

EMPLOYMENT LAW BULLETIN



A Monthly Report On Employment Law Issues

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BIDEN USES EXECUTIVE AUTHORITY TO RAISE MINIMUM WAGE TO \$15 FOR GOVERNMENT CONTRACTORS

President Biden campaigned on a proposal to raise the minimum wage to \$15.00 by 2026. He first tried to carry out this campaign promise as part of the \$1.9 trillion stimulus bill, but the Senate parliamentarian ruled that raising the federal minimum wage does not meet requirements to pass the bill by a majority vote (without the opportunity for a filibuster) through budget reconciliation. There were later attempts by liberal Democrats to circulate a plan to punish corporations with a tax penalty if employees were not paid at least a certain amount.

On April 27, 2021, President Biden signed an executive order requiring that federal contractors pay a \$15 minimum wage. Starting January 30, 2022, agencies will be required to include a \$15 minimum wage in new contract solicitations. By March 30, 2022, agencies must implement it into new contracts. The agencies will also incorporate it into existing contracts when they are extended. The current minimum wage for work on covered federal contracts is \$10.95. In addition, the bill eliminates over three years the lower minimum wage of \$7.65 for federal contractor employees on tips. By 2024, workers regularly earning gratuities will be subject to the same \$15 pay as other contractor employees. It will also require government contractors paying workers with disabilities to pay at least \$15 per hour.

Such changes come with a great deal of controversy. The non-partisan Congressional Budget Office on February 8, 2021 reported that, while lifting as many as 900,000 Americans above the poverty level, the \$15 minimum wage would cost 1.4 million Americans their jobs. Further, many believe that local and regional minimum wages are more appropriate than a nationwide one, given disparities in job markets and cost of living, as evidenced by the variations in state minimum wage laws. A Rasmussen Poll indicates that only 31% of Americans support a \$15 minimum wage, although 80% of Americans believe the minimum wage should be raised. The nationwide minimum wage has not been raised in over a decade, and 29 states now have minimum wages higher than the federal level.

TPS STATUS ADDED FOR BURMA AND VENEZUELA

Temporary Protected Status (TPS) allows nationals of a foreign country to live and work in the U.S. because of conflict or disaster preventing their safe return to their home country. In March, the Department of Homeland Security made the announcement allowing Venezuelans and Burmese to be granted TPS, and extending the status for Syrian nationals living in the U.S. In May, Homeland Security said it will redesignate Temporary Protected Status for Haiti, giving nationals already living in the U.S. as of May 21 the opportunity to apply for protections. The TPS status would shield them for deportation for 18 months, a term that can be renewed. The TPS announcement for Venezuelans is particularly significant, as the Venezuelan population in the U.S. of some 320,000 people will be eligible, making them the largest population of TPS recipients, with El Salvador being next at around 250,000 people. Other countries with nationals in the U.S. on TPS include Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.

FAVORABLE TRUMP INDEPENDENT CONTRACTOR RULE CANCELED BY BIDEN

The Trump Administration issued a federal regulation making it easier for businesses to classify workers as independent contractors. While the Trump regulation listed five factors for consideration, the two given the far greatest weight were the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on personal initiative or investment. The final rule issued by the Biden Administration in early May rescinded this regulation.

While the Biden Administration did not replace the Trump regulation, Acting Wage and Hour Division Administrator Jessica Looman told reporters in an agency-arranged conference call how the Department of Labor (DOL) will handle enforcement efforts on the issue of classifying workers as employees or independent contractors. In general, she indicated that the Biden Administration will rely on a long-standing multi-factor test. She cited DOL Guidance from 2008 that outlined a seven-factor "economic realities" test. Among other things, there will be an examination of whether the work performed is "an integral part" of the business, and the worker's "degree of independent business organization and operation." Looman did not foreclose the possibility that DOL could release new guidance or a regulation on employee status in the future.

BIDEN ORDERS CREATION OF PRO-UNION TASK FORCE

In May, President Biden signed an executive order creating a task force to promote labor organizing as part of a push to strengthen unions. According to the White House, the Order will direct the task force to promote new ways of using the federal government's policies to encourage workers to organize and successfully bargain with employers. It will be led by Vice President Harris and Labor Secretary Marty Walsh.

In a related matter, Sen. Joe Manchin (D. - W.Va.) announced he would vote for the PRO Act, probably the most pro-union law ever proposed. Only three Democrat senators have not joined the bill as sponsors, two Democrat senators from Arizona and Mark Warner from Virginia. However, as long as the filibuster rule remains in effect in the Senate, the bill has little chance in the Senate, although it has already passed in the House, supported by all the Democrats there.

In another related matter, Acting National Labor Relations Board (NLRB) General Counsel Peter Sung Ohr issued an expansive interpretation of worker's rights to band together to improve working conditions, promising vigorous prosecution of retaliation against concerted employee actions. The memo emphasizes that labor law can safeguard more than just group activity related to union organizing and discussions about "vital categories of workplace life," such as wages and hours. Worker discussions about political and social justice or workplace safety and health may also receive legal protections. He stated: "Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act." Ohr highlighted NLRB precedent showing what type of conduct the Board considers to be concerted, including conversations that involve only a speaker and a listener. Worker talks about certain core workplace issues can make group discussions "inherently concerted" he said.

HOW THE UNION ANALYZED ITS LOSS AT AMAZON

The 71% to 29% loss by the union campaign at Amazon in Bessemer, Alabama, is the most well-publicized and significant union election of the decade. The union brought in outside groups to show their strength and solidarity, including churches, the NFL Players' Association, Black Lives Matter organizers, and national celebrities including Senator Bernie Sanders and Danny Glover, and showed a video from President Biden encouraging their organization. The video from President Biden is likely to be used by union organizers in all future union campaigns. Wimberly Lawson has an analysis of this election that is available for free from the firm by emailing jww@wimlaw.com.

EMPLOYERS MUST FIND AND TELL LAID-OFF EMPLOYEES OF HEALTH SUBSIDIES

Before May 31, 2021, employers must notify certain former employees that they may be entitled to free health care coverage under recent federal legislation. The new law provides fully subsidized coverage through COBRA from April 1 through September 30, 2021 for employees who were laid off or lost their job-based health coverage due to reduced hours during the COVID-19 pandemic. The notice must be provided to people who were first eligible to elect coverage from October 2019 to the present, even if the people did not elect COBRA coverage or dropped COBRA coverage.

The Department of Labor has issued model notices that employers can use and has provided questions and answers that employers may have. The notices and other guidance can be found at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>.

TAX CREDIT FOR EMPLOYERS WHO GIVE EMPLOYEES PAID LEAVE FOR COVID VACCINATION AND RECOVERY

The American Rescue Plan Act of 2021 (ARP) allows small and mid-size employers, and certain governmental employers, to claim refundable tax credits that reimburse them for the cost of providing paid sick and family leave to their employees due to COVID-19, including leave taken by employees to receive or recover from COVID-19 vaccinations. The ARP tax credits are available to eligible employers that pay sick and family leave for leave from April 1, 2021, through September 30, 2021.

DO HIGH WELFARE BENEFITS PROMOTE UNEMPLOYMENT?

Numerous employers and some studies suggest that many employees prefer government aid to a regular paycheck. Employers would agree that lower skilled workers are scarce right now and many jobs remain unfilled. Multiple sources indicate that some workers are turning down offers in lower wage occupations because their stimulus checks and jobless benefits pay their bills. Indeed, some report that some of their workers have actually walked off production lines the minute upon learning their benefits or payments have been received. Kiplinger's report of April 16, 2021 agrees with these conclusions. Even though the federal unemployment supplement has been trimmed to \$300.00 a week, and extended through September 20, 2021, the University of Chicago reports that "42% of workers are making more than their pre-unemployment wage." And these analyses do not include food stamps, rental assistance and other government help that may be available to the unemployed, or the stimulus payments that have been made. The first \$10,200.00 in unemployment compensation is even tax exempt. University of Chicago economist Casey Mulligan estimates that as a direct result of the federal government's \$300.00 enhanced unemployment benefit, between three million and five million fewer people are currently employed. Approximately 23 states have recently announced that they would no longer accept the "free" federal supplemental unemployment benefit program that provides an additional \$300 a week because it has become such a disincentive to work.

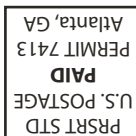
A report from the April 10-16 edition of the Economist indicates that working offers a measure of economic security and dignity, that being out of work never can, and makes the next job easier to get. A paper published by three economists in 2015 came to the conclusion that the American jobs boom coincided with reform movements to make unemployment benefits less generous, demonstrating that the one had caused the other, with the benefit reductions leading to the creation of 1.8 million extra jobs in 2014. Thus, too lavish welfare benefits can discourage work and cutting them make people look harder for a job. Former Treasury Secretary and Obama Administration Economic Director Lawrence Summers states: "Respectfully, I think it is close to self-evident that the fact that people are being paid more to stay at home than they would be to work - in millions of cases - is reducing the available supply of labor."

President Biden recently stated that in response to complaints from employers on the worker shortage, he would advocate that workers cannot turn down suitable job offers and still get unemployment benefits. Some employers are making such offers to their former employees in this regard. Notably, the number of vacancies exceeds hires by more than two million, the largest gap on record, as employers report government payments are incentive for some people to avoid work just at the time employers are struggling to find labor.

One country, however, is often hailed as coming up with a middle ground, Denmark, a country considered a role model by no less than Senator Bernie Sanders. Although Danish unemployment benefits are higher than those of other countries in the industrialized world, that country has found a way to reduce unemployment despite the high benefits. Denmark makes it very hard for persons to stay on welfare. Recipients of unemployment compensation must submit a CV to a coach within two weeks of becoming unemployed, and they can be taken off the unemployment benefits rolls for not trying hard enough to search for work or to keep up with training programs. The example of Denmark suggests that while simply boosting benefits may discourage employment, investment in training, monitoring and enforcement of the rules for those out of work may result in a higher standard of living as well as favorable unemployment patterns.

Unfortunately, the unemployment and welfare benefit programs instituted in recent years in this country seem to be going the other direction by reducing the work requirements as a condition for welfare benefits. This approach may turn out to be very shortsighted by encouraging long-term unemployment.

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