Episode 47: "New US DOL Independent Contractor Rule: How to Classify Personnel"

Speakers: Ari Kwiatkowski, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I'm Ari. Let's dig in.

[Ari]: Hi, guys. Welcome to "New US DOL Independent Contractor Rule: How to Classify Personnel." This is episode 47 of the *Barclay Damon Live: Labor and Employment Podcast* and I am thrilled to welcome you guys this week. And I will just say that this is our last episode before the holidays. Our last episode of 2022. So to our listeners, thank you so much for all your support over the last year. It's been about a year that we've been doing the podcast and it's been great. I've learned a lot. I hope you've learned a lot. And, you know, thank you so much for the support, all the love, and for tuning in and listening. So I'll just say we're going to send out 2022 in a good way today as the name suggests. We're going to really dive in and talk about the new independent contractor rule that was issued by the United States Department of Labor back in October. But before we do, I will share my fun or interesting fact about myself, which I feel compelled to share, as I always ask my guests to do the same.

[Ari]: So I was racking my brain as I was driving into the office today to record this. And I think one thing I have not shared with you guys is that I am a pretty diehard New York Yankees fan. If you're a Yankees fan, too, and you're listening, you're probably thrilled that Aaron Judge has signed his contract and we're good to go for next year. Seeing him play on a different team would have been pretty brutal. If you're not a Yankee fan, you're probably annoying to even be reading about it or hearing about it. So I apologize for that in advance. But I think that is something I have not mentioned and I don't think it's come up in any of the podcast episodes so far this year. So I wanted to throw that out there for you guys.

[Ari]: Anyway, now that we're through that, let's dig in. Let's talk about this new rule. So on October 13, the United States Department of Labor issued a notice of proposed rulemaking to help employers determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act. So if you are in the gig industry, if you're in the construction industry, the trucking industry, the hospitality industry, you definitely want to listen up, tune in for this episode and for this discussion because this is going to be huge for you. But again, why do we care? So essentially this issue is important because it really deals with how employers classify their employees, i.e., whether the employees, is an independent contractor or the employee is just an employee, a W-2 employee. And, you know, this new proposed rule by the United States Department of Labor really addresses that issue. And the reason why we care is because whether or not an employee is... or an individual is classified as an independent contractor or an employee really determines whether or not that person is covered by the wage and hour laws, you know, is subject to or is qualified for overtime payments, whether the employee is exempt, and things of that nature.

[Ari]: So it really is important as it relates to salary, tax issues, minimum wage, overtime, things like that. So before we dive into the new rule, let's talk a little bit about where we've been and then where we're going. So, you know, the whole purpose of this new rule, basically, it was enacted by the Department of Labor and it's really in response to a rule that was passed back in the last or final days of the President Trump's administration back in January 2021. So let's take another step back and talk about why the rule passed by that... during President Trump's administration was significant. So prior to 2021, the rule for determining

whether or not an employee was an independent contractor or an employee under the Fair Labor Standards Act was really one articulated by the courts, and it was called the "economic reality test." And basically what that meant was in determining whether an employer had properly classified an employee, the court would look at the totality of the circumstances, a number of factors as to whether or not an economic reality, or practically speaking, the employee was working for the employer or the employee really was running his or her own business and able to basically survive on its own, on their own, without the help of the employer.

[Ari]: So historically, that is how it was determined whether or not an employer properly classified an employee or an independent contractor. It was as a five-factor test articulated by the Supreme Court in a case called United States vs Silk, which was issued back in the '40s. So fast forward, however many decades to the final days of President Trump's administration, where the Department of Labor proposed a new rule addressing this test, we'll call it the January 2021 rule. And that test really was a bit of a departure from the years-long application of the five-factor test rule. And basically under the new rule, the DOL or the Department of Labor under the 2021 rule reduced the number of primary factors the agency would consider when determining whether a worker is an independent contractor to that historically five-factor test to two what the rule described as "core factors." And those two core factors were "the nature and degree of control over the work" and "the worker's opportunity for profit or loss based on initiative and or investment." And we're not going to get too into the weeds on the factors today. But I just want to make you guys aware of what the differences are in the rule.

[Ari]: So, you know, under President Trump, the Trump administration, DOL rule, the rule focus was on the two factors I just mentioned. The rest of the factors that were historically considered, you know, weren't considered under that rule until the first two factors would not point to the classification... point to the same classification. So basically under the 2021 rule, you would only get to the other factors if the first two that I mentioned, the core factors did not, were not satisfied. And historically speaking, the independent or excuse me, the economic realities rule, I think has been a little bit more employee-friendly, whereas the rule, unsurprisingly, proposed by the Trump administration, was more employer-friendly. So there was definitely a shift with this rule. But I will add with the caveat that once the DOL passed this rule in January 2021, in the earliest days of President Biden's administration, he basically issued a moratorium, saying that the rule would not go in effect. So until that time, you know, I think the administration, the current administration has really taken its time over the last, you know, however many years to develop a rule that they think is defensible.

[Ari]: All right, guys. So that's where we were. That's historically the kind of framework for this new rule. Let's talk about where we are now, where we're going. So as I mentioned, the new rule was issued on October 13. There is a comment period up until... that actually just ended this week. So we'll see how everything shakes out. We'll talk about that in a moment. But this new rule is really intended to be a return to that economic realities test. And looking at the United States DOL now the web..., the Department of Labor website, you know, basically the Department of Labor is saying that the rule would align the department's approach with the court's Fair Labor Standards Act interpretation and the economic reality test, as we discussed a few moments ago, and really restore the multifactor totality of the circumstances analysis to determine whether an employee is an employee or an independent contractor under the Fair Labor Standards Act. So this really is a return to the prior test. You know, I think that the Biden administration certainly took its time and in developing and proposing this rule for comment, which would amend the codified federal regulations if it is adopted. But in any event, let's just talk a little bit about the factors. You know, this is this is a very fact-intensive analysis. And if you're in this industry and you have these issues come up, you know that it's not something that you can get through super quickly. So I don't ...as I mentioned a few minutes ago, I don't want to go through every factor, but I'll just list them for you. So the factors under the new rule that the courts will consider in determining whether a worker has been classified properly is the opportunity for profit or loss, depending on managerial skills, investment by the worker and the employer, degree of permanence of the work relationship, nature and degree of control, and the extent to which the work performed is an integral part of the employer's business, as well as skill and initiative. So basically the new rule, you know, really identifies these factors and makes it clear that the whole notion of the two-factor test that I mentioned a few minutes

ago is really out the door at this point. So they're really it's really looking at the totality of the circumstances, the totality of the relationship between the worker and the employer, and really taking a hard look at that. So I think that's kind of a general overview of the new rule and why it was enacted. I think it's worth taking a moment to talk about, you know, what does this mean? And assuming the rule is adopted, which I'm sure it will be, you know, what is the point of this and will it matter it? And I think that that's important to talk about, you know, for a few reasons.

[Ari]: So as I mentioned a couple moments ago, while this will amend the code of federal regulations, whether or not a worker was misclassified is typically, you know, an issue for the courts to determine in interpreting and applying the regulations. So, you know, I think that it really will lie with the courts to determine how employees are classified ultimately, even if the rule does pass. So I think that's important to note. And another thing to keep in mind when you're looking at this new proposed rule is (if you're an employer), is to also keep in mind that the law of the state where your workers are or your employees are, because obviously there are certain states that apply stricter rules, less stringent, more stringent rules than the US DOL rule. And it's important to also keep that in mind. So, guys, I think this has been a good general overview. I just wanted to alert you if you haven't heard about it and in particular, if you're in the industries that we mentioned, the gig industry, hospitality, trucking, transportation, this is definitely important, and you definitely got to listen up. And I think it's important as well to just consider the effects because I do think it's more than likely that the rule will be adopted, and we should find out soon because the comment period did end this week.

[Ari]: So thank you so much, guys, for listening this year. As I mentioned at the beginning of the episode, this is our last episode before the holidays. Happy holidays to you, your families, whatever holiday you celebrate. We will be back in the beginning of January right after the new year. We're going to return to our segment on discrimination. And we will be traveling to Massachusetts, where I will talk with Carolyn Crowley, who is a Barclay Damon partner in our Boston office.

[Ari]: And we will give you the lowdown on handling discrimination claims under Massachusetts law. In the meantime, definitely check out some of our content. As I mentioned, we have almost 50 episodes for you. Take a look, visit our anchor page, visit our website and you can kind of take a look at all the content that we've gone through this year. It's been a good time. This is a good time, I should say, if you're an employer, to take a look at your employee handbooks...end of the year, if there are new policies you want to roll out next year, definitely take a look. We have a couple episodes on that topic, which I shared with Megan Bahas, who's another attorney at our office. And there's just a lot of content there for you guys, so definitely check it out, if you have time. Over the next few weeks, take a look at our library. Click the link on our website and definitely take a look. If you have employers in New York, if you have employers in Connecticut, Massachusetts, there's something for you. Thanks so much, guys. Have a great rest of your year and I will see you in 2023.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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