

EMPLOYMENT LAW BULLETIN



A Monthly Report On Employment Law Issues

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JOINT EMPLOYER AND INDEPENDENT CONTRACTOR REGULATIONS TO BE REVIEWED BY THE BIDEN ADMINISTRATION

On March 11, 2021, the Department of Labor (DOL) indicated it would review the previous Administration's worker classification regulation of determining independent contractor relationships. The Wage and Hour Division will allow a 30-day comment period on its proposal to repeal the Trump rule, which had made it easier to classify workers as independent contractors rather than employees. On the same day, the DOL announced that it is seeking public comment on whether to repeal the Trump Administration Joint-Employer Rule, which went into effect last year but is currently in litigation in the Second Circuit Court of Appeals. Industry groups intervened in the litigation to defend the Trump rule knowing that a new Administration might try to rescind it.

In both cases, DOL has not announced what independent contractor or joint-employer standard will be followed in the future. However, the circumstances indicate that the Biden Administration will return to the Obama-era enforcement approach.

CONTROVERSIAL PRO-UNION PRO ACT PASSED BY HOUSE

The Protecting the Right to Organize Act (the PRO Act) has been a long-term goal of organized labor. It previously passed the House of Representatives last year, but the Democrats never had sufficient power in the Senate to bring the bill to a vote there. On March 9, 2021, the House voted 225-206 to pass H.R. 842, the PRO Act. This Bill has long been considered to be a "Christmas tree list" of demands by organized labor. Among other things, this Bill as passed by the House would do the following.

- Voids state "right-to-work" laws and allow union agreements to require all employees to pay fees to cover the cost of union activities as a condition of employment;
- Stipulates that strikes could not be prohibited based on their "duration, scope, frequency, or intermittence," and repeal existing restrictions on "secondary" boycotts and picketing for recognition, as well as prohibit employers from permanently replacing an employee who strikes, prohibits locking out or otherwise withholding employment by employers to influence bargaining, prohibits misclassifying as independent contractor an employee covered by the Labor Act, and prohibits requiring employees to attend employer campaign activities unrelated to their job (so-called "captive audience meetings");
- Requires the NLRB to award lost wages and damages to employees discharged or suffering economic harm because of an employer's Labor Act violation, and also allow additional amounts as liquidated damages;
- Provides for such wages and damages even to workers residing in the U.S. illegally;

- Grants immediate temporary court relief to employees terminated or significantly affected by an employer's interference with labor rights, unless a court rules that there is not a reasonable likelihood that the claim will succeed;
- Allows employees to bring a civil action against their employer in a federal district court after sixty (60) days of filing a claim with the NLRB, and the court could award lost wages, damages, and reasonable attorneys' fees;
- Effectively reverses the Supreme Court ruling in *Epic Systems* allowing employers to enforce arbitration agreements with class-action waivers;
- Authorizes the NLRB to impose penalties on employers, such as \$50,000.00 if an employer's violation results in discharge or other serious economic harm which can be doubled to as much as \$100,000.00 for multiple violations in the preceding five (5) years;
- Provides a \$500.00 penalty if an employer does not post a Notice of Employees Rights and Protections, and inform new employees of such information, or submit the bargaining unit voter list, plus a penalty of as much as \$10,000.00 per day for an employer that does not comply with an NLRB order;
- Requires the NLRB to consider a union's proposed bargaining unit to be appropriate if the employees share a "community of interest" that is sufficiently distinct from others;
- Requires employers to provide unions with a list of all bargaining unit employees within two (2) business days after the NLRB approves an election;
- Employers would not even have standing to participate in the representation case proceeding;
- Allows the NLRB to certify a union and require bargaining with the union not only where employees vote in favor of the union, but also where they have not voted in favor of the union because of election interference by an employer but have signed authorization cards designating the union (the old "card-check" concept).
- The NLRB would have to suspend the processing of an election petition until an unfair labor practice charge is remedied or dismissed, thus giving a union a lot of flexibility as to when to arrange a vote;
- After union certification, the employer and union would have to start negotiating an initial bargaining agreement within ten (10) days of the union's written request, or within an additional period agreed by the parties - if there isn't an agreement after ninety (90) days of bargaining, the dispute would be referred to a three-member arbitration panel which would write a contract binding for two (2) years (first contract arbitration);
- Broadens the definition of joint employer regardless of whether control is considered direct or indirect as well as whether control is exercised through reserved authority or not;
- Verifies that workers performing any service would be considered employees and not independent contractors unless the workers is free from the employer's control, the services are outside the employer's usual course of business, and the worker is engaged in an independently established role related to the service (the so-called "ABC Test");
- Modifies the definition of "supervisor" to state that such individual must engage in supervisory activities "for a majority of the individual's work time;"
- Requires employers to disclose to the Labor Department arrangements with consultants or attorneys to indirectly persuade employees on their union rights (the so-called "Persuader Rule");
- Appeals by employers to federal appeals courts would be limited.

This bill already has at least 40 co-sponsors in the U.S. Senate, where the Democrats now have a majority since the Vice President can break any tie. Republicans will filibuster the bill, but the situation would change dramatically should the Democrats elect to remove the filibuster from the Senate procedures.

OSHA RESPONDS TO EXECUTIVE ORDER WITH NEW COVID-19 NATIONAL EMPHASIS PROGRAM

In a January 2021 Executive Order, President Biden directed the Occupational Safety and Health Administration (OSHA) to establish a COVID-19 National Emphasis Program and asked the agency to determine by March 15, 2021 whether to issue an Emergency Temporary Standard tailored to the pandemic. A report from the Office of Inspector General of the

Department of Labor in February first tasked OSHA for conducting about 50% fewer inspections from February 2020 through October 2020 compared with the same period a year earlier and for not making in-person visits for many of those inspections. The current National Emphasis Program issued as effective on March 12, 2021, is responsive to those directives. The Program will remain in effect for up to one (1) year from its issuance. In the COVID-19 pandemic's first 12 months, only about 10% of federal workplace safety inspections were virus-related, and only four violations of the General Duty Clause were found. Most of the violations found pertained to respiratory protection rules, and secondly, for violations of requirements to record worker deaths or illness. The previous Administration had determined that an Emergency Rule specific to COVID-19 was not necessary because OSHA could rely on the General Duty Clause.

Announcing the National Emphasis Program, OSHA said it would adjust its enforcement strategy to conduct on-site inspections where practical. Remote-only inspections would be conducted if a determination is made that it is not safe to send inspectors to a workplace. The new enforcement directive sets a goal for COVID-19 inspections to account for at least 5% of each OSHA regional office's annual inspections. For the selection of inspection targets, OSHA will create lists of employers in selected industries – such as medical facilities, warehouses, stores and meat processing plants – and provide them to local OSHA offices. If the area office does not meet the 5% with unprogrammed inspections (fatalities, hospitalizations, and complaints) and follow-up inspections, it will schedule inspections from the target lists.

On the same day, March 12, 2021, OSHA updated its Interim Enforcement Response Plan to prioritize the use of on-site workplace inspections where practical, and to prioritize COVID-19-related inspections involving deaths or multiple hospitalizations due to occupational exposures to COVID-19. This directive encourages a written pandemic plan, as recommended by the Centers for Disease Control (CDC), by stating that such pandemic plans “should be established, as recommended by the CDC.” The directive suggests that OSHA inspectors review employee training records, including any records of training related to COVID-19 exposure prevention or in preparation for a pandemic. An attachment provides a checklist for various industries in developing preparedness plans. Part of the review should include that of the employer's injury and illness records to identify any workers with recorded illnesses or symptoms associated with the exposure to persons with suspected or confirmed COVID-19. When considering citations, inspectors should evaluate whether the employer made good-faith efforts to comply with applicable OSHA standards and, in situations where compliance was not possible during the pandemic, to insure that employees were not exposed to hazards from tasks, processes, or equipment for which they were not adequately trained.

**NEW ADMINISTRATION FIRES EEOC GENERAL COUNSEL
DURING TERM OF OFFICE, JUST LIKE TOP NLRB LAWYER**

The Equal Employment Opportunity Commission (EEOC) and National Labor Relations Board (NLRB) are independent agencies within the Executive Branch of government, and no American President until President Biden has fired the General Counsel of these agencies during their term of office. Since the firing of the NLRB General Counsel, respondents in NLRB cases have challenged the NLRB's prosecutorial power. Employers will argue that any action the new NLRB General Counsel takes before the prior General Counsel's term would have ended in November, is unenforceable. A number of trade associations and at least four GOP Senators led by Sen. Rand Paul sent the President a letter on February 19, 2021 calling the NLRB General Counsel's termination “nakedly political” and reminiscent of former President Nixon's firing of Watergate special prosecutor Archibald Cox in 1973, a move that became popularly known as the “Saturday night massacre.” Republicans should maintain a majority on the EEOC Commission through July 20, 2022, when GOP Commissioner Janet Dhillon's term expires, at which point the Democrats are expected to assume control once a nominee can be confirmed.

STIMULUS BILL MEASURES THAT AFFECT EMPLOYMENT

The \$1.9 trillion stimulus bill has significant effects on employment.

- Unemployment Insurance - Weekly federal supplement of \$300.00 per week is extended through September 6, 2021, and payments on the first \$10,200.00 will generally be tax-free for households earning up to \$150,000.00 per year.
- Health Coverage - Subsidizes the premiums for individuals eligible for COBRA coverage through September for laid-off workers.
- Paid Leave - Encouragement of paid leave benefits as much as \$1,400.00 per week and providing tax credits for employers with fewer than 500 employees to reimburse them for the cost of the sick time. While employers are not required to provide emergency paid sick leave or emergency FMLA leave, employers who choose to voluntarily continue such leaves may claim tax credits for qualified wages paid between April 1, 2021 through September 30, 2021.
- Other Provisions - A third round of stimulus payments at \$1,400.00 per eligible individual which begins to phase out for those earning \$75,000.00, with couples making up to \$150,000.00 getting \$2,800.00. Children and adult dependents are also eligible. Tax credits are expanded as well as the child tax credit increase to \$3,000.00 from \$2,000.00 for each child 6 to 17 years old, with children 5 and under eligible for \$3,600.00.

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