From the HR Hotline

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What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

Zywave's HR consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. The HR Hotline fields dozens of questions each day from employers seeking answers to their HR questions.

In recent months, employers have been requesting clarification or seeking guidance on the U.S. Department of Labor's (DOL) new independent contractor rule, Affordable Care Act (ACA) reporting deadlines and changes, the U.S. Equal Employment Opportunity Commission's (EEOC) 2024 priorities and agenda, and the IRS' recently released guidance on SECURE 2.0 provisions. While questions surrounding these topics can vary based on locality, employer and individual circumstances, federal agencies offer guidance that can aid employers in addressing day-to-day challenges in the workplace.

This article explores some questions and answers to common HR situations.

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

What Is the DOL's New Independent Contractor Rule?

On Jan. 9, 2024, the DOL released a final rule, effective March 11, 2024, revising the agency's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). If this rule becomes effective, it may result in a greater number of workers being classified as employees—not independent contractors. This change would be significant, particularly in the gig economy, as it would afford more workers rights and protections under the FLSA. Accordingly, it's critical that employers understand the new rule and its potential impacts on their businesses, as the final rule could significantly affect employers' operational and compliance costs as well as increase their litigation risks.

Overview of the DOL's Final Independent Contractor Rule

Under the FLSA, employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to these protections and benefits. Misclassifying workers as independent contractors can have serious financial and legal consequences for employers, including costly litigation, penalties and attorneys' fees.

The final rule rescinds the 2021 Independent Contractor Rule and returns to the pre-2021 rule precedent. In doing so, the final rule restores the multifactor, totality-of-the-circumstances analysis to assess whether a worker is an employee or an independent contractor under the FLSA. The final rule ensures that all economic realities test (ERT) factors are analyzed equally without assigning a predetermined weight to a particular factor or set of factors. These six factors include:

1. The opportunity for profit or loss, depending on managerial skill
2. Investments by the worker and the potential employer
3. The degree of permanence of the work relationship
4. The nature and degree of control
5. The extent to which the work performed is an integral part of the potential employer's business
6. The worker's skill and initiative

In addition to focusing on the six ERT factors, the new rule allows additional factors to be considered if they are relevant to the overall question of economic dependence. According to

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

the DOL, this final rule will reduce the risk of employees being misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves.

How Will the New Rule Impact Employers?

The 2021 Independent Contractor Rule made it easier for employers to classify workers as independent contractors under the FLSA. This rule focused on two core factors:

1. The nature and degree of the worker's control over the work
2. The worker's opportunity for profit and loss, based on initiative and/or investment

These factors carried more weight in determining the status of independent contractors than the three other ERT factors (the amount of skill required for the work, the degree of permanence of the working relationship and whether the work is part of an integrated unit of production). However, the DOL's new rule may make it more difficult for employers to classify workers as independent contractors by reinstating the complex multifactor and totality-of-the-circumstances analysis, which is generally viewed as more employee-friendly. As a result, the new rule will likely lead to more workers being classified as employees.

The DOL's final rule has the potential to significantly increase the risk of employee misclassification for employers. Consequently, employers may face increased liability risks, such as class action lawsuits or administrative actions, for not providing FLSA-required benefits and protections to workers. This will probably impact small businesses more than larger organizations because they generally do not have the resources or necessary staffing to address complex compliance issues, such as employee classification under the FLSA.

It's likely that the DOL's new independent contractor rule will be challenged in court. This could delay the final rule's implementation. There's currently a lawsuit pending over the Biden administration's attempt to withdraw the 2021 Independent Contractor Rule in May 2021. In that case, a federal court concluded that the Biden administration violated federal law in rescinding the regulation, and so it reinstated the 2021 rule. This lawsuit has been delayed for months while the DOL prepared its new rule. The case will probably restart since the agency released the final rule.

How Can Employers Prepare for the DOL's New Rule?

Although the DOL's final rule does not impose any new requirements on employers until it becomes effective, employers should become familiar with the final rule and evaluate what changes they may need to adopt if the rule becomes effective. Employers can prepare for the

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

DOL's new independent contractor rule by ensuring they comply with all employee classification requirements under the FLSA. This is especially important for organizations that rely on independent contractors.

While the final rule imposes a different standard than the 2021 rule, most employers may already be familiar with the new rule, as it mirrors an earlier standard that existed before the 2021 rule.

Employers can better ensure compliance with the DOL's final rule by taking the following actions:

- Audit existing working relationships with gig workers, freelancers, independent contractors and employees.
- Determine whether any workers' classifications must be changed in light of the final rule.
- Review any agreements with gig workers, freelancers, independent contractors and employees to ensure they comply with the final rule.
- Update employment policies and procedures to align with the DOL's final rule.
- Train managers on the FLSA's worker classification requirements.

While the DOL's final rule only applies to the FLSA, many states have their own rules for determining worker classification. To avoid potential violations and penalties, employers need to be familiar with all laws that apply to their organizations. Employers are encouraged to seek legal counsel to discuss specific issues and concerns related to employee classification requirements.

Employers can explore these government resources for more information:

- DOL's news release on the final rule
- DOL's website
- DOL's FAQs on the final rule
- Federal Register notice

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

What Are the Upcoming ACA Reporting Deadlines?

Employers subject to ACA reporting under Internal Revenue Code Sections 6055 or 6056 should prepare to comply with reporting deadlines in early 2024. For the 2023 calendar year, covered employers must:

- Furnish statements to individuals by **March 1, 2024** (an alternative method of furnishing statements to covered individuals is available in certain situations).
- File returns with the IRS by **Feb. 28, 2024** (or **April 1, 2024**, if filing electronically). Beginning in 2024, employers who file **at least 10 returns** during the calendar year must file electronically.

Penalties may apply if employers are subject to ACA reporting and fail to file returns and furnish statements by the applicable deadlines.

Individual statements for 2023 must be furnished within 30 days of Jan. 31, 2024. **Because 2024 is a leap year, the deadline for individual statements is March 1, 2024.** In addition, electronic IRS returns for 2023 must be filed by March 31, 2024. **However, since this is a Sunday, electronic returns must be filed by the next business day, which is April 1, 2024.**

What Employers Are Subject to ACA Reporting?

The following employers are subject to ACA reporting under Sections 6055 and 6056:

- Employers with **self-insured health plans** (Section 6055 reporting)
- **Applicable large employers (ALEs)** with either fully insured or self-insured health plans (Section 6056 reporting)

ALEs are employers with **50 or more full-time employees** (including full-time equivalent employees) during the preceding calendar year. Note that ALEs with self-funded plans are required to comply with both reporting obligations. However, to simplify the reporting process, the IRS allows ALEs with self-insured health plans to use a single combined form to report the information required under Sections 6055 and 6056.

What Is Section 6055 and 6056 Reporting?

Section 6055 applies to providers of minimum essential coverage (MEC), such as health insurance issuers and employers with self-insured health plans. These entities generally use Forms

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

1094-B and 1095-B to report information about the coverage they provided during the previous year.

Section 6056 applies to ALEs—generally, employers with 50 or more full-time employees, including full-time equivalents, in the previous year. ALEs use Forms 1094-C and 1095-C to report information relating to the health coverage that they offer (or do not offer) to their full-time employees.

Employers reporting under both Sections 6055 and 6056—specifically, ALEs with self-insured plans—use a combined reporting method by filing Forms 1094-C and 1095-C.

What Is the New Electronic Filing Threshold?

There is a new electronic filing threshold for information returns required to be filed on or after Jan. 1, 2024, which has been decreased to 10 or more returns (originally, the threshold was 250 or more returns). Specifically, the instructions for 2023 returns (filed in 2024) provide the following clarifications and reminders:

- The 10-or-more requirement applies in the **aggregate** to certain information returns. Accordingly, a reporting entity may be required to file fewer than 10 of the applicable Forms 1094 and 1095, but it still has an electronic filing obligation based on other kinds of information returns filed (e.g., Forms W-2 and 1099).
- The electronic filing requirement does not apply to those reporting entities that request and receive a hardship waiver; however, the IRS encourages electronic filing even if a reporting entity is filing fewer than 10 returns.
- The formatting directions in the instructions are for the preparation of paper returns. When filing forms electronically, the formatting set forth in the "XML Schemas" and "Business Rules" published on IRS.gov must be followed rather than the formatting directions in the instructions. For more information regarding electronic filing, see IRS Publications 5164 and 5165.

How Have ACA Information Reporting Penalties Changed for Returns Filed in 2024?

IRS Revenue Procedure 2022-38 includes updated penalty amounts that may apply to reporting entities that fail to comply with the ACA's requirements under Internal Revenue Code Sections 6055 and 6056. **The increased amounts apply to 2023 information returns and individual statements that are required to be filed and furnished in 2024.**

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

What Are the General Reporting Penalties?

A reporting entity that fails to comply with the Section 6055 and Section 6056 reporting requirements may be subject to the general reporting penalties for:

- Failure to file correct information returns (under Code Section 6721)
- Failure to furnish correct payee statements (under Code Section 6722)

However, penalties may be waived if the failure is due to reasonable cause and not willful neglect. Penalties may also be reduced if the reporting entity corrects the failure within a certain period of time.

What Are the Adjusted Penalty Amounts?

For 2023 information returns and individual statements that are filed and furnished in 2024, the adjusted penalty amounts are as follows:

- The penalty for failure to file an information return or provide an individual statement is $310 per return or statement (increased from $290).
- The penalty for returns that are corrected within 30 days after the due date or statements corrected within 30 days after the required furnishing date is $60 per return or statement (up from $50).
- Returns or statements corrected after 30 days but before Aug. 1, 2024, carry a penalty of $120 per return or statement (up from $110).
- The penalty for failing to file a correct information return or provide a statement due to intentional disregard is $630 (up from $580). In some cases, this penalty may be larger, as the penalty is equal to the greater of either the applicable amount or 10% of the aggregate amount of the items required to be reported correctly.

The maximum penalty amounts are different for small businesses and large businesses. Specifically, lower annual maximums apply to entities with average annual gross receipts of up to $5 million for the three most recent taxable years. There is no maximum penalty for intentional disregard.

The IRS provides an information return penalties webpage that includes the applicable penalty amounts by year as well as additional resources on how to calculate and pay the penalty.

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

What Is the EEOC's 2024 Regulatory Agenda?

On Dec. 6, 2023, the EEOC published its regulatory agenda for the first time in two years. The agenda, which lists all regulations scheduled for review or development during the next 12 months, was released by the federal Office of Information and Regulatory Affairs. For employers subject to EEOC-enforced federal fair employment laws, the new agenda provides a preview of the topics related to these laws that they can expect the EEOC to prioritize and clarify in 2024.

The EEOC's regulatory agenda singles out its proposed regulations to implement the Pregnant Workers Fairness Act (PWFA) as a key priority for finalization for 2024.

What Are the EEOC's Pending Regulatory Items?

The EEOC's new agenda identifies nine pending items—five of which are in the proposed rule stage and four that are at the final rule stage—that the agency plans to address in 2024.

Topics scheduled to be addressed in the **proposed rules** include:

- Discrimination based on disability in EEOC programs/activities and accessibility of electronic and information technology
- Fees for electronic record disclosures under the Freedom of Information Act
- Amendments to regulations on retaliation against federal employees and additional EEO data posting and complaint processing requirements
- Employer recordkeeping and reporting requirements under Title VII of the Civil Rights Act, the Americans with Disabilities Act and the Genetic Information Nondisclosure Act
- Rules for electronic posting of the "Know Your Rights" poster

The EEOC also plans to release **final rules** on the following topics in 2024:

- Procedures for certain complaints made by employees of state or local governments covered under the Government Employee Rights Act
- 2024 adjustment to the penalty for failure to display posters
- Regulations to implement the PWFA
- Amendments to include the PWFA in procedural and administrative rules

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

Employer should become familiar with the EEOC's regulatory agenda and monitor the EEOC's website for the release of any of the planned guidance that may be relevant to their businesses. Most federal agencies complete their highest-priority regulatory items between April and June.

For more information, employers can review the EEOC's regulatory agenda and priority statement.

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

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The Consolidated Appropriations Act of 2023 was signed on Dec. 29, 2022. This act is an omnibus bill that includes the SECURE 2.0 legislation, referred to as such because it builds on the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019. The legislation is intended to increase employees' retirement savings by assisting employees who may not be able to save for retirement because they're overwhelmed with student debt and, thus, are missing out on available matching contributions for retirement plans. Additionally, this law makes numerous important changes that employers should be aware of. A section-by-section summary of the legislation can be found here.

The tax savings provision in SECURE 2.0 allows employees with student debt to receive matching contributions by reason of repaying their student loans. An employer can make matching contributions under a 401(k) plan, 403(b) plan or SIMPLE IRA with respect to "qualified student loan payments." A qualified student loan payment is broadly defined as any indebtedness incurred by the employee solely to pay for their qualified higher education expenses. In addition, for purposes of the nondiscrimination test applicable to elective contributions, the SECURE 2.0 provision allows a plan to test the employees who receive matching contributions on student loan repayments separately.

What Are the New Plan Amendment Deadlines?

On Dec. 20, 2023, the IRS issued Notice 2024-2, providing guidance in the form of questions and answers with respect to various provisions of the SECURE 2.0 Act. This notice extends the deadlines to make plan amendments to reflect the applicable provisions of the SECURE Act and SECURE Act 2.0, as follows:

- **Dec. 31, 2026**, is the deadline to amend a qualified retirement plan that is not a governmental plan or an applicable collectively bargained plan.
- **Dec. 31, 2028**, is the deadline to amend an applicable collectively bargained plan.
- **Dec. 31, 2029**, is the deadline for a governmental plan within the meaning of Internal Revenue Code Section 414(d).

Under Section 501 of SECURE 2.0, the plan amendment deadline for SECURE Act and SECURE 2.0 Act provisions is the last day of the first plan year beginning or after Jan. 1, 2025 (or Jan. 1,

What Is the DOL's New Independent Contractor Rule?

What Are the Upcoming ACA Reporting Deadlines?

What Is the EEOC's 2024 Regulatory Agenda?

What Is the Significance of the IRS's Comprehensive Guidance on Various SECURE 2.0 Provisions?

2027, in the case of certain collectively bargained or governmental plans). **The new guidance extends the plan amendment deadlines under Section 501.**

In addition to extending plan amendment deadlines under Section 501, Notice 2024-2 addresses issues under the following sections of the SECURE 2.0 Act:

- Section 101 (expanding automatic enrollment in retirement plans)
- Section 102 (modification of credit for small employer pension plan startup costs)
- Section 112 (military spouse retirement plan eligibility credit for small employers)
- Section 113 (small immediate financial incentives for contributing to a plan)
- Section 117 (contribution limit for SIMPLE plans)
- Section 326 (exception to the additional tax on early distributions from qualified plans for individuals with a terminal illness)
- Section 332 (employers allowed to replace SIMPLE retirement accounts with safe harbor 401(k) plans during a year)
- Section 348 (cash balance)
- Section 350 (safe harbor for correction of employee elective deferral failures)
- Section 601 (SIMPLE and SEP Roth IRAs)
- Section 604 (optional treatment of employer contributions or nonelective contributions as Roth contributions)

The U.S. Department of the Treasury and the IRS invite comments and suggestions on the guidance, which should be submitted on or before **Feb. 20, 2024**.

Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll continue to keep you apprised of noteworthy updates on these topics. For resources on any of these topics discussed, contact us today.

HR Hotline can provide general guidance but cannot provide tax advice or review plan documents for compliance.