SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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DOL finalizes worker classification regulations, but will they survive a new administration?

Earlier this month, the United States Department of Labor announced a final rule clarifying the standard for employee versus independent contractor status under the Fair Labor Standards Act. The Secretary for the Department of Labor stated that this new rule will make it easier to identify employees covered by the Act, "while recognizing and respecting the entrepreneurial spirit of workers who choose to pursue the freedom associated with being an independent contractor."

This new rule reaffirms an "economic reality" test to determine whether an individual is an employee or an independent contractor. According to the new rule, the two most probative factors are the nature and degree of control over the work and the worker's opportunity for profit or loss based on initiative and/or investment. Additional factors that may help guide one's analysis are the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production.

When the new rule was announced at the beginning of the month it was set to take effect on March 8, 2021. However, on January 20, 2021, shortly after President Biden's inauguration, the White House issued a memorandum to all executive departments and agencies requesting they halt all non-emergency rulemaking and regulatory activity pending review by the new administration. This memorandum has effectively put a freeze on the implementation of DOL's new worker classification rule, pending the Biden administration's review.

For information on the new rule, click here.

To read the White House memorandum, click here.

New Administration Impacts Labor and Employment Laws

With any new presidential administration comes new policies and changes in law. Several of President Joseph Biden's policies and proposals will impact the workplace, and the following are just some of the issues of which employers should be aware:

"Robust Regulatory Action" by the Department of Labor

Upon taking office, President Biden took action which revoked several executive orders by the prior administration related to the Department of Labor's regulatory authority. This resulted in the Department of Labor rescinding its Promoting Regulatory Openness Through Good Guidance Rule ("PRO Good Guidance Rule"), which imposed heightened burdens on the

Department of Labor before taking regulatory action. With the withdrawal of this rule, employers should expect more "robust regulatory action" by the Department of Labor in the next four years.

Read more here.

Gender Identity and Sexual Orientation Discrimination

In an executive order issued on January 20, 2021, President Biden set out his administration's policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation . . . ." Under this executive order, the Department of Labor and other federal agencies shall review "all existing orders, regulations, guidance documents, policies, and programs, or other agency actions . . . that were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination." Such agencies "shall consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions" to implement the administration's policy prohibiting gender discrimination and sexual orientation discrimination.

Read more here.

COVID-19: New Workplace Safety Standards Likely to be Implemented

On January 21, 2021, President Biden issued an executive order "Protecting Worker Health and Safety." This executive order requires federal agencies to issue "revised guidance to employers on workplace safety during the COVID-19 pandemic." Also under this executive order, the Occupational Safety and Health Administration ("OSHA") shall "consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021."

Read more here.

Federal COVID-19 Leave Benefit Obligation Expired, but Tax Credit Lives On

The Labor and Employment Law Alert has extensively covered all things employment-related touching on the pandemic over the past year. We have written on the Families First Coronavirus Response Act ("FFCRA") and its COVID-related leave obligations. As we have previously written, the leave obligations sunset on December 31, 2020. Nevertheless, President Trump signed House Bill 133 at the end of December which allows employers the option to continue providing paid leave consistent with the FFCRA and receive a tax credit for such leave until March 31, 2021.

The bill can be found here.

DOL Clarifies Position on Travel Time and Certain FLSA Exemptions

The United States Department of Labor ("DOL") has recently released several opinion letters from its Wage and Hour Division. These letters address a variety of issues relating to the Fair Labor and Standards Act ("FLSA") including the compensability of travel time and whether certain employees can be compensated for travel time. These letters can be summarized as follows:

FLSA 2020-19: This letter addresses the compensability of travel time. Specifically, this letter addresses whether an employee who is given permission to leave work for a personal purpose and then travel home to resume working from home for the remainder of the day must be paid for the intervening travel time between their personal activity and returning home in a variety of circumstances. Drawing on its precedents regarding travel time, the DOL notes that the travel time is not compensable during this time because the employee is "off duty" and able to perform personal activities during the intervening time, regardless of when they resume working. The DOL went on to state that, when an employee can perform a work task at any time at home, i.e., uploading documents from home after work or before returning to a worksite the next day, that time does not qualify for compensable travel time merely by uploading the documents immediately before returning to the worksite, because they could complete this task at any time. However, the DOL also reiterates its opinion that direct travel between worksites is compensable time under the FLSA, such as when a construction worker moves between projects during the day.

FLSA 2021-6: This letter addresses whether a staffing firm qualifies as a "retail or service establishment" under the FLSA for the purposes of determining whether an employee qualifies for a commission exemption from overtime pay requirements. The letter clarifies that a staffing firm qualifies as a service establishment, and that the recent withdrawal of the "non-retail" list would not prohibit the staffing industry from being a qualifying service industry under the definition of the FLSA. It is important to note that a staffing agency must not have more than 25% of its "sales" attributable to resale, which the letter defines as referring candidates to other staffing firms, and that an employee must otherwise qualify for the commission exemption through earning more than one and one half the applicable minimum wage and having more than 50% of their wages attributable to a commission.

FLSA 2021-7: This letter addresses whether small-town journalists and community news source journalists qualify as creative or learned professionals for the purposes of being exempt from the minimum wage and overtime provisions of the FLSA. In addressing this question, the DOL refers to its long-standing opinion that a news reporter that "merely recounts the facts" or "re-writes press releases" does not qualify for this exemption, while a reporter that contributes a "unique interpretation or analysis to a news product" is likely to qualify for such an exemption. The letter notes that the shift from "just the facts" to "context based" reporting in small-town journalism, where journalists gather information and present a story as opposed to simply recounting facts, qualifies these individuals as creative professionals for the purpose of the FLSA. In order to maintain this exemption, reporters must earn a minimum of $684 per week pursuant to the DOL's minimum salary requirements.

While two other opinion letters, FLSA 2021-8 and FLSA 2021-9 were released in January as well, these letters were later withdrawn by the Biden administration and have no binding effect. To read more on these topics, please click here, here, and here.

Equal Employment Opportunity Commission Approves Final Rules and Opinion Letter During Public Meeting

In a remotely held public meeting, the United States Equal Employment Opportunity Commission ("EEOC") approved a final rule updating the Commission's Conciliation Procedures. The EEOC's new rule on conciliation procedures outlines its responsibilities in the conciliation process to fulfill its Congressional mandate and to increase the effectiveness of its efforts to achieve cooperation and voluntary compliance with federal employment discrimination laws.

During this meeting, the EEOC also approved a formal opinion letter concerning Individual Coverage Health Reimbursement Arrangements ("ICHRA") and potential liability under the Age Discrimination in Employment Act of 1967 ("ADEA"). The opinion letter concludes that ICHRAs, in which employers deposit the same dollar amount regardless of an employee's age, do not violate the ADEA because all employees receive the same amount from the employer and the employer is not involved in the employee's decision about which health insurance to purchase. In addition, the letter explains that employers that choose to increase the amount deposited into an older employee's ICHRA account in order to offset age-based increases to his/her health plan costs do not violate the ADEA.

For more information, click here.

EEOC Proposes New Limits on Wellness Program Incentives

The EEOC is seeking public comment on proposed changes to the rules governing incentives provided to employees to participate in wellness programs. The EEOC is attempting to return to a threshold of de minimis incentives rather than the current 30 percent rule adopted in 2016. (It should be noted that the proposed changes will only apply to those programs which track employee health data.) These changes attempt to address the concern that if an incentive is too high some employees may feel compelled to participate in the program to reap the benefit or avoid a penalty. And in doing so, the employee may unintentionally disclose conditions which are protected by the Americans with Disability Act ("ADA") and Genetic Information Nondiscrimination Act (GINA).

Public comments are being accepted through March 15, 2021.

Please see the EEOC's website for further information and procedure to submit comments at www.EEOC.gov.

New Schedule 2021 Opening of EEOC Data Collections

The EEOC has announced the scheduled 2021 openings of EEOC Data Collection periods. Below is a preliminary schedule for filing data collection forms from 2019, 2020 and 2021 depending on classification. This schedule is for private sector, school districts, local referral unions and state & local governments. Exact dates will be announced on the EEOC home page at www.eeoc.gov. You may visit https://EEOCdata.org for more information.

April 2021: 2019 and 2020 EEO-1 Component 1 Data Collection (Private Sector Employers)
July 2021: 2020 EEO-5 Data Collection (Public Elementary/Secondary School Districts)
August 2021: 2020 EEO-3 Data Collection (Local Referral Unions)
October 2021: 2021 EEO-4 Data Collection (State/Local Governments)

On the lighter side: King's Hawaiian Rolls are on the ~~menu~~ docket!

Buyer Beware! You will not be ingesting the sweet aromas of the Hawaiian Islands when you bite into a King's Hawaiian Roll. A firm in New York has filed a consumer class-action lawsuit claiming that the maker of King's Hawaiian Rolls misleads the public on the location at which those tasty dinner rolls are actually baked. King's Rolls are baked in Torrance, California and Flowery Branch, Georgia, but the packaging shows a picture of Hilo, Hawaii. The lawsuit asserts that consumers will be misled by the location of the bakery, and as such, harmed. But, let's be honest; who really cares as long as they keep making them!

Firm News

On January 29, 2021, Terry J. Harmon served as a panelist for The Florida Bar's Education Law Certification Exam Review. Mr. Harmon presented "Florida's Administrative Procedures Act."

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