



LABOR & EMPLOYMENT DEPARTMENT

ALERT

ARE SIGNIFICANT NEW WAGE AND HOUR AMENDMENTS ON THE HORIZON?

By Wayne E. Pinkstone

Employers should keep a close watch for new legislation and regulations that could introduce significant new amendments to federal wage and hour law. Legislation was recently introduced in both the U.S. Senate and House of Representatives that would require employers to keep records of non-employees who perform work and provide for special penalties for employers that misclassify employees as non-employees. At the same time, the U.S. Department of Labor (DOL) is considering new regulations that would change the recordkeeping requirements of the Fair Labor Standards Act (FLSA) with respect to worker classification.

Proposed Legislation

The proposed legislation, called the Employee Misclassification Prevention Act, would require employers to maintain records not only for employees but for all non-employees, and specifically independent contractors. The current recordkeeping requirements apply only to employees. Under the proposed legislation, employers would be required to document the classification of non-employees and also provide written notification to every worker regarding their classification as an employee or non-employee (i.e., independent contractor). For purposes of the law, it would be

presumed that a worker was an employee if the employer failed to maintain the records or provide the notice required by the law.

The proposed law, which appears to have the backing of DOL Secretary Hilda L. Solis, would also impose special penalties against employers that fail to comply. The purported purpose of the legislation is to combat what some believe is the purposeful misclassification of workers as independent contractors to avoid the minimum wage and overtime requirements of the FLSA.

If the Act is signed into law, employers would be required to closely examine how they classify their workers and pay particular attention to the use of independent contractors. Employers would have to be prepared to justify their classification of independent contractors or face potentially steep penalties.

Proposed DOL Amendments

In addition, the DOL recently announced it was considering new rules that would require employers seeking to exclude workers from the FLSA's coverage to perform a "classification analysis" on the reason for the classification. In short, employers would have to explain in writing why an employee is classified as exempt from the FLSA's requirements. The amendment would also

require employers to disclose the analysis to the worker and retain the analysis to provide to enforcement personnel if requested.

According to the DOL, “[t]his is an issue of transparency and is critical to workers’ understanding of their legal rights and responsibilities.” Further, the DOL sees the new rules as encouraging “greater levels of compliance by employers, to enhance awareness among workers of their status as employees or independent contractors and employee rights and entitlements to minimum wage and overtime pay, and to facilitate DOL enforcement.”

For employers, the proposed regulations present significant changes to recordkeeping requirements. As with the proposed Employee Misclassification Act,

employers would be forced to examine how they classify their workers and be prepared to justify, in writing, the exemption status of employees to the DOL. These are potentially significant changes to federal wage and hour law and employers would be wise to keep close watch on the proposed changes.

Attorneys in Fox Rothschild’s Labor and Employment Department regularly counsel employers on compliance with federal and state wage and hour laws and assist in conducting internal wage and hour audits. If you have any questions regarding the proposed legislation or DOL amendments, please contact Wayne E. Pinkstone at 609.895.7063 or wpinkstone@foxrothschild.com or another member of the Labor and Employment Department.



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