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HRAGC LEGAL UPDATE

JANUARY 21, 2021

FEDERAL

United States Department of Labor

The DOL issued a final rule this month attempting to clarify when a worker is properly classified as an independent contractor. The rule makes it easier to provide benefits to workers – such as inclusion in a retirement plan – without turning them into employees. If an employer can comply with the rule the employer would have greater latitude to provide some benefits to independent contractors that have traditionally been limited to employees, and permit the employer to avoid complying with the Fair Labor Standards Act including its requirements to pay minimum wage and overtime.

The DOL reaffirms the "economic reality" test which focuses on the actual practice of the worker and examines whether the worker is really economically dependent on the employer for work and therefore an employee subject to the FLSA, or whether the worker is really in business for himself or herself and thus properly classified as an independent contractor not subject to the FLSA. The DOL identified two primary factors it deems most probative on the question:

- the worker's control over the work; and
- the opportunity for profit or loss.

This moves away from heavy reliance on the amount of control the employer may exercise. If the answer to the first two factors is the same, there is no need to look at the other factors. If necessary, three other factors may be considered in the analysis: the amount of skill involved, the permanence of the relationship, and whether the work is an integrated unit of production. The rule has several examples to illustrate how the question should be resolved based on the facts.

The rule is effective March 8. The Biden administration may well delay implementation or take steps to withdraw it. Employers should be careful about taking any aggressive action based on this final rule and should monitor the situation to assess whether the rule actually becomes effective. If effective, there is a safe harbor provision for employers who rely on the rule in good faith.

Equal Employment Opportunity Commission

The EEOC issued a proposed rule attempting again to clarify what incentives employers may offer to encourage employee participation in employer wellness programs that require disclosures related to disabilities or medical information without violating the ADA and GINA. Its previous rule was overturned by a federal court. Under the new rule, employers are encouraged to provide "de minimis" incentives, such as a water bottle or small gift card. Paying for a gym membership is not de minimis.

The concern with offering larger incentives is that it can make participation less voluntary. Where participation in the program requires the employee to relinquish protected medical information, an absence of voluntariness could be coercive and would violate the law. A "de minimis" incentive is seen as leaving the employee's decision to participate truly voluntary which should address the issue that caused the court to overturn the earlier rule.

The rule does not apply to incentives a part of a group health plan wellness program where a health standard must be met to receive the incentive. There larger incentives (or 30 or 50% of the cost) may be utilized provided other factors are met. The comment period is open for 60 days.

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NEW HAMPSHIRE

New Hampshire Legislature

Bills are now starting to emerge from Legislative Services. Some things to look for in this session:

- Bills related to workplace lactation rights and requiring employers to provide a sufficient space and break time for nursing mothers
- A bill requiring employers to provide a reasonable accommodation to a pregnant employee
- Bills requiring employers provide for paid sick leave (these appear to be different from the bills filed in prior sessions)
- Bills related to COVID-19 testing and extending unpaid leave benefits due to COVID-19
- Bills related to non-compete agreements
- Bills related to the minimum wage
- Bills addressing time records and employee uniforms

More to come as these bills work through the legislative process.

Best Practices for Addressing Leave and Return to Work Issues

The Families First Coronavirus Response Act ended December 31, 2020. The US DOL clarified that employers are not required to provide FFCRA leave after that date but may do so voluntarily. But employers may still take FFCRA tax credits up to March 31, 2021 for any FFCRA qualified paid leave voluntarily provided in the first quarter of 2021. This is not new FFCRA leave but would apply only to unused FFCRA leave.

Employers should closely examine that all payments owed for FFCRA leave have been paid and ensure that all requests for leave were fulfilled to avoid potential claims. And confirm that records are accurate and current. Because FFCRA leave counted against FMLA leave, making an accurate assessment of remaining FMLA leave is essential so that requests are properly addressed. Remember to view all potential leave issues through the traditional framework of FMLA, ADA and the like. Consider any employees who voice religious objections to vaccination policies or workplace safety measures and assess whether an unpaid leave is an appropriate accommodation, assuming a person is otherwise qualified to receive leave. The EEOC approved its final rule last week updating its compliance manual section on religious discrimination.

Carefully review any strong action to end leaves, remote work or flexible schedules and push employees back to work, unless there is a true business necessity or objectively demonstrable performance issues supporting the decision. Strongly consider extending leaves or the use of flexible schedules at least in this period where the spread of the virus remains high and vaccinations are progressing slowly.

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