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## **Wage and Hour Update**

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## **Wage and Hour Update - Top Trending Wage and Hour Issues 2023**

The following is a brief summary of the wage and hour issues trending in 2023.

### **The Impending Final Independent Contractor Rule**

A final rule addressing independent contractor status issued by the Trump Administration (which some argued made it easier to classify individuals as independent contractors) was withdrawn by the U.S. Department of Labor (DOL) under the Biden Administration before it became effective in March 2022. But a federal court revived and reinstated the Trump final rule holding the Biden Administration's withdrawal invalid. In October of 2022, the DOL then responded by issuing a new proposed independent contractor rule, and a final rule is expected to be issued in 2023.

Under the DOL's new proposed rule, whether a worker is considered an independent contractor or employee will turn on six non-exhaustive factors, each carrying the same weight:

- Nature and degree of control exercised by the employer over the performance of the work;
- Worker's opportunity for profit or loss based on the worker's use of managerial skill;
- Worker's skill or initiative, including whether the worker uses specialized skills to perform the work;
- Degree of permanence of the work relationship between the parties;
- Whether the worker makes capital or entrepreneurial investments related to the performance of work and if so, whether such investment relative to the employer's investment indicates the worker is an independent contractor; and
- Whether the work performed is an integral part of the employer's business.

The above multi-factor list, in some variation or another, has been used by the DOL and the federal courts for decades. The Trump Administration's list included only five factors and placed emphasis on the first two factors, considering them to be core factors. The DOL proposed rule requires that all factors be weighted equally and indicates that additional factors may be relevant.

Labor Secretary nominee Julie Su continues to face close scrutiny by Republican members of the Senate Committee on Health, Education, Labor, and Pensions, at least some of whom believe she is not qualified for the position. Notably, however, during a recent Committee hearing on her nomination, Su plainly stated that, in her view, the DOL has no intention of seeking to implement the "ABC" test for determining independent contractor status, or of issuing a new joint employer rule.

The "ABC" test currently is used by a handful of states, most notably California, to determine whether an individual is properly classified as an employee or an independent contractor, and is a considerably stricter test for establishing independent contractor status than that currently applied under the FLSA. During the Committee hearings, Su noted that any change to the independent contractor analysis currently adopted by the DOL would require Congress to implement.

## **The Much Anticipated Proposed Overtime Rule**

Employers continue to wait anxiously for the DOL to propose a new rule increasing the salary level for employees subject to the “white collar” overtime exemptions — those for executive, administrative, and professional (EAP) employees. The current salary level for the standard exemptions stands at \$35,568 and, for “highly compensated” employees, \$107,432. The DOL’s new minimum salary threshold will likely be more than \$47,476 a year with some advocating the threshold be over \$80,000.

During 2022, the DOL repeatedly stated a rule was in the works for months, and even held “town halls” to obtain input from the public and affected stakeholders. But 2022 has come and gone without a new rule. With inflation at its highest level in years, some pundits are speculating the new rule will include a large minimum salary level increase. However, the DOL may be concerned about implementing too drastic a change, in light of the 2016 federal court ruling invalidating the Obama Administration’s previously proposed significant increase. The Department also may be concerned about avoiding the “major questions” doctrine, revived by the U.S. Supreme Court last term, which limits the power of agencies to regulate areas that significantly impact the economy without clear authority from Congress. Whenever the proposed overtime rule is issued, we expect the various stakeholders to submit voluminous comments. Wading through the comments takes time, as does fashioning a final rule. Whatever final overtime rule is ultimately adopted, it is almost guaranteed that there will be legal challenges. If the legal challenges are successful, the rule could be enjoined on a limited or perhaps nationwide basis while the court challenges play out.

When might we expect to see the DOL issue a final independent contractor rule and publish its proposed new overtime rule? We hesitate to guess, but many expect to see the DOL take action in the summer of 2023.

## **Fighting Over Military Leave**

The issue of whether employers must provide paid military leave remains unsettled. Many employers are being sued on a class action basis under the theory that if non-statutory paid leave is offered to other workers (e.g., jury duty, bereavement leave) then paid leave must be provided for military leave takers, too.

Where an employer provides “benefits,” including pay, to employees on a leave of absence, the USERRA requires employers to offer the “most favorable treatment accorded to any **comparable form** of leave when [an employee] performs serve in the uniformed services.”

Several federal appellate courts have initially concluded that paid leave is a right and benefit protected by the USERRA. These courts have not addressed the comparability issue on the merits, but have made clear that the comparability issue is a fact issue to be determined later in the case.

## **Wage and Hour Issues Relating to Remote Workers**

The COVID-19 pandemic has turned out to be the greatest disruptor to the American workplace in decades. While the pandemic is largely in our rearview mirror, employers came to learn that many of their employees could work from home. Many employees grew accustomed to working from home and now indicate they will only work for employers who allow remote work or at least hybrid work schedules. As a result, many employers now have a considerable number of employees who work from

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