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Independent Contractor and Joint Employer Challenges

New Rules From the Department of Labor and the National Labor Relations Board

Today’s Presenters

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Agenda

Department of Labor's "New" Independent Contractor Rule

- What is it?
- How did we get here?
- How has it changed?
- How will it affect employers and businesses?
- What challenges to the rule are pending or anticipated?

National Labor Relations Board's 2023 Joint Employer Rule

- What is it?
- How did we get here?
- How has it changed?
- How will it affect employers and businesses?
- What is the current status of the rule and what further actions are anticipated?

Best Practices and Recommendations for Employers

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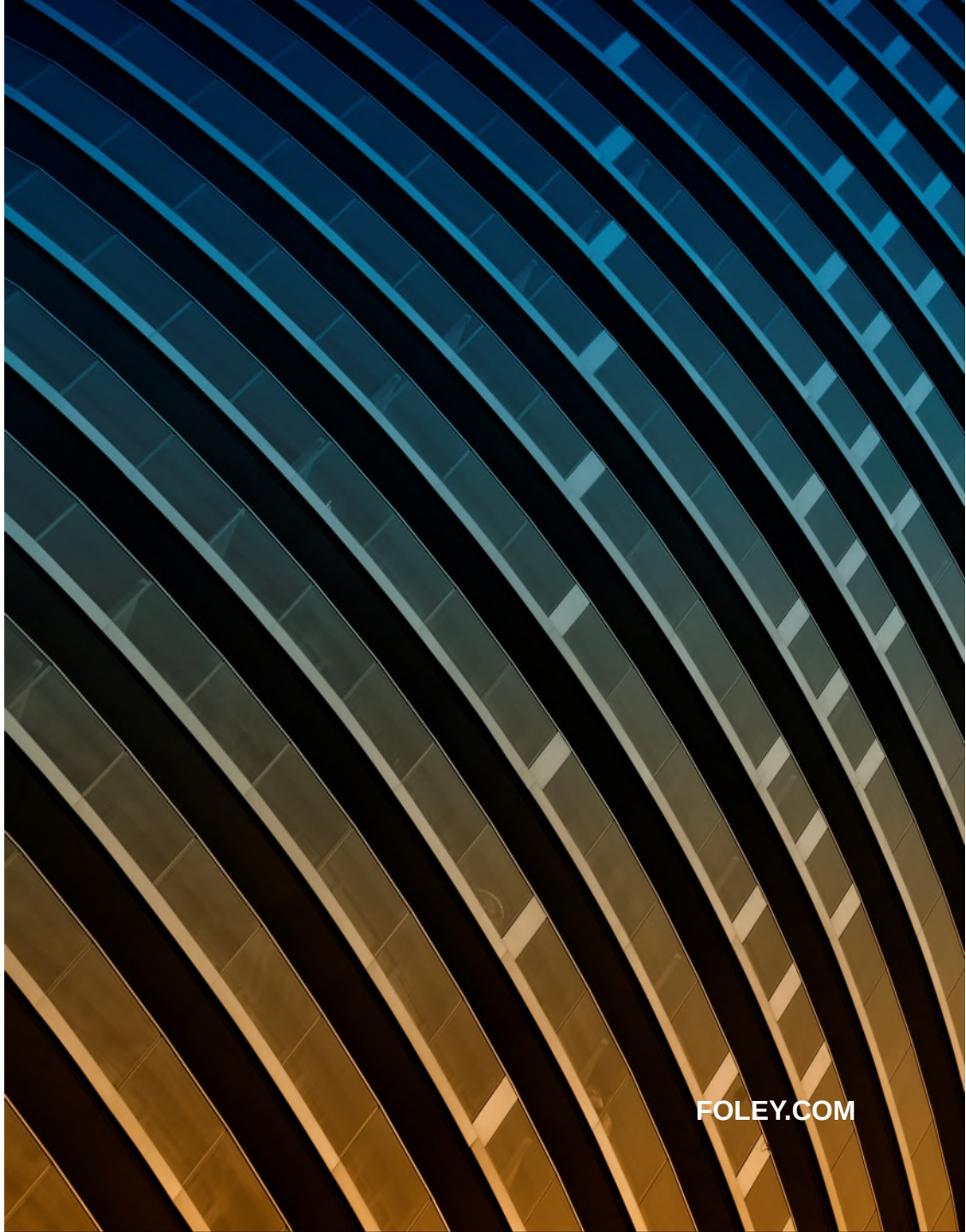
The Department of Labor's "New" Independent Contractor Rule



Department of Labor (DOL) Independent Contractor Rule

- What is it?
  - The DOL Independent Contractor Rule (“IC Rule”) applies to independent contractor classification determinations under the Fair Labor Standards Act (FLSA).
  - The DOL’s IC Rule is guiding persuasive authority for courts — not controlling in and of itself.

DOL Independent Contractor Rule

- How did we get here?
  - Trump administration DOL proposed an IC Rule in September 2020.
  - Trump administration DOL issued a final IC Rule in January 2021.
  - Biden administration DOL withdrew* the Trump administration DOL's final IC Rule in May 2021.
  - Biden administration DOL proposed a "new" IC Rule in October 2022.
  - Biden administration DOL issued a final IC Rule in January 2024.
    - **It is this IC Rule that became effective March 11, 2024.**

DOL Independent Contractor Rule

- What changed?
  - The Trump administration DOL used a five-factor test, with two being “core” factors: the nature and degree of the worker’s control over the work, and the worker’s opportunity for profit or loss.
  - The now-effective IC Rule uses a six-factor test, with a “totality of circumstances approach.”
    - None of the factors carries any pre-determined weight, none are dispositive, and other circumstances indicative of economic dependence may also be considered.
    - All factors are weighed to determine if worker is economically dependent on the potential employer for work.
  - With the totality of the circumstances approach, “what’s old is new again.”

DOL Independent Contractor Rule

- Six factors are considered:
  - 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.

DOL Independent Contractor Rule

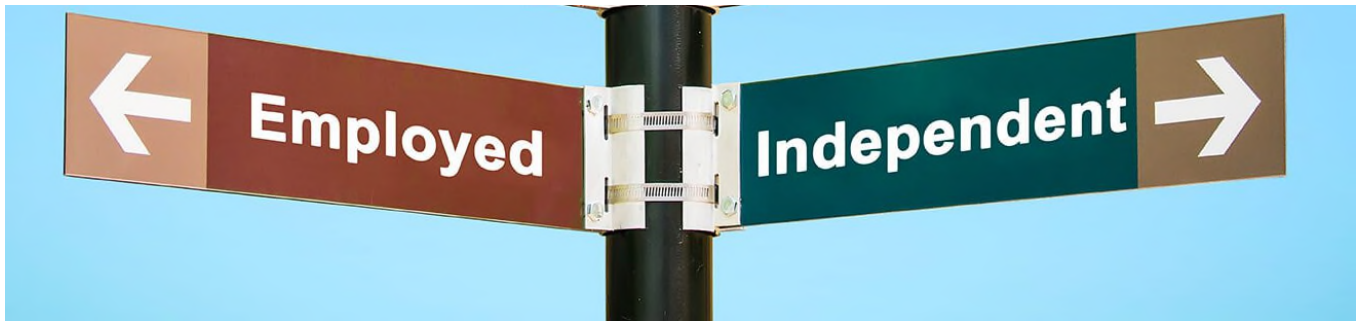
- Factor 1: Opportunity for profit or loss depending on managerial skill.
  - Initiative or business acumen/judgment affecting the worker's economic success or failure
  - Relevant questions include:
    - Does the worker determine or meaningfully negotiate pay?
    - Does the worker accept or decline jobs?
    - Does the worker choose order and/or time in which jobs are done?
    - Does the worker market, advertise, etc. to secure more work?
    - Does the worker hire others, buy materials, or rent space?
  - No opportunity for profit/loss → indicative of employee status.

DOL Independent Contractor Rule

- Factor 2: Investments by the worker and the employer.
  - Worker's investments being capital or entrepreneurial in nature, as opposed to costs of tools, equipment, or labor.
  - Relevant questions include:
    - Does the worker make investments that increase ability to do more work? Or reduce costs? Or extend market reach?
    - Does the worker make similar types of investments to the employer to suggest that the worker is operating independently?

DOL Independent Contractor Rule

- Factor 3: Degree of permanence of the work relationship.
  - Indefinite, continuous, exclusive relationship → more likely an employee.
  - Definite, non-exclusive, project-based, sporadic → more likely an independent contractor.
  - Seasonal or temporary nature is not necessarily indicative of independent contractor status where lack of permanence is due to “operational characteristics” of a particular business or industry.
  - The question is whether the worker is exercising their own independent business initiative.



DOL Independent Contractor Rule

- Factor 4: Nature and degree of control.
  - Employer's control, including reserved control, over worker’s performance and economic aspects of the relationship.
  - Relevant questions include:
    - Does the employer set the worker’s schedule?
    - Does the employer supervise the worker’s work or limit the worker’s ability to work for others?
    - Does the employer reserve the right to supervise/discipline the worker?
    - Does the employer control prices of services/products provided by the worker?
  - Employer’s actions for sole purpose of complying with law not necessarily indicative of control.
  - More control → more likely employee status.

DOL Independent Contractor Rule

- Factor 5: Extent to which the work performed is an integral part of the employer's business.
  - Question is not whether any individual worker is integral — it is whether the function they perform is an integral part of the business.
  - DOL considers "integral" to mean "critical, necessary, or central to the potential employer's principal business."
  - This is a broad formulation that likely covers myriad services.

DOL Independent Contractor Rule

- Factor 6: Skill and initiative.
  - Relevant questions include:
    - Does the worker used specialized skills to perform the work?
    - **And, do those skills contribute to business-like initiative?**
    - Is the worker dependent on the employer for training?
  - It is not enough to have specialized skills — both employees and independent contractors may be skilled workers — it is whether the worker uses those specialized skills in connection with business-like initiative.

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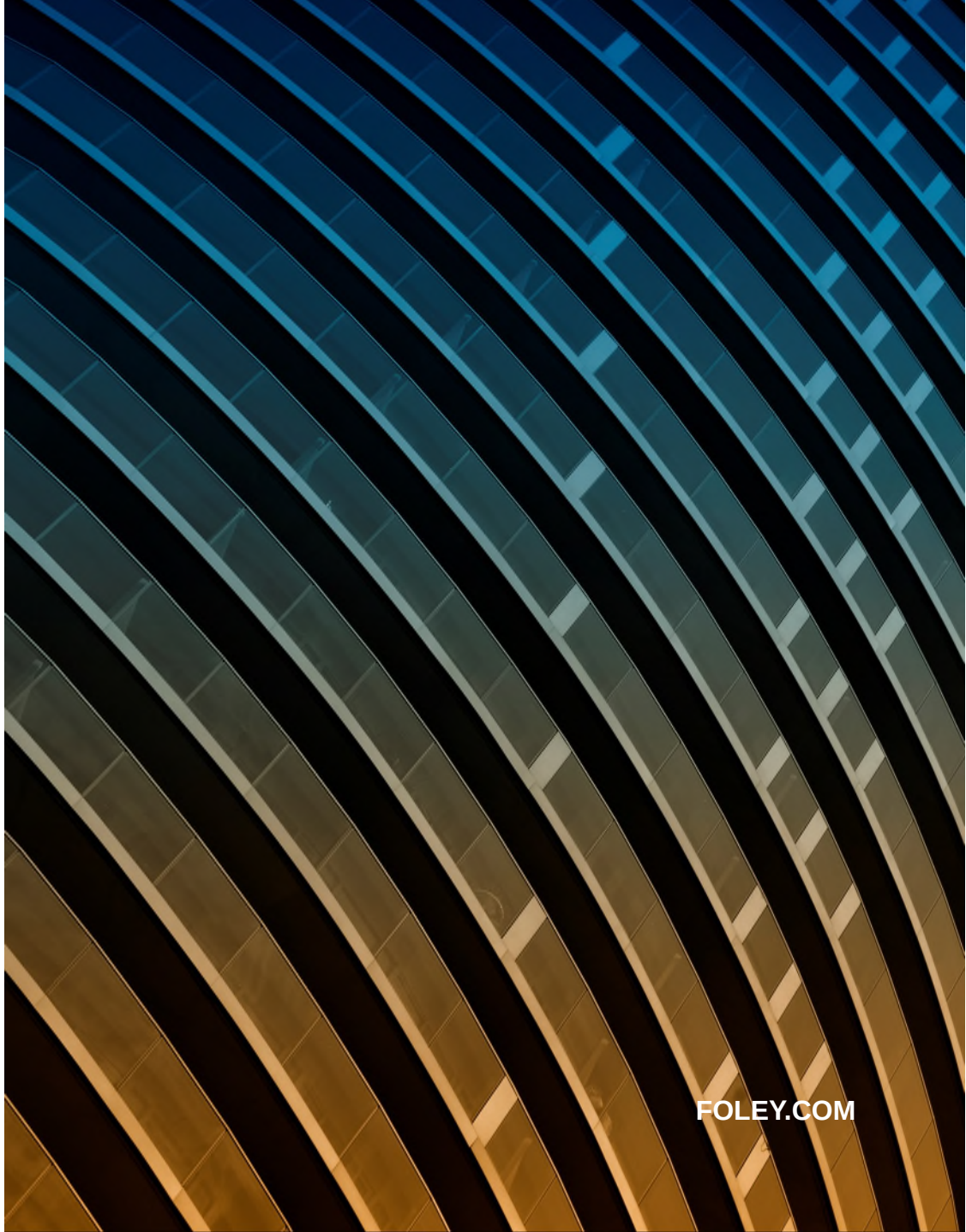
The National Labor Relations Board's 2023 Joint Employer Rule



National Labor Relations Board's (NLRB) 2023 Joint Employer Rule

- What is it?
  - The NLRB's 2023 Joint Employer Rule ("2023 Rule") addresses the standard for determining when two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA).

NLRB’s 2023 Joint Employer Rule

- How did we get here?
  - The NLRB’s interpretation of when two or more entities will be deemed joint employers has changed over the years.
  - During the period from 1984 to 2015, entities had to have “direct and immediate” control over workers in order to be a joint employer with another entity; indirect control was generally not enough for a secondary entity to be found to be the joint employer of another employer’s workers.
  - The increased use of independent contractors and temporary/contingent workers as well as the growth of franchises and the “gig” economy resulted in a greater focus on joint employment.

NLRB’s 2023 Joint Employer Rule

- How did we get here?
  - In 2015, the NLRB issued the *Browning-Ferris* decision in which it held that an entity may be a joint employer even if it:
    - only had indirect, limited control over the essential working conditions of another employer’s workers; or
    - had a contractual right to control the working conditions of the other employer’s workers but never exercised that control.
  - *Browning-Ferris* resulted in a significant shift in the standard for joint employer status.

NLRB's 2023 Joint Employer Rule

- How did we get here?
  - In 2020, the Board reversed course, rejected the *Browning Ferris* analysis, and established a joint employer rule ("2020 rule") which required an entity to both possess **and exercise** "substantial direct and immediate control over one or more essential terms or conditions" of employment.
    - This was a return to the pre-*Browning-Ferris* standard where indirect control was insufficient for joint employment.
  - In September 2022, the new NLRB proposed revised regulations to repeal the 2020 Rule and go beyond the *Browning-Ferris* standard.
  - On October 26, 2023, the NLRB finalized and published the 2023 Rule which was scheduled to become effective on December 26, 2023, but has been repeatedly delayed and stayed pending resolution of various legal challenges.
    - More to come on that later!

NLRB’s 2023 Joint Employer Rule

- What changed?
  - The 2023 Rule revives the *Browning-Ferris* standard — but goes even further.
  - Under the 2023 Rule, two or more entities will be found to be joint employers if:
    - They “share or codetermine” at least one of the essential terms or conditions of employment for a group of employees.
      - Essential terms and conditions of employment include:
        - Wages, benefits, and other compensation
        - Hours of work and scheduling
        - Assignment of duties
        - Supervision over performance of duties
        - Work rules and directions governing performance and grounds for discipline
        - Tenure of employment (hiring and discharge)
        - Working conditions related to safety and health

NLRB’s 2023 Joint Employer Rule

- What changed?
  - An entity “shares or codetermines” a term or condition of employment if:
    - It possesses **the authority to control** or exercise the power to control the term or condition.
      - Control can be direct, indirect, or through an intermediary.
      - Even “reserved” control — *i.e.*, the ability to control, even if control is not exercised — can establish joint employer status.

NLRB’s 2023 Joint Employer Rule

- How will it affect employers and businesses?
  - Overall, the 2023 Rule significantly expands the criteria for establishing joint employment and makes it easier for workers to be found to be jointly employed.
  - It has significant implications for both labor relations and legal liability for labor violations.
    - Joint employers are all held responsible for bargaining obligations, unfair labor practices, and other legal liabilities.
  - **BUT** this is limited in application to matters arising under the National Labor Relations Act.

NLRB’s 2023 Joint Employer Rule

- What is the current status of the 2023 Rule?
  - The 2023 Rule was previously stayed twice:
    - NLRB extended the original effective date from December 26, 2023, to February 26, 2024, in anticipation of legal challenges
    - Eastern District of Texas ordered implementation to be stayed until March 11, 2024, pending the outcome of a challenge to the rule’s legality
  - On March 8, 2024, the Eastern District of Texas **vacated** the 2023 Rule
    - Held that it was overbroad to the extent that it allowed joint employment status to be based on indirect or reserved control alone
    - Also found that the rule’s rescission of the prior 2020 Rule was arbitrary and capricious under the Administrative Procedures Act
    - Restored the NLRB’s 2020 Rule requiring the exercise of “substantial direct and immediate control” over essential terms and conditions of employment in order to be a joint employer
      - **2020 Rule is the operative rule — absent further action**

NLRB’s 2023 Joint Employer Rule

- What further actions are anticipated?
  - The NLRB indicated that it would review the court’s decision and consider next steps.
  - Said the court’s decision “is not the last word” on efforts related to joint-employer standard
  - Has multiple options:
    - Could refuse to comply with the ruling outside of the territory covered by the Eastern District of Texas
    - Could appeal the court’s ruling to the Fifth Circuit
    - Could initiate rulemaking process to officially rescind the 2020 Rule

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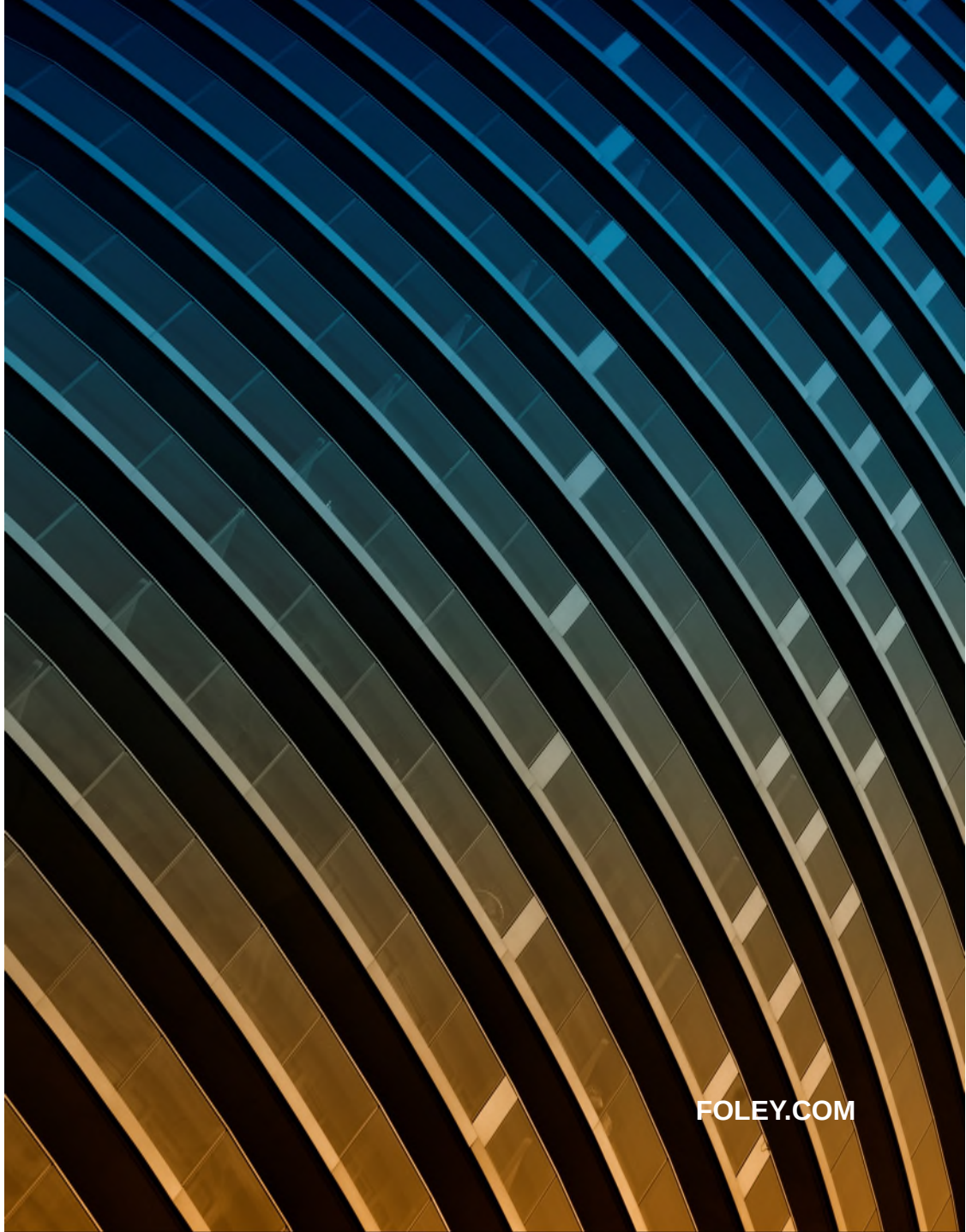
Best Practices and Recommendations for Employers



Best Practices and Recommendations

- Assess the working arrangements with contractors and staffing agencies to determine if they are reducing or increasing potential issues — *e.g.*, pushing organizing efforts, engaging in actions that might result in unfair labor practices if found to be jointly employed, creating wage and hour liability, etc.
- Conduct an audit of all individual independent contractors to evaluate whether they are properly classified as independent contractors or whether they are more properly characterized as employees under applicable law and guidance.
- Review contracts with contractors, staffing agencies, and other third-party workers to determine whether there are provisions in those contracts providing for indirect or reserved control and to ensure that they include appropriate language regarding independent contractor status, control over work, indemnification, etc.

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