Summary of U.S. Department of Labor Independent Contractors Final Rule

On January 10, 2024, the U.S. Department of Labor (DOL) published a final rule, entitled Employee or Independent Contractor Classification Under the Fair Labor Standards Act, that goes into effect on March 11, 2024. This rule revises the Department's guidance on how the agency determines who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). It specifically rescinds the Independent Contractor Status Under the Fair Labor Standards Act rule (2021 IC Rule), that was published on January 7, 2021, under the Trump Administration, and essentially reverts to the agency's earlier and broader multi-factor economic realities test.

Overall, the new standard will in certain circumstances make it more difficult for long term care providers to properly classify a worker as an independent contractor. Likewise, this final rule does have the potential to place greater financial and legal burdens on long term care providers as existing contract workers may now need to be reclassified as employees under the new standards. More specifically, the rule includes that a worker is **not** an independent contractor if they are, as a matter of economic reality, economically dependent on an employer for work. To evaluate this, the final rule applies the following six factors to analyze employee or independent contractor status under the FLSA:

- Opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the potential employer;
- Degree of permanence of the work relationship;
- Nature and degree of control;
- Extent to which the work performed is an integral part of the potential employer's business; and
- Skill and initiative.

This final rule differs from the guidance provided in the 2021 Independent Contractor Rule in several ways. Specifically, this final rule:

- Abandons the 2021 Independent Contractor Rule giving greater weight to the "control over the work" and "opportunity for profit and loss" factors, and returns to a totality-of-the-circumstances economic reality test, where no single factor or group of factors is assigned any predetermined weight;
- Considers the six factors noted above (instead of five), including the investments made by the worker and the potential employer;
- Provides additional analysis of the "control" factor, including a detailed evaluation of how scheduling, supervision, price-setting, and the ability to work for others impact the nature and degree of control over a worker;
- Returns to the DOL's broader consideration of whether the work is integral to the employer's business (rather than more narrowly whether it is exclusively part of an "integrated unit of production");

- Expands the analysis for some factors, including evaluating exclusivity in the context of the "permanency" factor and evaluating initiative in the context of the "skill" factor; and

- Looks only at control actually exercised over a worker, eliminating the 2021 Independent Contractor Rule that considered an employer's reserved but unexercised rights to control a worker as part of the wholistic "control" analysis.

On the legislative side, there has been concern amongst some members of Congress around this more expansive final rule. U.S. Senator Mike Braun (R-IN) and U.S. Senator Rick Scott (R-FL) sent a letter recently to the DOL opposing the final rule. U.S. Senator Bill Cassidy, MD (R-LA), has also been vocal on his opposition to the rule as has Congressman Roger Williams (R-TX) who wrote a letter to DOL.

What does this mean to providers?
Practically, this rule likely narrows the scope of contract workers who long term care providers can properly classify as independent contractors. For example, workers who are providing services integral to providing long term care services now may be at greater risk of misclassification. Similarly, workers who provide services to long term care providers for any significant period of time or exclusively also now may be at greater risk of misclassification. Likewise, what reserved but unexercised control that a contract worker may have is no longer relevant; only actual control exercised by the contract worker and the long term care provider is relevant when evaluating potential misclassification.

In light of these shifts and potential risks, providers will likely need to take a fresh look to determine if individuals who they're working with would be deemed an employee rather than an independent contractor under this expanded framework. If the worker should be an employee, they are entitled to receive the FLSA's wage and hour protections among other employee benefits and protections. If you use independent contractors, providers should review the rule and each of the factors carefully -- and may want to consider seeking counsel from an employment law attorney to assess the risks around misclassification.

The DOL has published a list of frequently asked questions around the rule. The DOL also noted that individuals who have questions about this final rule may call the Wage and Hour Division's (WHD) Division of Regulations, Legislation, and Interpretation (DRLI) at (202) 693-0406. For questions about the employment classification of a particular worker or group of workers, please contact your nearest Wage & Hour Division (WHD) District Office, as displayed at https://www.dol.gov/agencies/whd/contact/local-offices.

AHCA/NCAL is also currently working on hosting a webinar in the near future around this rule to answer questions providers may have, and information will be forthcoming. In the meantime, if a member has any questions or comments about this final rule, please contact AHCA's AVP of Workforce and Constituency Services Dana Ritchie.