Las Vegas Chamber of Commerce

Update on Federal Labor Issues

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Some Key Labor and Employment Issues Employers are Facing

- Changes to overtime regulations
- Aggressive Wage and Hour Division enforcement and Administrator's Interpretations
- New NLRB joint employer standard
- EEOC new data collection report
- New NLRB union "ambush" election rules regulations
- DOL Persuader regulation
- Aggressive OSHA regulatory and enforcement agenda
- State and local agendas (minimum wage, paid sick leave, etc.)

Revisions to Overtime Regulations for Executive, Administrative, and Professional Employees

- Final Regulation in *Fed. Reg.* May 23, effective Dec. 1
- Employees eligible for overtime compensation unless all three criteria met:
  - Must be paid a salary
  - Salary must be more than threshold—previously $455/week ($23,660/year)
  - Must qualify under exemption category—meet primary duties test
- New salary threshold is $913/week or $47,476/year
  - New salary level higher than CA
  - 100+% increase
- For first time salary level will be adjusted every 3 years
  - Based on 40th percentile of full time salaried workers in lowest income region of the country, right now the South
    - But South includes MD, VA, and DE
  - DOL doesn't want to go through trouble of rulemakings

Credit for Commissions, Bonuses, Incentives

Up to 10% of the $47,476 salary can come from nondiscretionary bonuses and incentive payments

- Such payments must be paid on a quarterly or more frequent basis
- The employer is “permitted” to make a “catch-up” payment no later than the first pay period of the next quarter

Highly Compensated Employees

- HCEs have to meet salary threshold (previously $100K) and be performing only one of the duties associated with an executive, administrative or learned professional employee
  - Presumption is that if paid this level then not eligible for overtime
- New salary threshold for HCEs will be $134,004/year
  - HCE annual compensation level set to the 90th percentile of earnings for full-time salaried workers annually in lowest income region and adjusted every 3 years

Potential Primary Duties Test Changes

- No actual *proposed* changes to the primary duties tests
  - Expected a proposed quantification requirement ala California: time spent performing primary duties must be "more than 50%"
- Instead, questions posed in preamble on possible changes
  - DOL "considering" California example
  - Also targeted "concurrent duties" for executive exemption
- Statement in press that absence of proposed regulatory text does not preclude changes in final regulation
- No changes to duties test in final regulation.

Chamber Comments

- Proposed salary level ($50,440) too high, especially for non-profit, government, healthcare employers and small businesses.
- If DOL adopts the proposed 113% salary level increase, the agency should provide a one-year effective date and phase-in the increase over five years.
- DOL should allow all non-discretionary bonuses and commissions to count toward the minimum salary level for exemption.
- Adopting annual automatic increases to the salary level or any changes to the duties test without proposed regulatory text violates the Administrative Procedure Act.
- DOL should make no changes to the Primary Duties test

Impacts of the Changes: Employees May Not Benefit

- Reduced hours for employee if they are reclassified—**eligible for OT is not the same as earning OT**
  - Same income, just recalibrated on hourly basis—only get paid for hours worked
- Loss of flexibility if now on the clock
- Loss of ability to work remotely and employer provided technology—email off hours would have to be compensated
- Loss of opportunities to travel since time would have to be captured and compensated
- Loss of preferred benefits for salaried workers
- Loss of career opportunities/perceived lower status

Path to Stop or Modify the Rule?

- Congressional Review Act
  - Congress must pass a joint resolution within 60 legislative days after publication of the Final Rule—if Congress adjourns reg is bumped to next Congress
    - May 23rd right up against deadline
  - Must be signed by the President
- Appropriations rider—included in House LHHS bill
  - Very hard to get done, final package not until December
  - If regulation is final and in place undoing changes creates more problems
- Litigation?

Legislative Response

Protecting Workplace Advancement and Opportunity Act (S. 2707/H.R. 4773)

- Would nullify the Department of Labor's overtime regulation
    - CRA style language
- Requires that any new proposed reg be more responsive to small businesses, nonprofits, regional economies, local governments, Medicare and Medicaid dependent health care providers, and academic institutions.
- Would prohibit any future proposed regulation from including any form of automatic update.

New bills?

Compliance, Step-By-Step

- Identify employees who are currently exempt and being paid between $23,660--$47,476
  - Reclassify or increase salary to keep exempt?
- Develop new compensation plan for the reclassified employees
  - Same income in hourly format?
  - Include expected OT, or let employee earn OT?
  - Change in benefits?
- Communicate the changes to employees
  - Explain why reclassifying—NOT demotion
- Train the reclassified employees and their managers
  - What will now be compensable time, how employees will have to track their time
  - Use of electronic technology, remote access/email/travel?

Overtime Regulation: Only the Tip of the Wage and Hour Iceberg

- WHD Administrator David Weil's theory of "fissured workplaces"
  - Defined as companies contracting out or otherwise shedding activities to be performed by other businesses.
  - Often involves subcontractors or independent contractors, temporary staffing agencies, labor brokers, franchising, licensing, and third-party management.
  - Weil: The issue is whether a business can have a high level of coordination and oversight over the outside or subordinate entities but disclaim responsibility for the FLSA or other employment law obligations.

WHD Misclassification Initiative: Going After "Fissured Workplaces"

- Sees these workplaces as breeding grounds for misclassification of employees as independent contractors
  - Employers simply mislabeling certain employees as independent contractors to reduce payroll costs, avoid responsibilities
  - DOL "supports the use of legitimate independent contractors, who play an important role in our economy, but when employers deliberately misclassify employees in an attempt to cut costs, everyone loses"
- WHD working with the IRS, states, other agencies to combat employee misclassification
  - Entered into partnerships with 26 states to work together on this issue –information sharing and coordinated enforcement
  - Also working with other DOL agencies: Employee Benefits Security Administration, OSHA, OFCCP, and the Office of the Solicitor.

Administrator's Interpretation on Employee vs. Independent Contractors

- Issued July 14, 2015—shifts analysis from "control test" to broader "economic realities" test with goal of finding more workers to be employees
  - No opportunity to comment or provide input
  - In effect as of issuance
  - Reads much more like a regulation than an AI
    - Interprets statutory language, not regulation
    - Lengthy legal analysis rather than discussion of specific facts
- Subtle but significant: will not be felt until employer is audited and accused of misclassification

Specifics of Economic Realities Test

Factors of multi-factor “economic realities” test typically include:

- (A) the extent to which the work performed is an integral part of the employer’s business;
- (B) the worker’s opportunity for profit or loss depending on his or her managerial skill;
- (C) the extent of the relative investments of the employer and the worker;
- (D) whether the work performed requires special skills and initiative;
- (E) the permanency of the relationship; and
- (F) the degree of control exercised or retained by the employer.

Applying the Economic Realities Test

- Each factor is examined and analyzed in relation to one another, and no single factor is determinative.
- The "control" factor, should not be given undue weight.
- The factors should be considered in totality to determine whether a worker is *economically dependent on the employer,* and thus an employee.
- *"The application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers, as evidenced by the Act's defining 'employ' as 'to suffer or permit to work.'"*

NLRB Joint Employer Decision

- Previous test: whether the putative joint employer ***exercises direct and immediate control*** over the employees at issue. This direct control is generally understood to include the ability to *hire, fire, discipline, supervise and direct.*

- Browning Ferris Industries test (August 27, 2015)**:** joint employment exists even where one company ***only has the right to exert indirect or potential*** control over the terms and conditions of another company's employees.
  - Dissent: "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited."

NLRB Joint Employer—Chamber Efforts

- Amicus brief in *Browning Ferris*
- Member of the Coalition to Save Local Business pushing for "Protecting Local Business Opportunity Act" (S. 2015/HR 3459)
- Comments to both House and Senate oversight hearings, both "pre" and "post" BFI.
- March 2015 event: "The NLRB and the Joint-Employer Standard: New Interpretations, New Liabilities and the Impact on Other Statutes."
- Publication: "Opportunity at Risk: A New Joint Employer Standard and the Threat to Small Business"
- DC Court of Appeals – Chamber brief filed Tuesday, June 14, 2016
- June 21, 2106 U.S. Chamber conference and report: "Main Street In Jeopardy: The Expanding Joint Employer Threat to Small Business"

NLRB Joint Employer Cross Pollination

Other enforcement agencies and the plaintiffs' bar are looking to see how the new NLRB joint employer standard can be exploited under other statutes.

- **OSHA:** Internal draft OSHA memorandum reveals that the agency is looking at the potential for a joint-employment relationship between franchisors and franchisees when investigating workplace safety.
- **EEO Issues** : Caps on compensatory damages increases with the number of employees. Plaintiffs' bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing the amount of available damages.

Wage and Hour Administrator's Interpretation on Joint Employment

- Issued January 20, 2016
- Recover back wages from either "joint employer"
- Will make larger businesses liable for FLSA violations of their business partners
  - May undermine ability of small contractors to retain business
- Identifies two forms: Horizontal and Vertical Joint Employment

Horizontal Joint Employment

- Will only apply current FLSA joint employment regulations to “horizontal” relationships—more traditional approach
- Two or more employers that “are sufficiently associated or related with respect to the employee”
  - Common ownership
  - Overlapping officers, directors, executives or managers
  - Shared control of operations (e.g., hiring, firing, payroll, scheduling, supervision of employees)
  - Shared clients or customers

Vertical Joint Employment

- If “horizontal” joint employment does not exist, will apply the “economic realities” test
  - Vertical joint employment exists where the employee has an employment relationship with one employer, but the economic realities show that he or she is economically dependent on another employer involved with the work.
- In the past, the economic realities test was applied to determine whether a worker was an employee at all – not to determine who is the worker’s employer
- The current FLSA joint employment regulations do not reference this test

EEO-1 Report Data Collection

- February 1, 2016 - EEOC announces proposed changes to EEO-1 report
  - Paperwork Reduction Act action, NOT normal rulemaking under Administrative Procedure Act
- Filers with 100 or more employees will be required to submit data on employee's W-2 earnings and hours worked in addition to data currently collected (e.g., ethnicity, race, and sex, by job category) in EEO-1 Form.
- Increases data cells from 180 to 3,660

EEO-1 Report Data Collection

Paperwork Reduction Act issues: burden, benefit, privacy

- Burden:
  - $19.8M - 2015 burden estimate for completing the EEO-1 report in its current form
  - $5.5M – EEOC's new burden estimate for completing the current EEO-1 report
  - $10M – EEOC's new total cost estimate
  - $693M – Chamber survey estimate
- Benefit: useless data leading to false positives and false negatives.
- Privacy: will be used to embarrass companies.

EEO-1 Report Data Collection—Chamber Efforts

- Chamber testified at EEOC hearing March 16, 2016 (few employer representatives allowed)
- Chamber filed comments with EEOC on April 1, 2016
  - Waiting for EEOC to move forward
  - Because Paperwork Reduction Act action, second comment opportunity coming with OMB
- WSJ editorial
- *EEOC Reform Act*—would block new EEO-1
- Seeking appropriations riders

How Employers are Feeling