2020–21 Wage and Hour Update

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The past year has been eventful. The same is true for the field of wage and hour law. There is a new presidential administration and head at the Department of Labor. The balance of power in Congress continues to shift, and with it, legislative priorities change. The Fifth Circuit has announced a new standard for determining the appropriateness of collective actions under the Fair Labor Standards Act. Below, we take a look these and other developments in the ever-changing world of wage and hour law.

Before moving on—a special thanks to my colleague Jackie Staple for her contributions to this paper.

REGULATORY DEVELOPMENTS

Out with the old, in with the new. Such is the nature of the Department of Labor at the moment. With the rollover of the presidential administration, Eugene Scalia has been replaced by Marty Walsh to serve as Secretary of Labor. Mr. Walsh most recently served as mayor of Boston. Before that, Mr. Walsh was a Massachusetts state representative and also worked for a variety of labor unions, including Laborers' Union Local 223 in Boston and the Building and Construction Trades Council. The consensus is that the DOL under Mr. Walsh will adopt a more pro-worker agenda through rulemaking and enforcement actions.

In some respects, that agenda is already apparent. On January 7, 2021, the DOL under the Trump administration published a final rule clarifying the standard for employee versus independent contractor under the FLSA. This rule provided that two "core factors" under the economic realities test—the nature and degree of control over the work and the worker's opportunity for profit or loss based on initiative and/or investment—should predominate when assessing whether a worker is an employee or independent contractor. In theory, this rule may have made it easier to classify workers as independent contractors.

Whether that would have played out in practice is something we are not likely to ever know. On March 2, 2021, the DOL (now under control of the Biden administration) formally delayed the effective date of the independent contractor rule from March 8, 2021 to May 7, 2021. Most expect the rule to be scrapped entirely. A new rule *may* be issued in its place, but that remains to be seen.

The Biden DOL has also signaled that it will withdraw the Trump administration's tip rules. That regulation, issued on December 22, 2020, would have changed a variety of rules concerning tipped employees. Most notably, the rule would have changed the DOL's longstanding 80/20 rule, which provided that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on non-tip producing duties exceeded 20% of the employee's workweek. In lieu of the rigid 80/20 rule, the DOL's final rule would have permitted an employer to take a tip credit for the time an employee in a tipped occupation performs related non-tipped duties so long as those duties were performed contemporaneously with or for a reasonable time immediately before or after the tipped duties.

Like the independent contractor rule, the Biden administration has delayed the implementation of the new tip rule. Certain aspects of the tip rule are non-controversial, and may

survive. However, other aspects of the regulation, such as the abandonment of the 80/20 rule, are likely to be withdrawn.

Joint employment is another topic likely to be addressed soon by the Biden DOL. In March 2020, the DOL (then under the leadership of Eugene Scalia) issued new regulations on joint employment. The intent of this rule was to simplify the test for when a worker might be considered an employee of more than one entity for purposes of the FLSA. However, in September 2020, a district judge in the Southern District of New York struck down the rule as impermissibly restricting the broad definitions of "employer," "employee," and "employ" under the FLSA. That decision is on appeal before the federal Second Circuit Court of Appeals. In the meantime, the Biden DOL has been working on a new regulation on joint employment, which has been sent to the White House regulatory office for review. The substance of the rule is not yet known, but it is likely to differ substantially from the prior version issued by the Trump administration. There will be more to come on this topic soon.

LEGISLATIVE DEVELOPMENTS

The federal minimum wage is in the news again. The minimum wage under the Fair Labor Standards Act is $7.25/hour. While many states have enacted laws to set the minimum wage above the FLSA's floor, the federal minimum wage has been $7.25/hour since July 24, 2009. Critics contend this is too low. Organizations such as the Fight for $15 have advocated for raising the federal minimum wage to $15/hour. Business groups argue such measures are unsustainable and potentially counter-productive.

It appears the Biden administration may seek to raise the federal minimum wage. In January 2021, President Biden sought to raise the minimum wage to $15/hour as part of his initial proposal for the recently passed $1.9 trillion stimulus package (The American Rescue Plan of 2021, H.R. 1319, 117th Cong. (2021)). While the minimum wage increase was ultimately scrapped in Congressional negotiations to finalize the package, the measure does show the new administration's interest in the issue. In recent comments, the president has suggested he may seek to phase in any increases in the minimum wage over time.

Of course, any action on the federal minimum wage must come from Congress. With the current Senate composition (50 Republicans, 48 Democrats, and 2 Independents), and some Senate Democrats expressing hesitancy on the issue, it remains to be seen what will happen next.

CASE LAW UPDATE

As always, the courts have been active in issuing interesting and important decisions in this field of law. We discuss some highlights below with a primary focus on the Fifth Circuit.

***Swales v. KLLM Transport Services*, 985 F.3d 430 (5th Cir. 2021) – District courts should "rigorously enforce" standards for certification of FLSA collective actions.**

The FLSA permits "similarly situated" employees to proceed together in a single case as a collective action. A collective action differs from a traditional class action in that a plaintiff-employee in a collective action must affirmatively "opt-in" to the case by filing a written notice with the court.

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