

- [Announcer] You are listening to "HR Mixtape" your podcast with the perfect mix of practical advice, thought provoking interviews and stories that just hit different so that work doesn't have to feel well like work. Now your host Shari Simpson.

- Joining me today is Corinne Tirone. Corinne is the senior director of government relations here at Paylocity. She is an attorney with over 13 years of experience in legal research, payroll and HR compliance. Her focus at Paylocity is on monitoring the legislative landscape at the federal, state and local levels to help inform the organization's development projects, compliance strategy, and risk mitigation plans. Corinne, as always, it is a pleasure having you back on the podcast.

- Thanks. Happy to be here.

- So we are just at the front end of a new final rule that has been issued by the Department of Labor related to independent contractors. So could you walk us through what that is?

- Yeah, absolutely. Everybody's favorite topic is DOL rules. So the final rule is an update to an existing rule that has been in place and it comes it, you use it to determine a worker's classification as an employee or as an independent contractor under the FLSA. The final rule, this one was announced on January 9th of this year with an effective date of March 11th, 2024. The question of whether a worker's an employee versus an independent contractor is very important for an organization. If a worker's classified as an employee, the worker gets certain protections under FLSA and independent contractors don't get those. It's things like minimum wage over time, et cetera. And if an organization incorrectly classifies a worker as an independent contractor, that can result in costs in terms of litigation, any work that might need to be done to rectify that error, it also has that potential for reputational damage. So to complicate matters, this specific rule was also just changed a few years ago and it's been the subject of a lot of controversy. So there might be some confusion as to exactly what that rule is. So I really appreciate you asking me to come back on and have the opportunity to talk about this and set our clients up for success.

- Oh, for sure. I know a lot of our listeners deal with independent contractors, and if they aren't now, they may do so in the future. So it's a great subject for us to chat about and of course, I appreciate you joining me. So I'm excited to dive into this a little bit more. So let's start off with what does it mean that the department issued a final rule? What exactly does final rule mean?

- I'm glad you asked that because it's super important to understand the terminology that's used before we're getting into the nitty gritty of the requirements. So when the Department of Labor or DOL issues a

final rule, that's the result of a longer process that administrative agencies go through before they make a regulatory update. A lot of people know how a bill becomes a law. Many of our listeners probably, you know, hear the little "Schoolhouse Rock" jingle right now. But administrative, they make rules and regulations through a different process. Both the legislative process and the rulemaking process create obligations that must be followed, but the procedure for creating them is different. For our purposes today, this final rule is the result of a notice of proposed rule and administrative agencies such as the DOL, they issue a notice of proposed rulemaking when they're considering updating or expanding a rule that's already on the books. In this case, a notice of proposed rulemaking was issued on October 13th, 2022. And after the notice is issued, the agency allows the public a period of time to make a comment. It's called the notice and comment period. For this rule, the government received over 55,000 comments. So as you can imagine, like it takes some time, takes some time to go through all of that. And it's not just actually the review that needs to be done, they really try to consider these comments before they issue the final determination of what those new obligations will be. And that is the final rule. So calling it a final rule, it implies some, some certainty, like you expect that you know what happens next will become final. But as I mentioned earlier, this specific test was actually updated very recently in 2021. So it's important to keep in mind that this could change again in relatively short order. So, final for now, prepare yourselves accordingly, but could change again. So just keep that in mind as you prepare your organization.

- It's a really great point about terminology used and that evolving landscape of compliance. So thanks for starting with that perspective. You mentioned a 2021 update that the DOL made. What happened in 2021?

- So in 2021 there was a final rule issued that changed the analysis of how to consider different factors of the workers' relationship with an organization in order to make that determination of whether they would be classified as an independent contractor or an employee. The 2024 final rule that was recently published essentially rescinds that 2021 rule, the department's kind of walking back what they said in 2021, because they want to go back to applying the historically understood method of looking at the FLSA and applying it to your workforce because there's so much precedent there. There are decades of precedent that the court has created applying those that historically understood method, and they think that going back to that will reduce the risk of misclassification and provide more consistency for organizations that are working with individuals who are truly in business for themselves.

- So how did the independent contractor test work historically and then I guess under the new 2024 final rule?

- Yeah, so as I said, this final rule, it's rooted in a long understood principle of FLSA, that a worker cannot be an independent contractor if that worker, as a matter of economic reality is dependent on an employer for, so it's often kind of referred to that way as like the economic realities test. As we all know, there's a wide range of economic relationships between workers and organizations. So there's kind of there's a six pronged approach, a six factor test to use to make that determination. The factors are one, whether the worker has an opportunity to realize a profit or loss that is dependent on the manager, the worker's managerial skills. Two, how much investment has been made by the worker and the organization. Three, the degree to which the relationship is permanent or impermanent. And four is the nature and the degree of control by which the organization that the organization has over the worker. Five is the extent to which the work performed as an integral part of the potential employer's business. And then six, the final factor is the skill and initiative of the worker. Now, there are six of them, as I just said, but they're meant to be considered in their totality, which is like a fancy kind of legalese way of saying like no one factor makes or breaks the analysis. You have to look at that entire picture in order to make an appropriate determination. The guidance for what these factors actually mean that is provided in the final rule is actually really robust too. So not only do they list these factors, but they're also described in great detail. So if you stopped listening as soon as I said things like, who has the opportunity for profit or loss? Like, don't worry, they break it down for you so you can digest those meanings and really figure out how to apply these factors to your workers. I would really recommend that all of our listeners like familiarize yourselves with the factors and what they represent before making determinations of whether a worker can be classified as an independent contractor, spending some time familiarizing yourself with the test and the meanings and really walking yourself through the analysis. I would do that and I would also encourage you to play devil's advocate while you do that. Just because you could make an argument in favor of them being an independent contractor does not mean that a regulator or a judge is going to agree with you. So really apply some scrutiny here in this situation. It is better to err on the side of caution.

- What was the update we saw in 2021 in indifference or variation from what you just shared in the final rule?

- So the 2021 update did a few things differently. It really designated two of those factors as like core factors. In doing so, those two were given greater weight essentially than the others. So as I mentioned with the this new final rule and what it was historically in the past, it's a totality of the circumstances analysis, meaning none of them have more weight than the others. And essentially what they did for a brief period was say like, some of these do have greater weight or lesser weight than the rest of them. But what they

were finding is that that had a bit of a disruptive effect. So anyone who actually dealt with it during that period of time would probably agree. What they did with that 2021 rule is they left behind decades of legal precedent that businesses had been relying on to make that determination and it made it really hard for them to know how to classify their workers.

- Okay, so how does the 2024 final rule help employers and potentially workers?

- I really like that you phrase it like that because I think it's important to keep that in mind. It does help employers, but it helps workers too. So that's a great way of phrasing that and keeping that top of mind as we talk about it. The DOL's really attempting to do just that, they're trying to bring clarity to this situation that has potentially for the past few years been difficult for people to really wrap their minds around. So not only does that final rule return to those traditionally understood norms and that test that has been applied for decades, it also attempts to provide that more robust guidance compared to what previously existed. So the analysis that they provide can apply to any worker, any industry, it's easy to find. You can actually just Google it, look it up in the code of federal regulations. That's great reading by the way, for anyone with a little downtime in a black law dictionary. But like joking aside, like they're really trying to make this easy, they're trying to make it simpler for someone to look at this test, understand how it applies to their situation. And I really think that they did a good job of hitting the mark on that.

- Does the final rule that the DOL put out only work on testing independent contractors specifically related to FLSA?

- Yes, and that is a great call out. The final rule only applies to the rights and obligations of workers under FLSA. And the reason that that's worth calling out, as I'm sure many listeners are already keying in on, is that there may still be state laws that have to be taken into account. So some states like California and New Jersey, they have their own independent contractor tests that must also be considered.

- The state test that you mentioned. Is that the ABC test?

- Yes, yes. So everyone remembers the ABC test that came, I think originally came out of California a few years ago. It is different than the new final rule. And the final rule does not adopt the ABC test. And it's important for decision makers to understand that, I'm not gonna get too far in the weeds on what that test is, but this new final rule doesn't change or replace those state laws. You have to comply with both.

- What if a worker wants to be an independent contractor? Can a worker voluntarily choose to waive employee status in favor of being classified as an independent contractor?

- That's a great question. I'm sure that comes up for some of our listeners. And it definitely, worth kind of considering and thinking through, according to DOL, allowing for employee status and related protections to be something that could be waived would potentially be harmful to employees and undermine that goal of eliminating unfair methods of competition in commerce. So the test being based on this economic reality, a worker can't waive those rights, the economic realities determine the classification, and that classification is not determined or impacted by the wishes of either the worker or the employer.

- This has been very helpful. Do you have any tips or ideas for HR professionals and other decision makers to consider when getting up to speed with this final rule?

- Yeah, I mean, I think, like I often say at the end of these conversations with you, it's really the first step is really familiarizing yourself with the new requirements. So as I mentioned earlier, jump into the guidance that they're actually providing within the rule itself. Familiarize yourself with those factors and with the meanings think about them through the lens of your own situations. And then really do look at your workers and how you have them classified today. And if you think that it would, if you think that the analysis that you've done in the past to get to that determination would still hold up and if it wouldn't, if you seek inconsistencies there, what you need to do next is develop a gameplan so that you can make any changes that you need to make and set a timeline for yourself of when you're going to come into compliance and how you are going to do that. So, again, like with everything else, use this as an opportunity. Use it as an opportunity to ensure that your organization is in the best position possible to stay on the right side of compliance with this issue.

- Corinne, as always, having this conversation with you is so helpful. And for our listeners, we are actually gonna dive into this topic in even more depth on an upcoming webinar that we're gonna host in April. So if you want to attend that, make sure you hop over to Paylocity's website under our resource section under webinars. We will have that posted up in the next few weeks here. So definitely an opportunity to learn more and dig into some of those definitions of those six factors that you talked about Corinne. So as always, thanks for jumping on the podcast with me.

- Thanks for having me.

- [Announcer] I hope you enjoy today's episode. You can find show

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