

WAGE AND HOUR DIVISION UNVEILS PLANS TO SURVEY WORKERS' KNOWLEDGE OF THEIR CLASSIFICATION AS EMPLOYEES OR INDEPENDENT CONTRACTORS; MAY SIGNAL PLAN TO REACTIVATE "RIGHT TO KNOW" RULEMAKING

By Scott J. Wenner

From the advent of the Obama Administration, the U.S. Department of Labor has clearly expressed its intent to adopt an adversarial approach towards employers at the agency and sub-agency levels. As part of that strategy, the Department's Wage and Hour Division (WHD) hired hundreds more investigators and conducted more worksite investigations; imposed harsher penalties, which it widely publicized using "name-and-shame" tactics; and even sponsored the development of smart phone applications, *e.g.*, to help workers track their hours of work and alert consumers of businesses cited for wage and hour violations, among others.

Perhaps the most ambitious and provocative of WHD's efforts was its plan to publish a "right to know" rule. Intended as a means to facilitate WHD's broadside attack on what it claims is wholesale misclassification of employees by employers — both as exempt from overtime pay and as non-employee independent contractors — this rule would require employers to (1) provide each worker classified as either exempt or as an independent contractor with a written justification for that classification, and (2) maintain a written record of the justification for each position, which would be subject to inspection by the WHD.

Many in the employer community were surprised and relieved when, in January 2012, WHD, which had promised a "right to know" rule since at least 2010, moved it from the proposed rule stage to a longer-term status on its public agenda. WHD's announcement earlier this month of a classification survey certainly suggests the return of "right to know" to WHD's agenda of active issues.

Notice Published in *Federal Register*

On January 11, the WHD published a Notice in the *Federal Register* seeking comments on a proposal to collect information for a new study concerning worker classification. See, 78 Fed.Reg. 2447 (available here: <https://www.federalregister.gov/articles/2013/01/11/2013-00389/proposed-information-collection-request-icr-for-the-worker-classification-survey-comment-request>).

WHD says that it published the Notice to comply with the Paperwork Reduction Act's mandate to ensure that the government's information collection efforts are sound and economical. Ironically, the notice fails to disclose the contents of the proposed information request on which it is seeking comments, instead directing interested persons to contact an official at WHD and providing only a mailing address and telephone number. The decision not to publish the information request seems to fly in the face of the Paperwork Reduction Act's purposes, leaving the efficacy of the notice subject to challenge.

The Notice does state the purpose of the information collection it is planning and of the survey it is undertaking that the information collection will support.

Subject of Information Collection

WHD's Notice does not clearly express its plans. It suggests that the Information Collection Request for which the Notice is required will contribute to the design and development of, and methodology for, a Worker Classification Survey that the WHD will conduct or sponsor. The Notice discloses that the collection of information for this purpose be conducted over 30 months at a cost of \$1.8 million, and will be led by Abt Associates — a research and consulting firm.

The Planned Worker Classification Survey

While short on specifics, the Notice provides some information on the Worker Classification Survey contemplated by WHD. It describes the survey as a collection of information about "employment experiences and workers' knowledge of basic employment laws and rules so as to better

(continued on page 2)

(continued from page 1)

understand employees' experience with worker misclassification.”

According to the Notice, the WHD plans to use the survey to:

- “gather information about workers' employment and pay arrangements” and
- measure (i) “workers' knowledge about their current job classification” and (ii) “their knowledge about the rights and benefits associated with their job status.”

According to the Notice, “[t]his survey will provide critical information to Department policymakers on whether workers have knowledge of employment classification and whether they understand the implications of their classification status.”

Although it does not state directly, the Notice implies that the survey will focus on misclassification of employees as independent contractors and may not address misclassification of non-exempt employees as exempt from overtime entitlement.

Comments Are Solicited from the Public

The Notice requests comments on WHD's planned collection of information. However, as the Notice and comment period is intended to satisfy only the Paperwork Reduction Act, WHD seeks comments only that (a) evaluate whether the proposed collection of information is “necessary for the proper performance of the functions of the agency [and] will have practical utility;” (b) evaluate whether the agency's estimate of the burden of the collection effort and the validity of the methodology and assumptions are accurate; (c) add to the “quality, utility and clarity of the information to be collected;” and (d) minimize the burden on those responding, including through use of modern collection techniques.

1. This is consistent with WHD's steadfast refusal to provide any detail about what it expected “right to know” to require while it was a priority agenda item. When questioned about it during a couple of online Q & A sessions, WHD's Acting Director Nancy Leppink merely parroted the generalities in the Department's published fact sheets — “the intent of this rulemaking is to foster more openness and transparency in demonstrating employers' compliance with applicable requirements to their workers and to better ensure compliance by regulated entities” — calling disclosure before a rule was proposed premature.” (See, <http://www.dol.gov/regulations/chat-whd-static-201012.htm>).

Given the scope of the comments invited by WHD, which are to be limited to the efficacy of data collection request as required by the Paperwork Reduction Act, it does not appear that the agency would welcome comments on the broader subject of whether the Worker Classification Survey is an appropriate activity for the agency or a proper use of its resources. Nevertheless, this notice period might be the only opportunity for employers to express concerns about WHD's plans, which raise troublesome questions. Therefore, the effort might be worth it.

The WHD's Intentions Appear Purposefully Oblique

There is an absence of candor and, ironically, transparency, in WHD's Notice that is troublesome. Reference already has been made to its failure to include in the Notice a copy of the proposed information request on which it claims to be seeking comments — an odd omission indeed, considering the context.¹ But there are other troubling aspects to the Notice as well.

The WHD declares in the Notice that “[t]his survey will provide critical information to Department policymakers on whether workers have knowledge of their employment classification and whether they understand the implications of their classification status.” Yet, by including “right to know” on its agenda and asserting that it was a priority item, the agency already had concluded that the answer to the question it claims it now needs a survey to determine is a resounding “No.” Nor does WHD's Notice explain the asserted criticality of the survey information to the Agency's task, and why that recognition took three years to develop. Having concluded in 2010 that a “right to know” rule is a priority, it is not unfair to expect the survey to be designed to support that conclusion.

Even if the rationale presented by the Notice were more convincing, it is impossible to view “right to know” and, more immediately, the contemplated Worker Classification Survey, out of the context of the Labor Department's broader agenda and enforcement tactics, and its attacks particularly on the use of independent contractors. In the final analysis it is difficult not to view with suspicion the WHD's lack of transparency in all matters surrounding the transparency rule it seeks to foist on all employers. It remains to be seen whether the survey WHD has commissioned serves another tactical purpose in view of the otherwise weak and generalized conclusions offered in the Notice to justify it.

(continued on page 3)

(continued from page 2)

Possible Action Items

1. Publication of a “right to know” rule requiring all employers — not just a relatively few wrongdoers — to provide written analyses to all independent contractors and exempt employees of the reasons for their classification is a significant possibility in the next few years. Although publication of a final “right to know” rule may be a couple of years off in the future, it would be productive to begin taking a fresh look at positions presently classified as independent contractor functions and exempt employee positions and to begin considering whether and how your company could justify the classification designated. After all, WHD, state agencies and private attorneys will continue to challenge those designations whether or not a “right to know” rule exists.
2. Consider working with counsel in reviewing your classification justifications to maximize the prospects for protecting your drafts from discovery or production in an investigation.
3. Consider preparing comments concerning the WHD’s Information Collection Request for submittal to the agency by the March 12, 2013 deadline set forth in the Notice. Comments can be sent via email to WHDPRA-Comments@dol.gov. If transmitted by mail, hand de-

livery or courier, comments can be sent to: Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader’s Labor and Employment Practices Group or to speak with a member of the Firm, please contact:

*Scott J. Wenner, Chair
212-973-8115; 415-364-6705
swenner@schnader.com*

*Michael J. Wietrzychowski, Vice Chair
856-482-5723; 215-751-2823
mwietrzychowski@schnader.com*

www.schnader.com

©2013 Schnader Harrison Segal & Lewis LLP