SCWA Legislative Update

April 12, 2021

What to Watch from the Department of Labor (DOL)

In late March, former Boston Mayor Marty Walsh was confirmed by the Senate and sworn in as the new Secretary of Labor. Secretary Walsh's initial orders of business are expected to be largely focused on COVID and broader Administration agenda items. For example, back in January President Biden instructed OSHA (which is part of the Department of Labor (DOL)) to issue proposed COVID-related workplace safety rules. While OSHA issued interim guidance, it missed the March 15 deadline set forth by the President to issue proposed rules and is still working to respond. Additionally, Secretary Walsh is also one of the members of the cabinet who have been tasked to help sell the President's new infrastructure proposal.

While it is easy to focus on the immediate COVID concerns and legislative pushes, the DOL also has a number of other regulatory items on its plate that are important for small businesses to stay aware of. In this alert, we will highlight some of the most significant of these.

Independent Contractor Rules

Probably the biggest long-term issue that is in the process of developing (largely behind the scenes) at the DOL relates to the rules surrounding when a worker can be classified as an independent contractor rather than an employee.

Of course, the distinction between an employee and an independent contractor comes into play in a whole host of laws enforced by a wide variety of agencies. From federal tax, wage and hour and antidiscrimination laws to state unemployment and workers compensation laws – the DOL is just one of many of the proverbial cooks in the kitchen on this issue. So why are we so focused on what the DOL might do? Because the DOL has the power to dramatically alter the playing field in this area.

The bottom line is that, as to any worker, businesses have to decide if that worker is an independent contractor or an employee. This classification will be applied for all purposes as 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). The DOL's independent contractor rules technically only apply for the purposes of determining worker classifications under federal wage and hour laws – namely the Fair Labor Standards Act (FLSA). However, the FLSA applies to any business with at least two employees and annual sales or business of at least $500,000. According to the DOL, 143 million American workers are covered by the FLSA. So, if the DOL makes the standard for classifying workers as independent contractors under the FLSA more rigorous, in order to stay in compliance any business

that is covered by the FLSA will have to use this more rigorous standard. In short – when it comes to worker classifications – it is the toughest test in town that controls.

The DOL currently uses what is known as the economic realities test to determine if a worker can qualify as an independent contractor. The economic realities test looks 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 waning 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 would focus 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 would allow 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. The notice is being held open for 30 days for comment. 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 challenge isn't expected to have a long term impact on the DOL's ability to walk away from the Trump rule (as the issues raised could largely be cured). But it does increase the cost, complexity and public attention to the issue.

Interestingly, the DOL's notice did not specify whether, after the Trump rule is pulled, the DOL will go back to the drawing board to push for a more restrictive rule. There is a good reason that the DOL is remaining cagey about its intentions – namely because President Biden has called on Congress to take action and initiate legislation to limit the use of independent contractors. It appears that the President wants to give Congress the first bite at the apple before the DOL announces that it will go ahead and make changes through the regulatory course. That said, such proposed legislation would face a significant uphill battle so it remains to be seen how long the President will wait on Congress before directing Secretary Walsh and the DOL to proceed. On the campaign trail, the President publicly favored the ABC test for independent contractors, which is currently in use in California (as well as a handful of other jurisdictions), and which creates a presumption that all workers are employees unless: (1) they are free from employer's control and/or direction while working; (2) their work is outside the usual course of the employer's business; AND (3) they are customarily engaged in an independently established trade, occupation, profession or business. Whether the President would push for the DOL to adopt the ABC test, which would clearly be a game

changer, or some intermediary standard remains to be seen and any change will face fierce opposition, especially from the gig companies like Uber that rely heavily on contractors for their business models.

Joint Employer

Another area where the DOL has been charting a change of course relates to the rules for when two companies will be considered joint employers for the purpose of liability under the FLSA.

In early 2020, the Trump Administration issued a new rule narrowing the instances in which two entities will be considered joint employers. Then in September of 2020, in a case brought by New York and Pennsylvania, a federal judge struck down the rule finding it “arbitrary and capricious” and inconsistent with the FLSA. The Trump Administration appealed the decision to the Second Circuit Court of Appeals. After President Biden won the election, a selection of business groups intervened in the case to defend the Trump Administration’s rule (expecting that the new Biden Administration would elect not to do so). The case before the Second Circuit is still pending and just last week the Biden Administration asked the court for a 60-day delay. In the meantime, on March 11, the DOL issued a proposed rule to repeal the Trump Administration’s joint employer rule and to revert back to the prior rule promulgated by the Obama Administration that expanded the instances in which companies can be considered joint employers.

Also on the Radar

·Tipped Employees – Another rule published by the Trump DOL that had not yet gone into effect when the Biden Administration came to town deals with tip pooling for food service and hospitality workers. The Trump DOL’s rule was originally slated to go into effect on March 1, 2021. However, there have already been legal challenges brought and the Biden Administration has proposed to delay those parts in dispute until December 31, 2021. For businesses that have tipped employees, the future of this rule will certainly be something to watch.

·Overtime Rules – There have been a lot of questions about whether the Biden DOL will look to change the rules for employees to qualify as exempt from overtime and minimum wage requirements under the FLSA. As you may recall, the Obama Administration promulgated rules that would have substantially increased the salary required to be paid to an employee to qualify as exempt. Those rules were struck down by a federal district court judge just a few months before the end of President Obama’s second term. The Obama Administration appealed the ruling to the appellate court but when the Trump Administration came to town, they decided to drop the appeal, scrap the Obama Administrations rules and promulgate their own rules which increased the salary threshold but by a much smaller margin. There may still be interest in some progressive circles around increasing the overtime salary requirement further, but seeing as there was already some increase recently, it may be that this becomes a back burner priority behind those Democratic priorities that were not addressed at all or that were reversed during the Trump presidency.

Remote Workers – The DOL did recently issue guidance on how employers can satisfy DOL posting requirements for employees that are now working remotely. Pre-COVID, a reasonable criticism of the DOL was that it hasn’t done enough to recognize the changing

structure of the workplace and the electronic ability of employees to perform work when they are not in the workplace. Employers have long been requesting, and the DOL has long been promising, further guidance on de minimis work in the digital age – specifically, to set brighter lines about when non-exempt employees need to be paid for very brief electronically facilitated touches like checking work email that they may have installed on their phone or responding to a text. While the DOL has a lot on its plate right now, the long-term impact of the pandemic on the way and place where work is conducted may add to the pressure on the DOL to get this guidance done.

IRS Provides Guidance for Employers Claiming the Employee Retention Credit for First Two Quarters of 2021

The Internal Revenue Service recently issued guidance for employers claiming the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) modified by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act).

Notice 2021-23 explains the changes to the Employee Retention Credit for the first two calendar quarters of 2021, including:

- the increase in the maximum credit amount,
- the expansion of the category of employers that may be eligible to claim the credit,
- modifications to the gross receipts test,
- revisions to the definition of qualified wages, and
- new restrictions on the ability of eligible employers to request an advance payment of the credit.

As a result of the changes made by the Relief Act, eligible employers can now claim a refundable tax credit against the employer share of Social Security tax equal to 70% of the qualified wages they pay to employees after Dec. 31, 2020, through June 30, 2021. Qualified wages are limited to $10,000 per employee per calendar quarter in 2021. Thus, the maximum employee retention credit available is $7,000 per employee per calendar quarter, for a total of $14,000 for the first two calendar quarters of 2021.

Employers can access the Employee Retention Credit for the 1st and 2nd calendar quarters of 2021 prior to filing their employment tax returns by reducing employment tax deposits. Small employers (i.e., employers with an average of 500 or fewer full-time employees in 2019) may request advance payment of the credit (subject to certain limits) on Form 7200, Advance of Employer Credits Due to Covid-19, after reducing deposits. In 2021, advances are not available for employers larger than this. Further details on how to calculate and claim the employee retention credit for the first two calendar quarters of 2021 can be found in Notice 2021-23.

Under the American Rescue Plan Act of 2021, enacted March 11, 2021, the Employee Retention Credit is available to eligible employers for wages paid during the third and fourth quarters of 2021. The Department of the Treasury and the IRS will provide further guidance on the Employee Retention Credit available under the ARPA.

Additional coronavirus relief information for businesses is available on IRS.gov.

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