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Don’t Drop the Ball in the New Year: Wage and Hour Issues Employers ?Should Watch Out for in 2023?

Labor & Employment Workforce Watch

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Employee vs. Independent Contractor Issues

As we previously covered, on October 13, 2022, the United States Department of Labor (“DOL”) issued a proposed new rule for classifying workers under the Fair Labor Standards Act. The proposed rule largely mirrors the Obama-era test, which seeks to focus “on the economic realities of the workers’ relationship with the employer,” and frames a worker’s economic dependence on their employer as the “ultimate inquiry” for the test. The comment period for the proposed rule closed on November 28, 2022, with an unprecedented 52,644 comments submitted.

The biggest change outlined by the proposed new rule would be the rescinding of the 2021 Independent Contractor Rule. This rule, put in place during the final days of former President Donald Trump’s administration, utilized an “economic realities test” that focused on two factors: (1) the nature and degree of the individual’s control over their work, and (2) the individual’s opportunity for profit or loss.

According to the DOL, the new proposed rule would do the following:

- Align the department’s approach with courts’ FLSA interpretation and the economic reality test.
- Restore the multifactor, totality-of-the-circumstances analysis to determine whether a worker is an employee or an independent contractor under the FLSA.
- Ensure that all factors are analyzed without assigning a predetermined weight to a particular factor or set of factors.
- Revert to the longstanding interpretation of the economic reality factors, including the investment, control and opportunity for profit or loss factors. The integral factor, which considers whether the work is integral to the employer’s business, is also included.
- Assist with the proper classification of employees and independent contractors under the FLSA.

The proposed rule is intended to encourage employers to classify more borderline independent contractors as employees and/or hire more workers as employees, thus providing them the additional protections generally afforded to employees, such as eligibility to participate in company benefit plans, coverage under federal, state, and local employment laws, and other employment rights. However, critics of the proposed rule have countered that increased costs associated with engaging an individual as an employee versus an independent contractor (potentially up to 30% more), may discourage employers from retaining certain workers if they are considered to

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be employees or from hiring additional employees to replace current independent contractors. For a more detailed analysis of the DOL's proposed rule, and the potential implications for employers, see our QuickStudy on this topic.

Employers should monitor the proposed changes to independent contractor classification in 2023, as well as developments throughout the various states that have adopted or may adopt different classification standards.

Minimum Wage Increases in Certain States

The federal minimum wage rate for US employees will continue to be $7.25 per hour in 2023. However, several states have established their own rates that have or will be implemented in 2023. For example, Washington state's minimum wage will increase to $15.74 per hour (the highest state minimum wage in the United States currently) and California will increase its minimum wage to $15.50 (the second-highest in the country).

Two states, Connecticut and Massachusetts, will satisfy their scheduled incremental increases to bring both their minimum wages to $15.00. Six other states have made incremental increases in 2023 to move one step closer to reaching that milestone in the coming years:

- New Jersey (2024?)
- Delaware, Illinois, Maryland (for large employers), and Rhode Island (2025)?
- Florida and Maryland (for small employers) (2026?)

Florida's incremental minimum wage increase will take effect at the end of ?September. Employers should keep up with these minimum wage changes in various states, as they are increasing regularly, and failure to observe newly-implemented wage laws can result in a multitude of fines and penalties.

Colorado Paid Family and Medical Leave and Related Issues

Joining several other states that provide for paid family and medical leave for employees, Colorado's Paid Family and Medical Leave Insurance ("FAMLI") program went into effect on January 1, 2023. FAMLI provides Colorado employees with twelve weeks of paid family and medical leave funded through a payroll tax, which is paid half by employers and half by employees. Employees who take leave for pregnancy or childbirth complications may receive up to sixteen weeks of FAMLI leave.

FAMLI provides coverage for similar types of leave as the federal Family and Medical Leave Act ("FMLA") (*e.g.*, to care for a child following birth adoption, or placement through foster care, to care for a family member with a serious health condition, to care for the employee's own serious health condition, or to take qualifying leave relating to military service). In addition, FAMLI provides for "safe leave," which includes time to obtain a civil protection order, receive medical or mental health care for themselves or a family member, secure their home from a perpetrator, or seek legal assistance for domestic violence, stalking, sexual assault, or abuse-related issues.

An employee's wages are subject to premiums if: (1) the employee's entire service is performed in Colorado; or (2) the employee performs services inside and outside of Colorado but the services performed outside the state

are incidental to the work performed inside the state. Where the services are not localized in any one state, an employee's wages may still be subject to premiums where they meet certain requirements laid out in the law.

FAMLI applies to all employers in Colorado with one or more employee in the state, so essentially all Colorado employers are covered under the program. Notably, under the FAMLI statute, all workers are entitled to FAMLI benefits once they have earned $2,500 in Colorado at any point over the preceding year. Therefore, most Colorado employees will be eligible for FAMLI benefits on or soon after beginning their employment, unlike the federal Family and Medical Leave Act (FMLA), which provides that employees are not eligible for FMLA benefits until they have been employed for at least 12 months.

Although employees cannot begin taking FAMLI leave until January 1, 2024, employers were required to begin remitting premiums on January 1, 2023.

Other states and municipalities that currently have implemented some type of paid family and medical leave programs include California, Connecticut, Delaware, the District of Columbia, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Virginia, and Washington. Maryland also passed a paid family and medical leave act program that will become effective in 2025.

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