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# Hot Topics in Wage & Hour Compliance

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# Why is Wage & Hour Law So Hot?

## Enforcement and Private Litigation!

- WHD division touts **over 24,700** enforcement actions conducted in 2021
- Wage and hour claims continue to be the most litigated employment claims
- **January 8, 2022**, DOL signed a MOU with the NLRB to collaborate on investigations and share data with the specified aim of reducing independent contractor misclassification
- **February 1, 2022**, DOL announced that it planned to hire 100 new investigators for the Wage and Hour Division to support its enforcement efforts

# The Hot Topics

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- DOL's New Rules
- Remote Work
- State Law Developments
- Key Litigation Concepts



DOL's New  
Rules

Independent  
Contractors

# Introductory Comment

- The Supreme Court appears ready to challenge the administrative state.
- What does this mean for employers?
  - Be flexible and patient
  - We will see more instances of the DOL issuing proposed rules and those proposals being challenged in court. The Supreme Court appears ready to entertain and uphold those challenges.
  - This creates a challenging compliance environment for employers on one hand but provides an opportunity to challenge unfavorable rules beyond just writing comments.

# DOL's New Proposed Independent Contractor Rule

## Proposed Rule

- Rescinds the 2021 Independent Contractor Rule
- Institutes Multifactor Totality of Circumstances test, giving *equal weight* to each factor.
- **DOL stated that the new rule is specifically designed to reduce the number of employees “misclassified” as independent contractors**
- Comments may be submitted until November 28, 2022

# DOL's New Proposed Independent Contractor Rule

## **Current Rule**

- The 2021 Independent Contractor Rule was designed to streamline and simplify the analysis
- The 2021 Rule assigned greater weight to “control over the work” and “opportunity for profit or loss” factors of the Economic Realities Test

# DOL's New Proposed Independent Contractor Rule

## **Current Rule (cont.)**

- If the two primary factors (control & profit or loss) favor the same classification status, then the analysis stops. If the two factors favored differing classifications, then the analysis proceeds to consider three additional factors:
  1. Degree of permanence of the working relationship between contractor and potential employer
  2. Amount of skill required for the job
  3. Whether the work performed is part of an integrated unit of production



# DOL's New Proposed Independent Contractor Rule

## **The Multi-Factor Economic Realities Test**

1. The opportunity for profit or loss depending on managerial skill;
2. The investments by the worker and the employer;
3. The degree of permanence of the work relationship;
4. The nature and degree of control;
5. The extent to which the work performed is an integral part of the employer's business; and,
6. The skill and initiative of the worker.

# DOL's New Proposed Independent Contractor Rule

## What does the proposed rule mean for employers?

- Stop relying on the 2021 Rule
- Expect increased enforcement
- ***CONFIRM COMPLIANCE***
  - Proposed Rule tracks guidance issued under Obama administration, and tracks closely with several Circuits already following a similar test (Second, Third, Sixth, Seventh, Tenth Circuits) so compliance structures may already be in place

# DOL's New Proposed Independent Contractor Rule

## **What does the proposed rule mean for employers?**

- Will not affect states that have more stringent Independent Contractor tests such as California, New Jersey, Massachusetts, Illinois
- “Gig economy” companies could find it much harder to classify low-skill workers as independent contractors under the sixth element, especially in light of the “integral to the employer’s business” factor

# Independent Contractors -State Law

## **States Continue to Define Independent Contractors**

- California follows the strict ABC test which presumes employment unless employer can show that worker is free from control, engaged in a line of work separate from its own, and established as an independent firm.
- Massachusetts and New Jersey both have employee presumptions in their ABC tests
  - New Jersey law also requires payment of back taxes as part of its Unemployment Compensation Law and forced Uber to pay \$100 Million to the state for misclassification of its drivers

# Independent Contractors -State Law

## **States Continue to Define Independent Contractors**

- New York's Freelance Isn't Free Act requires written contracts for freelance workers that must include an itemization of the work to be done, the value of the work and payment rate, and due date for payment after completion (or within 30 days)
- Virginia follows the 20-factor IRS test for purposes of minimum wage

# DOL's New Independent Contractor Rule

## **Common Myths About Classifying Independent Contractors**

- “We send the individual a 1099”
- “We signed an agreement that states they’re an independent contractor”
- “The employee operates under an LLC or other business form”
- “We don't pay them a salary or hourly rate”



DOL's New  
Rules

White Collar  
Exemptions

# Changes to White Collar Exemptions

- DOL has included review of the white collar exemptions on its regulatory agenda since July 2021 and in June 2022 scheduled a Notice of Proposed Rulemaking for October 2022.
- We still hear that changes will be proposed in 2022.
- At a minimum, DOL will propose increasing the salary threshold. Changes to the highly compensated employee exemption and the duties tests are also possible.



# Increased Salary Threshold

- **Current Threshold** of \$684/week set by Secretary Scalia's DOL on September 24, 2019
- Secretary Walsh, testifying in front of the Education and Labor Committee on June 9, 2021 stated that the **current salary was “definitely” too low and agreed that “automatic updates” were necessary.**
- In 2016, the Obama-era DOL proposed \$913/week (\$47,476 annual); some groups are now pushing for \$1,000/week.
- Automatic updates rule likely

# Increased Salary Threshold

An increased salary threshold is not just a federal issue. States that increased their salary requirements in 2022 include:

- **California**
  - <25 employees: \$1,120/week (\$58,240 annually)
  - >26 employees: \$1,200/week (\$62,400 annually)
- **Colorado**
  - \$865.38/week (\$45,000 annual equivalent)
- **Maine**
  - \$735.59/week (\$38,251 annually)
- **New York**
  - \$1,125/week for New York City and Nassau, Suffolk, Westchester Counties (\$58,500 annually)
  - \$990/week for rest of state (\$51,480 annually)
- **Washington**
  - \$1,014.30/week (\$52,743.60 annually)

# Highly Compensated Employee Exemption

- Threshold increased from \$100,000 to \$107,432 in 2020.
- Original proposal in 2019 was an increase to \$147,414.
- Remember, highly compensated employee exemption **is not available** in all states, for example:
  - California
  - Missouri
  - Pennsylvania
  - New York

# Highly Compensated Employee Exemption

- Keep an eye on ***Hewitt v. Helix Energy***, which was argued before the Supreme Court on October 12. The issue is what constitutes a “**salary**.”
- Note the comments of Justices Kavanaugh and Gorsuch during oral argument that the salary basis requirement is not found in the FLSA and that the regulations requiring a salary basis may be inconsistent with the statute.



# DOL's New Rules

## Tip Pooling

# Tip Pooling Rule

- DOL's tip pooling rule went into effect on **December 28, 2021**
- Cemented the 80/20 rule into regulation: employers must pay minimum wage to tipped workers who spend more than 20% of their workweek on non-tipped tasks

# Tip Pooling Rule Challenged

- Following Supreme Court's ruling in ***West Virginia v. EPA*** which held that agency overstepped its authority under the “major questions” doctrine, Restaurant Law Center, *et al.* filed a notice of supplemental authority citing the case
  - Asserting the DOL similarly overstepped their Congressionally-granted powers by issuing the new 80/20 rule
  - Case currently pending in Western District of Texas



DOL's New  
Rules

Prevailing  
Wages



# Prevailing Wages

## The Davis-Bacon Act (DBA)

- Applies to contracts (a) for construction, alteration, or repair of public works to which the federal government or DC is a party, (b) involving manual laborers, (c) in excess of \$2,000 (and to subcontracts)
- Sets prevailing rates for wages and fringe benefits set by DOL's Wage & Hour Division
- Maintain accurate payroll records and submit them to contracting agency on a weekly basis
- Non-exempt employees who perform manual labor and administrative work during the same workweek must be paid at least as much as the prevailing wage whether hourly or salaried

# Prevailing Wages

## The Davis Bacon Act – NPRM

- NPRM issued March 2022 and comment period closed in May
- Returning to 30% rule of 1935 versus current 50% rule
  - In the absence of a wage rate paid to majority of workers in a classification, then a wage rate will be considered “prevailing” if paid to at least 30% of workers
  - Also eliminates separate urban and rural wage rates which would be comingled for determination of prevailing rate

# Prevailing Wages

## The Davis Bacon Act – NPRM

- “Off-site” construction of “significant portions” of a building now covered
- Propose making contract clauses and wage determinations effective by “operation of law” meaning that DBA requirements can be enforced even when they’re not included in the funding agency’s contract with the contractor
- Anti-retaliation provisions to protect workers who complain of prevailing wage violations

# The Infrastructure Investment and Jobs Act and Prevailing Wages

## Why are prevailing wages a hot topic now?

- DOL estimates that “most” of the construction projects spurred by the \$1.2 trillion in the IIJA will be subject to prevailing wage standards laws
- Some may already be familiar with the **Davis-Bacon Act**, but many new federal contractors will be created by taking IIJA funds

# The Infrastructure Investment and Jobs Act and Prevailing Wages

*Additional Applicable Laws:*

## **The McNamara-O'Hara Service Contract Act**

- Like the DBA, but for service workers on prime contracts in excess of \$2,500
- Contracts >\$100,000 subjects contractors to 1.5x overtime rate for 40+ hours

## **Walsh-Healy Public Contracts Act**

- Establishes minimum wage, maximum hours, and safety and health standards for contracts in excess of \$15,000 for manufacturing or furnishing materials, supplies, articles, or equipment to the federal government



# Compensation in the Remote Work Era

# Recording Hours Worked

## Recordkeeping

- For **nonexempt** employees, employers must record:
  - Time and day of the week when employee's work week begins;
  - Total hours the employee worked each workday and workweek;
  - The exact number of hours worked each workday and workweek, if an employee does not work their normal schedule. 29 C.F.R. § 516.2.
- "Off-the-clock" Work
  - Example: An hourly employee sends a late-night email outside of their normal work hours.
  - MUST be recorded.

# Recording Hours Worked

## Compensable Time

- FLSA **requires** employees to be paid for **all** work time “suffered or permitted” including work performed at home (29 U.S.C.S. § 203(g), 29 C.F.R. § 785.11, .12.)
  - **Even if it is unauthorized work!**
- “Suffered or Permitted” = Employer Knowledge
  - Actual or Constructive knowledge of an employee performing work.
  - Constructive knowledge if employer should have acquired that knowledge through reasonable diligence.
- **But!** Employees who telework and use time during workday for personal purposes (e.g., childcare), do not need to be compensated for such time, if completely relieved of duties. See DOL: COVID-19 and the Fair Labor Standards Act Questions and Answers, A. 21.



# Recording Hours Worked

## Federal Guidance on Tracking Compensable Time

- DOL Issued Field Assistance Bulletin No. 2020-5
  - Reasonable diligence demonstrated by providing a reasonable procedure for reporting unscheduled work.
  - **NOT** reasonable if:
    - ✓ Prevents or discourages employees from reporting work time;
    - ✓ No proper training on procedures;
    - ✓ Requires employees waive right to compensation for hours worked.
- *No requirement to conduct investigation into unreported hours if system is reasonable but employee did not use it.*

# Compensation in the Remote Work Era

## What Should Employers Do?

### 1. Inform

- Strict policy in Employee Handbooks prohibiting “off-the-clock” work and time fraud for failure to report time.
  - Account for differences in state laws with handbook or policy addenda for specific states.
- Train supervisors on FLSA requirements for “off-the-clock” so that it’s not assigned in the first place.

# Compensation in the Remote Work Era

## What Should Employer's Do?

### 2. Monitor

- Establish process, and train employees to report all time worked.
- Monitoring log-in times of employees; or *block* log-in after scheduled hours.

### 3. Discipline

- “Unauthorized Work” is misconduct – enforce it evenly.
- 29 C.F.R. § 785.13: “The mere promulgation of a rule against [unauthorized overtime] is not enough. Management has the power to enforce the rule and must make every effort to do so.”

# Compensation in the Remote Work Era

## Sample Timekeeping Policy

### Timekeeping and Reporting for Non-Exempt Employees

If you are classified as a NON-EXEMPT employee, you must maintain an accurate record of the total hours you work each day. Your time card must accurately reflect the time you begin and end work to ensure accurate reporting of all regular and overtime hours worked, any absences, breaks, lunch periods, late arrivals, early departures or overtime worked. At the end of each pay cycle, you should submit your completed and signed time card or time sheet to your manager for verification and approval.

NON-EXEMPT employees are prohibited from performing any "off-the-clock" work. "Off-the-clock" work means work performed and not included in total hours worked during a workday. Employees must take notice that, although they are given access to Company voicemail and email before or after normal hours of operation, NON-EXEMPT employees may not respond to after-hours work-related communications without explicit authorization from their supervisor. NON-EXEMPT employees must provide a written record of the time spent on the communication(s) for signature and validation by the supervisor. Any NON-EXEMPT employee who fails to report any hours worked will be subject to disciplinary action, up to and including termination.

It is a serious violation of Company policy for any employee to direct a NON-EXEMPT employee to change their own time card, or another NON-EXEMPT employee's time card, to under or over-report hours worked. If you are asked to change your own time card or are directed to inaccurately report your hours worked at any time, report it immediately to Human Resources. Fraudulent timekeeping and falsification or altering of time records are serious policy violations subject to discipline, up to and including termination of employment.

# FLSA Outside Sales Exemption

## Outside Sales Exemption

- FLSA defines an “outside salesperson” as one who is customarily and regularly engaged away from the place of business (29 C.F.R. § 541.500.)
- Outside sales does not include “sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls”
- *Home = place of business for remote workers?*
  - 29 C.F.R. § 541.502 – “any fixed site, whether home or office, used by a salesperson as a headquarters...is considered one of the employer’s places of business”
  - “customarily and regularly” is a low bar - DOL Wage Hour Op. Lt. FLSA2020-6 (June 25, 2020) (“one or two hours a day, one or two times a week” can pass the test)

# FLSA Outside Sales Exemption

## Outside Sales Exemption (cont.)

- Fully remote employees who do not travel may be misclassified
- **Tip:** to preserve exemption, require salespeople to make in-person visits to clients on a regular basis as part of performance metric

# Expense Reimbursement

## California

- Must indemnify employees for necessary expenses or losses incurred in the discharge of an employee's duties (***includes attorney's fees incurred in enforcing rights!***). Cal. Lab. Code § 2802.
  - Cell Phone Service – some “reasonable percentage of employee's cell phone bill”
  - Internet Service
  - Computers and Printers - “reasonable percentage” for use of personal equipment
  - Vehicle expenses when vehicle required - pay actual expenses or mileage

# Expense Reimbursement

## *Illinois*

- Employers must reimburse employees for necessary expenditures or losses incurred in the scope of employment and directly related to services performed for the employer. 820 Ill. Comp. Stat. 115/9.5.
- Necessary expenditures **include**:
  - all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer
- Necessary expenditures **do not include**:
  - Losses due to negligence
  - Normal wear
  - Theft unless caused by employer's negligence



# Expense Reimbursement

## *Illinois (cont.)*

- Employer not liable for expenses if:
  - Expenditure was unauthorized;
  - Employee did not follow employer's *written* reimbursement policy.
- Examples: Vehicle expenses and cell phone expenses - *Dennis v. Greatland Home Health Servs., Inc.*, No. 19-CV-5427, 2022 WL 767228, at \*6 (N.D. Ill. Mar. 14, 2022) (certifying class)

# Compensation in the Remote Work Era

## Sample Expense Reimbursement Policy

### Expense Reimbursement Policy

It is the Company's practice to reimburse employees for reasonable expenses incurred during the period they are employed by the Company in connection with travel and other business on behalf of the Company, subject to the guidelines and procedures set out in this policy. Employees must obtain advance written approval from Human Resources and receipts or other appropriate substantiating documentation for all travel and other business expenses incurred.

### Covered Expenses

Necessary work-related expenses may include, but are not limited to:

- Use of an employee's personal vehicle for business purposes.
- Business travel expenses such as meals and lodging.
- Tools and equipment required to perform the employee's job.
- Use of an employee's personal cell phone for business purposes.
- Required uniform purchase and maintenance.

Employees who work from home may request reimbursement for expenses incurred such as office supplies, internet access and required equipment costs.

\* \* \*



# State Law Developments

# State Law Survey

## Virginia

### Overtime

- Virginia Overtime Act changed to be consistent with FLSA in July 2022
- The following was removed:
  - Regular rate based on 40 hours instead of all hours worked
  - Treble damages
  - No requirement of willfulness for three-year statute of limitations

# State Law Developments

## Maryland

### Prevailing Wage Enforcement

- Effective October 1, 2022, Commissioner of Labor and Industry has authority to stop work on any public project where contractor fails to pay prevailing wage to workers
  - Applies to the **ENTIRE** project
  - Applies to prevailing wages at any tier, including subcontractors
- Notice will be provided, and Commissioner's must meet with offending contractor within 48-hours of stoppage
- Permits a contractor to terminate the contract of an offending subcontractor without liability

# State Law Developments

**D.C.**

## **Initiative 82**

- Ballot measure to phase out the tip credit
- By 2027, employers would have to pay the full minimum wage
- Similar measure passed in 2018 but overturned by the D.C. Council

# State Law Developments

## New York

### **“Manual Worker Law”**

- Sec. 191, New York Labor Law requires that “a manual worker shall be paid weekly and not later than seven calendar days after the end of the work week in which the wages are earned”
- NY DOL says that a manual worker is a person who spends more than 25% of work time engaged in physical labor
- Damages may be significant: ½ of the employer’s payroll for the six-year statutory period
- Retail, transportation, hotel, and restaurant industries are favorite targets of class action claims
- Employers may receive authorization from the NY Commissioner of Labor to pay manual workers less frequently



# Key Litigation Issues



# Litigation Issues

## ***Bristol-Myers Squibb – Split of Authority***

- Basic Principle: federal courts may exercise jurisdiction over claims of out-of-state plaintiffs in collective actions **only in states in which the employer has its principal place of business or is incorporated**. This authority is important because it can limit collective actions to residents of a single state.
- The 3<sup>rd</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Circuits **apply** *Bristol-Myers Squibb* to collective actions.
- The 1<sup>st</sup> Circuit does **not apply** *Bristol-Myers Squibb* to collective actions.

# Litigation Issues

## Gap Time Claims – Split of Authority

- Gap time – hours that are not usually covered by the FLSA's overtime or minimum wage provisions.
  - **Pure Gap Time** – straight time worked in a week in which no overtime hours were worked.
    - Example: Employee typically scheduled to work 35 hours/week for a set amount, above minimum wage. One week, employee works 40 hours. However, paycheck is unchanged for that week because no overtime hours worked, and employee still paid above minimum wage.
  - **Overtime Gap Time** – straight time worked during a week in which overtime hours were worked.
    - Example: Employee typically scheduled to work 35 hours/week for a set amount, above minimum wage. One week, employee works 50 hours. However, paycheck *must* increase for that week to reflect 1.5X for hours worked over 40, even if typical weekly paycheck would still average out to be above minimum wage.

# Litigation Issues

## Gap Time Claims – Split of Authority

- The 4<sup>th</sup> Circuit now recognizes overtime gap time claims.
- The 2<sup>nd</sup> Circuit does not recognize overtime gap time claims.
- This issue is important because recognizing overtime gap time claims increases damages significantly in FLSA collective actions.

# Litigation Issues

## Arbitration in California – *Viking River Cruises*

- Highly anticipated ruling by the US Supreme Court
- California courts held that arbitration agreements with class action waivers **are not enforceable** in PAGA cases. This caused a tidal wave of PAGA class actions in CA.
- The US Supreme Court held that the FAA preempts CA law and that PAGA claims are subject to individual arbitration.
- Employers should make sure their arbitration agreements with class action waivers are compliant and enforce them in PAGA cases.
- **BUT BEWARE OF MASS ARBITRATIONS.**

# Questions?

