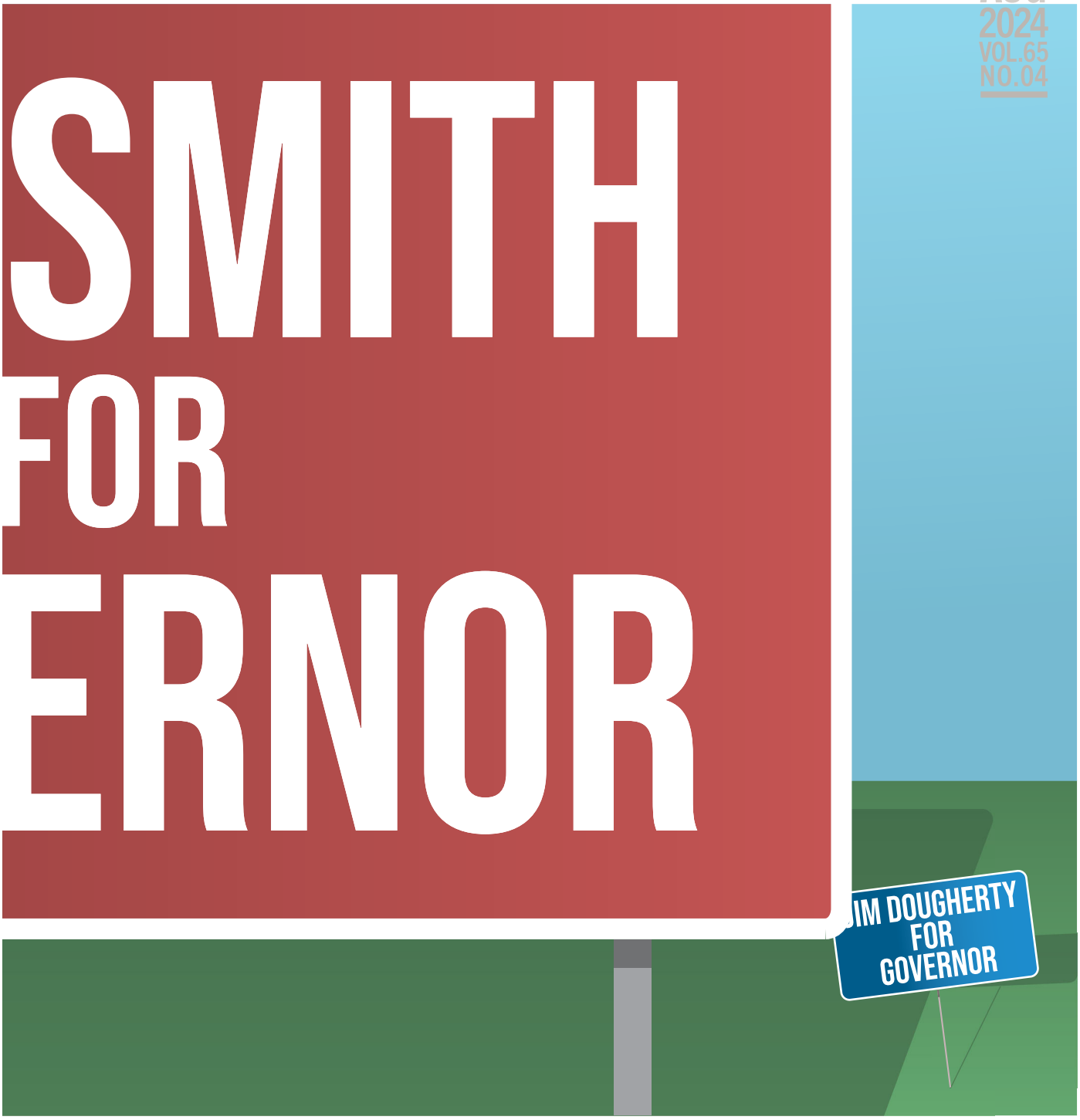
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By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

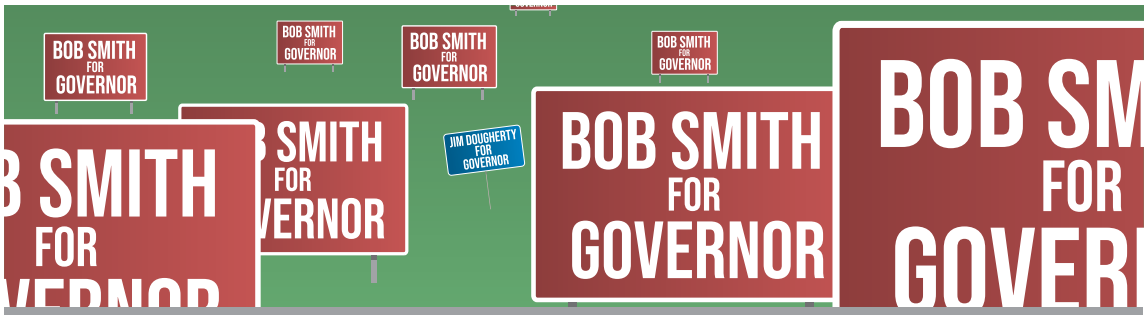
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INDEPENDENT CONTRACTORS AND OVERTIME EXEMPTIONS: THE DOL's LONG-AWAITED RULES

By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

The question of when overtime is payable—or is not, due to one or more exemptions in the law—is hugely consequential, including to local governments who are collectively among the largest employers in the nation. Recent Department of Labor pronouncements provide additional clarity on the subject.

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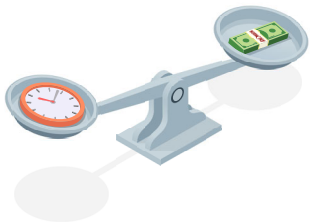
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Independent Contractors and Overtime Exemptions: The DOL's Long-Awaited Rules

By: MICHELLE WHITE,
Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas



The Department of Labor ("DOL") recently issued two controversial updates to regulations under the Fair Labor Standards Act ("FLSA")—the Independent Contractor Rule and the Overtime Exemption Salary Threshold. These long-awaited changes are generally considered to be employee-friendly, and multiple legal challenges have been filed seeking to invalidate these rules. Employers should be aware of how these changes may impact their employees and take appropriate steps to review their consulting agreements, salaries, and job duties to remain in compliance.

The FLSA and Independent Contactors

With an effective date of March 11, 2024, the DOL issued its final rule addressing independent contractor classification under the FLSA.[1] The FLSA provides legal protections for employees, as opposed to independent contractors or volunteers; however, the FLSA does not provide a method to distinguish independent contractors from employees.

Historically, courts have used a multi-factor economic reality test to differentiate between independent contractors and employees, which the DOL supported in informal guidance. While courts varied in the number and weight of factors considered, most courts reviewed relationships on a case-by-case basis by considering:

1. Worker's opportunity for profit or loss;
2. Investments in equipment or materials by the worker and the employer;
3. Degree of permanence and duration of the work relationship;
4. Nature and degree of control over the manner in which work is performed;
5. Degree to which the work performed is integral to the employer's business; and
6. Whether the work requires special skills and initiative.[2]

In 2021, the DOL published a final rule with a new five-factor test.[3] This new business-friendly test primarily considered two core factors—the worker's opportunity for profit or loss and the nature and degree of control exercised by the employer. When these factors produced an unclear result, the analysis moved to three guidepost factors—the relationship's length or permanence, the worker's special skills, and the work's integration into the principal's operations. With the concurrent change in administration, the DOL attempted to delay and withdraw the rule days after the final rule was published, but these actions were rejected as violations of the Administrative Procedure Act and the rule remained in effect.[4]

The New Independent Contractor Rule

In October 2022, the DOL proposed a new rule to rescind the 2021 rule and replace it with a return to a "totality of the circumstances" test.[5] The proposed rule, which has almost uniformly been described as tending towards a determination that the worker is an employee rather than an independent contractor, became effective on March 11, 2024. The "totality of the circumstances" test considers the six factors of the economic reality test (described above) while allowing other relevant factors to be considered. None of these factors carry a pre-determined weight, and the weight of each factor may vary, depending on the particular circumstances of each case. The new rule further clarified these factors and provided examples to illustrate their applicability.

Challenges to the New Independent Contractor Rule

Several challenges to the rule have been filed claiming the rule broadly classifies workers as employees, the rulemaking was outside the scope of DOL authority, and the rule is arbitrary and capricious in violation of the Administrative Procedure Act.[6] Freelance workers have also chal-

lenged the rulemaking alleging similar violations while further seeking to "vindicate the right of individual entrepreneurs to remain independent in the face of a concerted effort to force them into employment relationships they neither want nor need."[7] These complaints all sought preliminary and permanent injunctions of the rule.

In addition to challenges in court, Congressional Review Act Resolutions have been introduced in both the Senate and the House of Representatives.[8] This process would require both houses of Congress to approve a joint resolution of disapproval, and the President would be required to sign the joint resolution. If vetoed, Congress can vote to override the veto. If this lengthy process is successful, the rule would be unenforceable.

Despite the many legal challenges, including multiple lawsuits seeking preliminary and permanent injunctions, the rule has not been enjoined or invalidated, and the new independent contractor rule became effective March 11, 2024. While these many legal challenges are pending, the rule remains in effect.

Impact of New Independent Contractor Rule

Employers with independent contractors or consultants should carefully review the circumstances of each independent contractor agreement to ensure appropriate classification under the final rule. Any agreements that do not meet the test under the final rule will need to be carefully evaluated to determine appropriate changes, including reclassification to employees, if necessary.

FLSA Exemption Salary Threshold

On April 23, 2024, the DOL announced a final rule which would raise the salary threshold for overtime exemptions under the Fair Labor Standards Act (FLSA).[9]

Under the FLSA, employees are classified based on their eligibility for overtime pay for any time worked over 40 hours in a workweek. The FLSA requires non-exempt employees to be paid for overtime hours worked while exempt employees are exempt from this requirement. While the language of the FLSA creates the executive, administrative, and professional exemptions ("EAP exemptions"), the requirements to meet these exemptions are found in the FLSA regulations "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]."[10]

Under the FLSA regulations, to be classified as exempt, the employee must meet the salary basis test, the salary threshold, and specific requirements related to job duties. There are several different tests available, depending on job duties and other job-related factors, but common exemptions include the EAP exemptions and highly compensated employee (HCE) exemptions.[11] While the duties requirements vary between these common exemptions, they all utilize a salary basis test and a minimum salary threshold that employees must be paid to be eligible for exemption. Some less common exemptions do not include a salary basis test or salary threshold, but most exemptions include these or substantially similar tests. In addition to the applicable job duties test, salary basis test, and salary threshold, the HCE exemption requires an employee to meet a total annual compensation threshold.

Over the past decade, the DOL has attempted to raise the salary threshold twice, with mixed results. The first attempt was a final rule issued in May 2016, which raised the salary threshold from $455 to $913 per week, which is $23,660 to $47,476 annually.[12] This May 2016 rule also created a mechanism to update the salary threshold every three years, with the next increase occurring in January 2020 and raising the salary threshold to $984 per week, or $51,158 annually. This 2016 rule was scheduled to become effective in December 2016, but on November 22, 2016, a Texas court enjoined the rule from becoming effective nationwide.[13] On August 31, 2017, that court issued a permanent injunction, reasoning that the agency "has exceeded its authority and gone too far with the Final Rule" by implementing a salary basis test that effectively eliminates the job duties test.[14]

After this, the DOL began the rulemaking process again to reevaluate raising the salary threshold, and a new final rule was issued in September 2019.[15] This 2019 final rule formally rescinded the 2016 final rule and raised the salary threshold from $455 to $684 per week, which is $23,660 to $35,568 annually. The 2019 final rule also raised the HCE annual compensation threshold from $100,000 to $107,432. Unlike the previous rule, this rulemaking process did not include any structure to automatically increase the threshold every three years. However, when published in the Federal Register, the 2019 final rule inadvertently included the structure providing for automatic increases every three years and inadvertently omitted some existing rules related to the HCE exemption. To address this, the DOL issued a June 2020 correction to the 2019 final rule to restore the omitted rules and to remove the structure for automatic increases.[16]

A challenge to the 2019 final rule was filed in August 2022, asserting the

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DOL Rules *cont'd from page 13*

salary threshold test to be unlawful or unconstitutional and seeking an injunction.[17] However, in September 2023, after considering cross-motions for summary judgment, the court granted the DOL's motion for summary judgment, holding in relevant part that (1) the final rule did not exceed the DOL's authority under the FLSA, (2) the FLSA does not unconstitutionally delegate legislative authority by empowering the DOL to determine salary threshold requirements. Although the 2024 final rule has since been issued, this case remains on appeal in front of the Fifth Circuit Court of Appeals. The salary threshold and HCE annual compensation threshold defined in the 2019 final rule remain in effect until the 2024 final rule becomes effective on July 1, 2024.

Salary Threshold 2024 Final Rule

The DOL published the most recent final rule in the Federal Register on April 26, 2024.[18] Like the previous changes to the FLSA overtime regulations, the 2024 final rule does not alter any of the job duties tests, but this final rule made changes to the salary threshold and the HCE annual compensation threshold. This 2024 final rule includes a staggered increase, with the first change becoming effective July 1, 2024, and an additional increase to be effective January 1, 2025.

Effective July 1, 2024, the salary threshold will increase to $844 per week, or $43,888 annually; and the HCE total annual compensation threshold will increase to $132,964. Additionally, effective January 1, 2025, the salary threshold will increase to $1,128 per week, or $58,656 annually; and the HCE total annual compensation threshold will increase to $151,164.

The 2024 final rule also included an automatic increase structure, similar to the structure of the 2016 final rule that was rejected as administrative overreach. Beginning January 1, 2027, the salary threshold and the HCE annual compensation threshold will continue to be automatically adjusted every three years based on concurrent wage data.

Challenges to the 2024 Final Rule

Some members of Congress have acted to prevent an increase in the salary threshold. Before the 2024 final rule was issued as a final rule, Missouri Representative Eric Burlison introduced H.R. 7367, the "Overtime Pay Flexibility Act."[19] This bill was designed to prevent the DOL from finalizing, implementing, or enforcing the 2024 rule. However, since being referred to the House Committee on Education and the Workforce on February 15, 2024, this bill has not made further progress.

On May 22, 2024, several businesses and business associations filed suit against the DOL in the Eastern District of Texas—the same court that permanently enjoined the 2016 final rule based on administrative overreach.[20] While the plaintiffs in this case did not request injunctive relief, more recently filed cases in Texas have requested injunctive relief, including a case filed by the State of Texas in the Eastern District of Texas on June 3, 2024.[21] The complainants allege the DOL "largely repeats" the same errors of the 2016 final rule by raising the salary threshold and exceeding the DOL's authority. In the complaint filed by the State of Texas, plaintiff further argues that the creation of any salary threshold is outside the authority of the DOL.[22]

Impact of New Salary Threshold Rule

Although it is possible that the 2024 final rule may be enjoined prior to becoming effective, there is no guarantee that an injunction will be granted. Unless this 2024 final rule is enjoined prior to the effective date, employers should prepare for these new thresholds to be effective on the applicable dates. Any employee whose salary is below the new salary threshold on each increase date will no longer meet the requirements for exemption and will be entitled to overtime compensation under the FLSA. Prior to July 1, 2024, all employers should review the salary of all of their exempt employees to determine whether their exemptions will be jeopardized by the increased salary threshold on either July 1, 2024, or January 1, 2025. Employers with exempt employees whose pay would no longer meet either threshold should review their individual circumstances to determine whether to (1) increase employee salary to meet the new salary threshold or (2) reclassify the applicable employees as non-exempt and therefore eligible for overtime pay.

Employers who determine their salary levels will only be affected by the January threshold may consider postponing their evaluation by a few months, pending the outcome of the legal challenges. However, employers affected by the July effective date should prioritize these evaluations. While factors in the evaluation processes may vary, depending on the particular circumstances of the employer, several factors should be considered in these processes. A few examples are listed below.

- Employees impacted by the July threshold will necessarily be impacted by the January threshold. As such, employers may consider whether it would be more efficient to make immediate changes based on the January threshold, instead of repeating this analysis within a six-month period. However, with the pending legal challenges, it may be prudent to conduct the immediate analysis based on both thresholds, while waiting to implement changes until the applicable effective date.
- Employers should determine whether an employee's salary would reasonably be able to be raised to meet both thresholds, and, if not, whether it would be more efficient to reclassify the employee as non-exempt prior to January 2025.
- The employer's cost of increasing an employee's salary should be compared against the estimated cost of overtime, if the employee were reclassified as non-exempt. If an employee would work sufficient overtime to surpass the salary threshold, and their position meets the applicable duties test, raising

their salary to meet the new threshold may be more cost effective.

Since there are a wide range of factors to consider in these evaluations, employers should consult with local counsel with questions or concerns about maintaining compliance.

Conclusion

In the challenges to both rules, the complaints summarily allege that the actions taken by the DOL are arbitrary and capricious, an abuse of discretion, and outside the DOL's statutory authority under the FLSA. However, as long as these final rules remain effective, employers should evaluate their consultant agreements, relationships, and salaries to remain in compliance. Misclassification under either rule can result in serious repercussions for employers. Examples of these repercussions include possible lawsuits, back taxes, penalties, fines, unpaid wages, interest on unpaid wages, and DOL audits, which may lead to charges of further employment law violations. Employers with questions or concerns about these rules should seek advice from employment council in their jurisdiction. ML

Notes

1. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).
2. *Id*. at 1641–44.
3. *Id*. at 1644–45.
4. *Id*. at 1645.
5. *Id*.
6. *See* Complaint, Frisard's Transp., LLC v. DOL, 2:24-CV-347 (E.D. La., filed Feb. 8, 2024).
7. Complaint, Warren, et al. v. Su, 2:24-CV-0007 (N.D. Ga., filed Jan. 16, 2024); see also Complaint, Littman and Chesak v. DOL, 3:24-CV-194 (M.D. Tenn., filed Feb. 21, 2024).
8. H.R.J.Res. 116, 118th Cong. (Mar. 6, 2024); S.J.Res. 63, 118th Cong. (Mar. 6, 2024).
9. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).
10. 29 U.S.C. § 213(a)(1).
11. 29 C.F.R. pt. 541.
12. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541) (permanently enjoined in Aug. 2017).
13. Nevada v. United States Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
14. Nevada v. United States Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).
15. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sep. 27, 2019) (to be codified at 29 C.F.R. pt. 541) (replaced by corrected final rule in June 2020).
16. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Correction, 85 Fed. Reg. 34969 (Jun. 8, 2020) (to be codified at 29 C.F.R. pt. 541) (replaced by new final rule effective July 2024).
17. Mayfield v. U.S. Dep't of Labor, No. 1:22-CV-792-RP, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023).
18. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).
19. H.R. 7367, 118th Cong. (Feb. 15, 2024).
20. Complaint, Plano Chamber of Commerce, et al. v. Su, 4:24-CV-468 (E.D. Tex., filed May 22, 2024).
21. Complaint, State of Texas v. Su, 4:24-CV-00499 (E.D. Tex., filed Jun. 3, 2024); *see also* Complaint, Flint Ave., LLC, v. Su, 5:24-CV-00130-H (N.D. Tex., filed Jun. 3, 2024).
22. Complaint, State of Texas v. Su, 4:24-CV-00499, at 5 (E.D. Tex., filed Jun. 3, 2024).

