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NCLA Asks Federal Court to Vacate the Dept. of Labor’s Unlawful New Independent Contractor Rule

Colt & Joe Trucking LLC v. U.S. Department of Labor; Julie Su and Jessica Looman, in their official capacities

Washington, DC (August 5, 2024) – The New Civil Liberties Alliance has filed a [motion](#) for summary judgment in *Colt & Joe Trucking v. U.S. Department of Labor*, asking the U.S. District Court for the District of New Mexico to vacate DOL’s vague new independent contractor rule. Promulgated earlier this year, the rule distorts the standard for determining if someone hired by a company can be classified as an independent contractor, instead of an employee subject to the Fair Labor Standards Act’s (FLSA) wage and hour requirements. This leaves small businesses like Colt & Joe Trucking unable to hire independent contractors without risking FLSA liability.

DOL’s prior 2021 rule generally allowed businesses to classify workers as independent contractors if they exercised independent judgment and control over their work and had an opportunity to earn profits—as opposed to wages or salaries—as a result. Junking this simple standard, the 2024 rule effectively broadens FLSA’s definition of “employee” to cover anyone performing services for another company under essentially whatever circumstance DOL decides.

The Labor Department says it abandoned the old standard for classifying independent contractors because it conflicted with judicial precedent, but no precedent prohibits focusing on control and opportunity as the most probative factors in determining whether a worker is in business for himself. The 2024 rule is arbitrary and capricious, worsening rather than reducing confusion over which economic factors matter in determining a worker’s classification. The Supreme Court prohibits agencies from promulgating “vague and open-ended regulations that they can later interpret as they see fit,” so DOL’s standardless new rule violates due process.

DOL also violated the Administrative Procedure Act (APA) and the Regulatory Flexibility Act by failing to adequately consider significant costs of withdrawing the 2021 rule and replacing it with the 2024 rule. Observers have criticized the agency for ignoring harms to independent contractors whom the new rule would reclassify as employees, explaining most independent contractors do “not want to be employees” and “believe they will lose work because of this rule.” On top of these substantive defects, Acting Labor Secretary Julie Su also lacked authority to promulgate the 2024 rule in the first place, having claimed secretarial powers for over a year without Senate confirmation in violation of the Appointments Clause.

NCLA released the following statements:

“The Department does not dispute its conclusion in 2021 that workers’ control over the work and opportunity for profit are the most probative factors in determining independent contractor status. Instead, it claims that the law somehow prohibits it from focusing on factors that it believes to be more probative. DOL then tries to argue that a simple two-factor test is *more* confusing to regulated employers than a freewheeling test that includes seven factors—one of which is the ‘totality of the circumstances.’ The APA prohibits such irrational decision-making.”

— **Sheng Li, Litigation Counsel, NCLA**

“Julie Su has unlawfully overstayed her term as Acting Secretary of Labor, so she lacks authority to issue this rule. A Senate controlled by the President’s party would not confirm her due in part to her views about this policy. Yet, she persisted in promulgating a rule implementing the very idea for which the Senate refused to confirm her. This is outrageous behavior on many levels, and the courts should have no qualms about setting aside this rule.”

— **Mark Chenoweth, President, NCLA**

For more information visit the case page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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