SCWA Legislative Update

October 17, 2022

Fall Regulatory Action

With the September 30 passage of a continuing resolution (CR) to fund the government through December 16, 2022, Congress has largely turned its attention to the midterms. While we do not expect much action from the Hill until after Election Day, there is still lots to watch coming out of the agencies:

DOL Proposes New Independent Contractor Rules

On October 11th, the Department of Labor (DOL) released the text of its much anticipated proposed rules on independent contractors. The proposal was formally published in the Federal Register on Oct. 13 and the comment period will be held open for forty-five days.

Since the DOL first made it clear that it would be revisiting the independent contractor rules, the big question has been whether the agency would look to implement a stringent ABC test like the one adopted in California. To the relief of employers, in the proposed rule the DOL has declined to pursue an ABC test and is instead simply returning to and fleshing out the economic realities test that was in place prior to 2021.

Taking a step back, it is important to note that the DOL's independent contractor rule technically only applies for the purposes of determining worker classifications under federal wage and hour laws – namely the federal Fair Labor Standards Act (FLSA). There are a whole host of different areas outside of the scope of these rules where the distinction between an employee and an independent contractor comes into play – including federal and state taxes, state unemployment and workers' compensation. But because it is logistically untenable and legally impermissible to have someone classified as an independent contractor for the purposes of some laws (such as unemployment) and an employee for others (such as wage and hour) – businesses must in practice follow the most restrictive rules (whether they be set by the DOL, the IRS, or a state agency) when determining how to classify their workers. For example, changes to the DOL's independent contractor rules shouldn't change how employers in California classify their workers because those employers are already having to comply with the much more rigorous rules set by the state. The distinction would however come into play if a worker's classification was challenged, in which case the nature of the dispute would govern which test would be applied.

To understand the DOL's new proposed rules it is important to understand the history of the rules over the last couple years. Before 2021, the DOL used what is

known as the economic realities test to determine if a worker can qualify as an independent contractor. The economic realities test looked at five factors: (1) the nature and degree of the worker's control over the work; (2) the worker's opportunity for profit or loss; (3) the amount of skill required for the work; (4) the degree of permanence of the working relationship; and (5) whether the work is part of an integrated unit of the business.

In the closing days of the Trump Administration, the DOL issued a new final rule that was intended to make it easier for businesses to satisfy the economic realities test and classify workers as contractors. Under the Trump independent contractor rule, the DOL focused primary on the first two factors of the economic realities test. Under that rule, if a worker would qualify as an independent contractor when looking at the factors of control and opportunity for profit and loss then the inquiry would stop there and the independent contractor classification would be permissible. Only if there was uncertainty or ambiguity would the Trump rule call for looking at the third, fourth and fifth factors noted above. The rule also allowed businesses to offer certain benefits to independent contractors without undermining their classification.

The Trump independent contractor rule was originally slated to go into effect on March 8, 2021. Unsurprisingly, when the Biden Administration came to town it issued an instruction that the agencies should hold and reconsider any rules that had been finalized but had not yet gone into effect – thus the effective date of the independent contractor rule was delayed. On March 11, 2021, the DOL issued a notice of its intent to entirely withdraw and strike the Trump independent contractor rule. Shortly after the notice was published, the Coalition for Workforce Innovation, which includes companies like Uber and Lyft, filed a lawsuit challenging the DOL's decision to delay and potentially withdraw the rule. This March, the U.S. District Court for the Eastern District of Texas struck down the DOL's notice. The DOL appealed this decision to the Fifth Circuit Court of Appeals. On request of the DOL, the Fifth Circuit Court of Appeals has stayed that case until December 7, 2022 based on the DOL's plans to release the new proposed rules which would make the issue of withdrawing the 2021 rules moot.

The new proposed rules would reinstate the economic realities test with each factor receiving equal weight and with the worker's and employer's investments into their respective businesses being broken out as its own factor in the test. The proposed rules also provide additional detail on how businesses should assess the issue of control and determining whether the work is integral to the employer's business. The DOL's stated goal in these proposed regulations is to bring the regulations back in line with the case law and standards that employers have become accustomed to.

NLRB Proposes New Joint Employer Rules

Also on the employment regulatory front, in September, the National Labor Relations Board (NLRB) proposed new rules for determining when businesses will be considered joint employers for the purposes of the National Labor Relations Act (NLRA). Comments on the proposed rules are due November 7.

The concept of joint employers and the determination of when two entities that do business together will be considered jointly responsible for specific employees has been a big issue over the last decade not just for the NLRB but also for the Department of Labor (which is also has the issuance of new joint employer rules on its to do list).

For the NLRB's part, the new proposed rules would replace the Trump-era rules which took effect in April 2020 and which substantially narrowed when employers would be considered joint employers for the purposes of the NLRA (which among other things governs issues like unfair labor practices, collective bargaining agreements and protected employment activities). Under the preexisting rule, a business would only be considered a joint employer if it had "direct and immediate control" over the worker's essential terms and conditions of employment. Under the new rule, two businesses would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." Under the proposed rules, to "share or codetermine matters" would mean to "possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment."

In other words, the new proposed rules (which harken back to the rules that existed before the last set of rules were finalized in 2020) would dramatically expand the circumstances when two businesses could be considered joint employers. While these rules are still in the proposal stage, businesses that share control of workers should take note and be prepared for upcoming changes and the corresponding increase in the risks associated with sharing such control.

Treasury Issues Final Rules on Beneficial Ownership Reporting Under the Corporate Transparency Act

On September 29, U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") issued its final rule (RIN 1506-AB49) to implement the beneficial ownership information ("BOI") reporting required established by the 2020 Corporate Transparency Act.

Under the new rules, unless they qualify for an exemption, foreign and domestic companies, including domestic corporations, limited liability companies, limited liability partnerships, business trusts and other entities will be required to report information regarding their company and beneficial owners. The rules do exempt twenty-six different types of companies from the reporting requirements – largely based on the fact that they are already subject to other government oversight (these rules after all are intended to prevent criminal actors from evading detection by using shell or front companies). The most broadly applicable exemption is for companies that (1) have at least twenty full-time employees in the U.S., (2) have a physical office in the U.S. and (3) file U.S. taxes with at least $5 million in gross sales.

Those business that do not qualify for an exemption and which will be subjected to the new rules will be required to make an initial filing with FinCen by the end of 2024 and thereafter report any changes to their beneficial owners within 30 days

of the change. New businesses established after the filing deadline will be required to file their initial report within 30 days of their formation. Failure to comply with the rules may result in penalties (including criminal penalties if the violation is willful) for the company and its senior officers.

While it is still over two years before the filings must be made, new and existing businesses, in particular small businesses that don't qualify for an exemption, will need to be working carefully to make sure that they will be in a position to comply and complete their filing on time.

We will continue to monitor the roll out of these rules and share resources as they become available.

IRS Updates Information on Tax Credit Helping Businesses to Hire Certain Categories of Workers

The IRS updated information on the Work Opportunity Tax Credit (WOTC), available to employers that hire designated categories of workers who face significant barriers to employment.

For employers facing a tight job market, the WOTC may be able to help.

The updates include information on the pre-screening and certification process. To satisfy the requirement to pre-screen a job applicant, on or before the day a job offer is made, a pre-screening notice (Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit) must be completed by the job applicant and the employer.

The Targeted Jobs Tax Credit (TJTC), which preceded WOTC, did not contain a pre-screening requirement. In enacting WOTC to replace the TJTC in 1996, Congress included the requirement that employers pre-screen job applicants before or on the same day the job offer is made. In doing so, Congress emphasized that the WOTC is designed to incentivize the hiring and employment of certain categories of workers.

After pre-screening a job applicant, the employer must then request certification by submitting Form 8850 to the appropriate state workforce agency no later than 28 days after the employee begins work. Other requirements and further details can be found in the instructions PDF to Form 8850.

WOTC has 10 designated categories of workers. The 10 categories are:

1. Qualified IV-A Temporary Assistance for Needy Families (TANF) recipients
2. Certain veterans, including unemployed or disabled veterans
3. The formerly incarcerated or those previously convicted of a felony
4. Designated community residents living in Empowerment Zones or Rural Renewal Counties
5. Vocational rehabilitation referrals

6. Summer youth employees living in Empowerment Zones
7. Food stamp (SNAP) recipients
8. Supplemental Security Income (SSI) recipients
9. Long-term family assistance recipients
10. Qualified long-term unemployment recipients.

Visit the WOTC page on IRS.gov for more information.

Chuck Space - SCWA Executive Director
4600 Spicewood Springs Road
Suite 103
Austin, TX 78759
(512) 343-9023