



2022 Wage and Hour Update

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The Department of Labor



- No significant developments.
- Still no Administrator at Wage and Hour Division.

2

The Gig Contractor Rule (again?)



- Issued by Trump DOL in January 2021.
 - Would have elevated two factors of economic realities test:
 - Nature and degree of control over the work; and
 - The worker's opportunity for profit or loss.
- May 5, 2021 – Biden DOL rescinds prior rule; reiterates that DOL will consider all economic reality factors.
- January 17, 2022 – District court vacates rescission of rule (*Coalition for Workforce Innovation v. Walsh*, 1:21-cv-130 (E.D. Tex.)).

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Minimum Wage



- No federal action for private employers.
- States remain active
 - May 2, 2022 – Hawaii legislature passes bill that would raise minimum wage to \$18/hour by 2028.
- EO 14026 -- \$15/hour minimum wage for employees working under a federal contract

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Hewitt v. Helix Energy Solutions, Inc.



- Can a day rate satisfy the salary basis test?
 - No – 5th Circuit panel (4/2020)
 - Yes – Same 5th Circuit panel (12/2020)
 - No – *En banc* 5th Circuit (9/2021) (12-6, with two separate dissents)
- May 2, 2022 – Supreme Court grants certiorari
- Potential questions at issue:
 - Does a day rate constitute payment of a predetermined amount without regard to quantity or quality of work?
 - What regulations apply when determining whether an employee has been paid on a salary basis for purposes of the highly compensated employee exemption?

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Southwest Airlines Co. v. Saxon



- Are ramp agents exempt under the transportation exception to the Federal Arbitration Act?
- The Federal Arbitration Act contains an exemption: “contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce”
- What is clear: “any other class of worker engaged in foreign or interstate commerce” means “transportation workers”
- What is unclear:
 - Who is a “transportation worker”?
 - When is work sufficiently connected to interstate commerce?

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