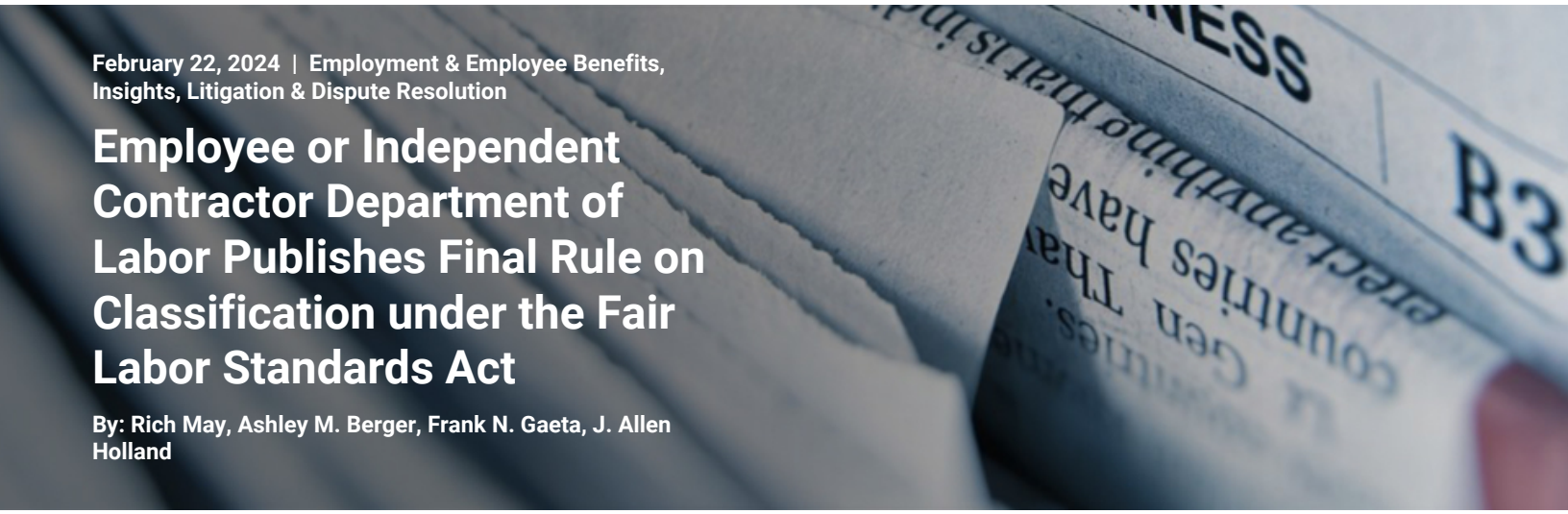

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Employee or Independent Contractor Department of Labor Publishes Final Rule on Classification under the Fair Labor Standards Act

By: Rich May, Ashley M. Berger, Frank N. Gaeta, J. Allen Holland

On January 10, 2024, the U.S. Department of Labor (the "Department") published its final rule for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act ("FLSA") (the "Final Rule"). The Final Rule goes into effect on March 11, 2024. While the Final Rule does not represent a significant change in the law, it does provide more clarity on how the Department interprets the FLSA. The Final Rule rescinds the "Independent Contractor Status Under the Fair Labor Standards Act rule" ("2021 IC Rule"), which was published on January 7, 2021.

Key Takeaways from the Final Rule

As a starting point, the final rule acknowledges that the overarching test for determining employee status under the FLSA is the "economic realities test." This has been the case for years. The DOL explains this test as an effort to determine "whether the worker is either economically dependent on the potential employer for work or in business for themself."

The purpose of the new rule is to announce how the DOL will make that determination. Here are the factors the DOL will consider: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the potential employer's business; (6) skill and initiative; and (7) "additional factors." (The rule notes that "additional factors may be relevant" in helping to determine the ultimate issue, which is always "whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work.")

The Final Rule includes commentary about each factor and explains how it will evaluate each factor. Like the 2021 IC Rule, the Final Rule identifies economic dependence as the "ultimate inquiry" of the analysis, while providing a list of factors to evaluate economic dependence.

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The Final Rule confirms, under the FLSA, that a worker cannot voluntarily waive employee status. In other words, an employee (if they are in fact, to be classified as such) cannot elect to be classified as an independent contractor, nor may an employee waive FLSA-protected rights.

It is unclear how the Final Rule will be applied by the courts, if at all, because courts have decades of experience in interpreting the FLSA and may conclude they don't need to look to the Department for guidance in interpreting it.

Apart from the FLSA, employers need to be mindful of applicable state worker classification tests. (Many states have their own wage laws, analogous to the FLSA.) Massachusetts and certain other states apply what's known as the "ABC" test. Fewer workers are likely to qualify as independent contractors under the ABC test than under the Department's economic realities test, in light of prong "B." The Massachusetts ABC test, set forth in MGL c.149, § 148B provides that, to be an independent contractor, all three of the following prongs must be satisfied:

(A) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(B) the service is performed outside the usual course of the business of the employer; and,

(C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Employers should also know, to add to the complexity, that there are differences not only between the FLSA test and some state wage law tests, but that the tests for classifying someone as an independent contractor for tax purposes, or for unemployment insurance coverage purposes, have their own variations.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys J. Allen Holland, Frank Gaeta, or Ashley M. Berger