



## DEPARTMENT OF LABOR

### Wage and Hour Division

### 29 CFR Parts 780, 788, and 795

### RIN 1235-AA34

## Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** Consistent with the Presidential directive as expressed in the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, titled “Regulatory Freeze Pending Review,” this action finalizes the Department of Labor’s proposal to delay until May 7, 2021, the effective date of the rule titled Independent Contractor Status Under the Fair Labor Standards Act (“Independent Contractor Rule” or “January 2021 Rule”), which was published in the Federal Register on January 7, 2021, to allow the Department to review issues of law, policy, and fact raised by the rule before it takes effect.

**DATES:** As of [insert date of publication in the Federal Register], the effective date of the Independent Contractor Rule published January 7, 2021 at 86 FR 1168 is delayed until May 7, 2021.

**FOR FURTHER INFORMATION CONTACT:** Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation or enforcement of the

agency's existing regulations may be directed to the nearest Wage and Hour Division (“WHD”) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On January 7, 2021, the U.S. Department of Labor (“the Department”) published the Independent Contractor Rule in the Federal Register with an effective date of March 8, 2021. *See* 86 FR 1168. The Independent Contractor Rule would, among other actions, introduce into title 29 of the Code of Federal Regulations a new part (part 795) titled “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.” *See id.* In a memorandum dated January 20, 2021, and titled “Regulatory Freeze Pending Review,” published in the Federal Register on January 28, 2021 (86 FR 7424) (“Regulatory Freeze Memorandum”), the Assistant to the President and Chief of Staff, on behalf of the President, directed the heads of Executive Departments and Agencies to consider delaying the effective dates of all regulations that had been published in the Federal Register but had not yet taken effect. The Independent Contractor Rule fell within this category. The Regulatory Freeze Memorandum states that the purpose of such delays is for agencies to review any questions of fact, law, and policy that the rules may raise, noting certain exceptions that do not apply to the Independent Contractor Rule. On January 20, 2021, the Office of Management and Budget (OMB) also published OMB Memorandum M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, which provides guidance regarding the Regulatory Freeze Memorandum. *See* OMB Memorandum M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, <https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf> (last visited February 25, 2021). OMB Memorandum M-21-14 explains that pursuant to the

Regulatory Freeze Memorandum, agencies “should consider postponing the effective dates for 60 days and reopening [the] rulemaking processes” for “rules that have not yet taken effect and about which questions involving law, fact, or policy have been raised.” *Id.*

On February 5, 2021, the Department issued a notice of proposed rulemaking (NPRM) in accordance with the Regulatory Freeze Memorandum and OMB Memorandum M-21-14 proposing to delay the effective date of the Independent Contractor Rule to May 7, 2021, which would be 60 days beyond its original effective date. *See* 86 FR 8326.

In the NPRM, the Department explained that delaying the effective date of the Independent Contractor Rule would give the Department additional opportunity to review and consider the Independent Contractor Rule, as the Regulatory Freeze Memorandum and OMB Memorandum M-21-14 contemplate. The Department noted that the Independent Contractor Rule would be its first generally applicable regulation addressing the question of who is an independent contractor and thus not an employee under the FLSA, and would adopt a new legal standard for determining employee and independent contractor status under the FLSA. In light of the significance of this change, the Department proposed to allow itself more time to further review and consider, among other important issues, the legal, policy, and/or enforcement implications of adopting that standard, such as: whether the January 2021 Rule effectuates the FLSA’s purpose, recognized repeatedly by the Supreme Court, to broadly cover workers as employees; the costs and benefits attributed to the January 2021 Rule, including the assertion that workers as a whole will benefit from the January 2021 Rule; and/or whether the January 2021 Rule’s explanation of the standard provides clarity for stakeholders and for the purposes of enforcement, as was intended.<sup>1</sup>

In the NPRM, the Department explained that it believed a 60-day delay would not be disruptive. The Department noted that the Independent Contractor Rule is not yet effective, and the Department has not implemented the Independent Contractor Rule. The Department further

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<sup>1</sup> *See generally* 86 FR 8327.

explained that its public guidance, including the longstanding Fact Sheet #13, titled “Employment Relationship Under the Fair Labor Standards Act (FLSA),” <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>, does not contain the Independent Contractor Rule’s new standard for determining whether a worker is an employee or independent contractor and will continue to be publicly available. Moreover, the Department explained that federal courts across the country have developed and applied legal analyses for determining employee and independent contractor status under the FLSA. Therefore, employers and workers are already familiar with the legal standard that the Department and courts will apply when determining a worker’s employment status under the FLSA during any delay of the January 2021 Rule’s effective date.

The Department sought comment on its proposal to delay the effective date of the Independent Contractor Rule. The period for providing comment expired on February 24, 2021.

## **II. Comments and Decision**

The Department received 1,512 comments in response to the NPRM. Many workers and representatives of workers supported delaying the effective date of the Independent Contractor Rule, stating that the delay would allow the Department to further consider whether the Independent Contractor Rule was inconsistent with the intent of the FLSA, as well as relevant case law, and evaluate the extent to which the Independent Contractor Rule may not have fully considered additional costs to workers. For example, numerous commenters, including A Better Balance, the American Federation of State, County and Municipal Employees, the Center for Law and Social Policy, The Leadership Conference on Civil and Human Rights, the National Employment Law Project, NETWORK Lobby for Catholic Social Justice, the Service Employees International Union (SEIU), the Shriver Center on Poverty Law, and the United Brotherhood of Carpenters & Joiners of America, asked the Department to delay the January 2021 Rule to consider, among other issues, the January 2021 Rule’s deviation from statutory text and relevant case law as well as the January 2021 Rule’s impact on workers. Many of these

comments noted that the January 2021 Rule will have a \$3.3 billion cost to workers each year, and will cause the most harm to workers of color in low-paying jobs in industries, such as janitorial services, home care, and agriculture, in which independent contractor misclassification is common. The Attorneys General of New York, Pennsylvania, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington also submitted a comment supporting the proposed delay, asserting that the January 2021 Rule would impose costs on states and does not increase clarity regarding the standard for determining who is an employee and who is an independent contractor. The Department agrees with these commenters that allowing more time for consideration of the January 2021 Rule is reasonable given the significant and complex issues the January 2021 Rule raises, including whether the January 2021 Rule is consistent with the statutory intent to broadly cover workers as employees as well as the costs and benefits of the rule, including its effect on workers. Moreover, allowing the Independent Contractor Rule to go into effect while the Department undertakes a further review of the Independent Contractor Rule could lead to confusion and uncertainty among workers and businesses in the event that the Department proposes changes to the Independent Contractor Rule following its review.

Numerous businesses, trade associations, individuals who identified themselves as freelancers or independent contractors, and their representatives opposed the NPRM because they believe the new standard created in the Independent Contractor Rule will provide clarity, and they would like it to take effect on its original effective date. For example, the American Council of Life Insurers, the Center for Workplace Compliance, the Coalition to Promote Independent Entrepreneurs, the National Association of Home Builders, the Harbor Trucking Association and Association of Bi-State Motor Carriers, and the Washington Legal Foundation took this stance; many of these commenters asserted that the Department fully considered the January 2021 Rule during the initial rulemaking process, and others stated that they had

undertaken preparations in anticipation of the January 2021 Rule going into effect.<sup>2</sup> The Department also received hundreds of nearly identical comments from individuals who identified themselves as “a financial professional, small business owner and an independent contractor” affiliated with LPL Financial, who expressed a desire to be able to continue to choose to be independent contractors. The Department has considered the comments opposing the delay of the effective date of the January 2021 Rule, but does not agree with them. The maintenance of the current state of the law would not be disruptive to current business practices, so the regulated community would not be significantly affected by the continuation of the longstanding status quo for 60 additional days. In addition, individuals who are currently independent contractors will not be affected by a delay of the Independent Contractor Rule, because they are already not employees under the FLSA. Although the Department understands that some commenters favor the January 2021 Rule and may have chosen to prepare to make adjustments to their operations in anticipation of it, the Department does not believe that the delay is significant enough to overcome its interest in carefully considering the January 2021 Rule pursuant to the Regulatory Freeze Memorandum and OMB Memorandum M-21-14.<sup>3</sup>

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<sup>2</sup> Commenters such as the Chamber of Commerce and Seyfarth Shaw on behalf of the Coalition for Workforce Innovation also asserted that the Department’s fundamental basis for a delay—that the Independent Contractor Rule would create a new standard for determining who is an employee under the FLSA versus an independent contractor, and that this significant change merits further consideration—is incorrect. They note that the Independent Contractor Rule sets forth an economic realities test, which courts have used for decades. Although these commenters are correct that courts and the Department have previously applied an economic realities test for this purpose, the substance of the test in the January 2021 Rule—for example, giving two factors greater weight in the analysis and nearly dispositive weight if they both point toward the same classification—is different in a number of significant ways from the existing analysis.

<sup>3</sup> Some commenters opposed to the proposed delay, including the U.S. Chamber of Commerce and Seyfarth Shaw on behalf of the Coalition for Workforce Innovation, argued that the Department had not based its reasons for proposing a delay on those enumerated in OMB Memorandum M-21-14. But the issues the Department indicated it would consider if allowed additional time, including the FLSA’s purpose, the costs and benefits of the rule, and the clarity the rule does or does not provide, are among the types of issues referenced in the memorandum. *See* OMB Memorandum M-21-14 (directing agencies to consider in deciding whether delay of a rule’s effective date is appropriate, among other things, whether “the rule reflected proper consideration of all relevant facts,” “the rule reflected due consideration of the agency’s statutory

Some commenters raised procedural objections to the Department’s proposed delay. The Associated Builders and Contractors, the Financial Services Institute, and Littler Mendelson, P.C.’s Workplace Policy Institute asserted that the 19-day comment period for this rulemaking was insufficient, and critiqued the Department’s statement in the NPRM that “WHD will consider only comments about its proposal to delay the rule’s effective date.” 86 FR 8327. The Department believes that the 19-day comment period did provide a meaningful opportunity to comment on the proposed delay. The Department received over 1,500 comments in response to the NPRM proposing to delay the January 2021 Rule’s effective date, comparable to the approximately 1,800 comments it received in response to the substantive notice of proposed rulemaking that it published in September 2020. *See* 85 FR 60600. Moreover, given the Independent Contractor Rule’s original March 8, 2021 effective date, it would have been impracticable to afford a longer comment period. Had the Department allowed for a longer comment period, the Independent Contractor Rule would have taken effect before the delay could begin, which would have defeated the purpose of this rule and caused additional confusion for regulated entities. As to the issue of the scope of comments sought in this rulemaking, the Department sought comments about, and considered whether, issues of policy, law, and fact warrant an extension of the Independent Contractor Rule’s original effective date by 60 days. If after having had additional time to consider the January 2021 Rule, the Department decides to propose any changes to the January 2021 Rule, it will at that point solicit comments on its substantive proposal.

Other commenters, including Littler Mendelson, P.C. and the National Federation of Independent Business, asserted that any delay to the Independent Contractor Rule’s March 8, 2021 effective date must be published at least 30 days before such a delay takes effect. The Department disagrees. Section 553(d) of the Administrative Procedure Act provides that

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or other legal obligations,” “the rule is based on a reasonable judgment about the legally relevant policy considerations,” and “objections to the rule were adequately considered”).

substantive rules should take effect not less than 30 days after the date they are published in the Federal Register unless “otherwise provided by the agency for good cause found.” 5 U.S.C. 553(d)(3). Even if this provision were to apply, the Department finds that it would have good cause to make this rule effective immediately upon publication. Like allowing for a longer comment period, allowing for a 30-day delay between publication and the effective date of this rulemaking would result in the January 2021 Rule taking effect before the delay begins, which would undermine this rule’s fundamental purpose of delaying the effective date before the Independent Contractor Rule takes effect in accord with the Regulatory Freeze Memorandum and result in additional confusion for regulated entities. The Regulatory Freeze Memorandum was issued on January 20, 2021, only 47 days before the rule’s original effective date of March 8, 2021. It would not have been practicable to issue an NPRM proposing to delay the Independent Contractor Rule and allow for ample time for public comment on that proposal in time to publish a final rule not less than 30 days before March 8. Moreover, this rulemaking merely implements a 60-day delay of the Independent Contractor Rule, rather than itself imposing any new compliance obligations on the regulated community. Therefore, the Department finds that a lapse between publication and the effective date of this rule delaying the Independent Contractor Rule’s effective date is unnecessary. Because allowing for a 30-day period between publication and the effective date of this rulemaking is both unnecessary and impracticable, there is good cause to make this final rule delaying the Independent Contractor Rule’s effective date effective immediately upon publication.

After reviewing timely comments submitted, the Department has decided to delay the Independent Contractor Rule’s effective date from March 8, 2021, to May 7, 2021, as proposed. This delay will allow the Department additional time to review the multiple issues of law, policy, and fact that warrant additional review and consideration in accordance with the Regulatory Freeze Memorandum before the Independent Contractor Rule goes into effect.

Signed this 2nd day of March, 2021.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

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