule cannot go into effect or continue in effect. Congress generally has 60 days of continuous session from its receipt of the final rule to avail itself of the disapproval procedure. CRA resolutions of disapproval are most frequently introduced during or following a change in political control in either the White House or Congress. Since the enactment of the CRA in 1996, members of Congress have introduced joint disapproval resolutions for more than 125 rules, but only 20 rules have been overturned through the process.

A court could enjoin the implementation of the rule in whole or in part, as a federal district judge in Texas notably did in 2016 with respect to the Obama administration's overtime rule and a New York federal district judge did in 2020 with respect to the Trump administration's joint employment rule. The new independent contractor rule is less controversial than either of those two rules.

Final rules can also be rescinded, altered, or delayed through further action by the agency that issued them (*e.g.*, by publishing a new Notice of Proposed Rulemaking, in which the agency provides a reasonable justification for the policy change) or by an Executive Order or a "regulatory freeze" directive from the White House, although both of these actions typically occur only following a change in political control of the White House.

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