DOL Withdraws Three Opinion Letters on Wage and Hour Rules

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President Joe Biden's administration recently withdrew three opinion letters addressing tipped workers and independent-contractor status under the Fair Labor Standards Act (FLSA). The letters were issued (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/more-opinion-letters-issued-in-final-days-of-trump-administration.aspx) in the last days of the prior administration.

"These letters were issued prematurely because they are based on rules that have not gone into effect," according to the U.S. Department of Labor (DOL).

Mark Goldstein, an attorney with Reed Smith in New York City, said the recissions are likely the start of a larger move by the new administration to modify or replace workplace-related regulations and guidance issued by President Donald Trump's administration.

DOL rules on paying tipped employees (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/dol-issues-final-rule-on-employee-tip-sharing.aspx) and classifying workers as independent contractors (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-final-rule-independent-contractor.aspx) were finalized prior to Biden's inauguration but were slated to take effect in March. On Biden's first day in office, the White House asked federal agencies to freeze proposed and pending regulations (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Biden-Administration-Freezes-Proposed-and-Pending-Regulations.aspx) to give new leaders time to review pending rules.

"The good news for employers is that the rescinded opinion letters were only just issued, meaning that it is unlikely that many employers had yet modified their operations based on the letters," Goldstein said.

Eli Freedberg, an attorney with Littler in New York City, noted that many of the recently issued opinion letters simply applied the same analysis that the DOL has used for years—even prior to the Trump administration.

"The withdrawal of those opinion letters doesn't necessarily signal that anything has changed on a substantive level," he explained. But the actions taken by the prior administration will be scrutinized by the new administration and possibly revoked or changed, he said.

Tipped Employees

One revoked opinion letter addressed FLSA compliance when paying tipped workers, such as restaurant servers and bartenders. Rules for tipped employees can be confusing, particularly when businesses take a so-called tip credit (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/dol-issues-final-rule-on-employee-tip-sharing.aspx), which allows employers that meet certain criteria to pay tipped workers less than minimum wage, as long as their tips make up the difference.

In the revoked letter, the DOL discussed rules for "nontraditional" tip pools, which include tipped servers and nontipped employees such as hosts and hostesses.

The Trump administration's final rule set forth criteria for allowing tipped and nontipped employees to share in tip pools. Notably, eligible employers would have to pay all participants in the tip pool the full minimum wage instead of taking a tip credit. Additionally, the final rule would prohibit management from keeping any portion of employees' tips regardless of whether the employer takes a tip credit.

Biden supports eliminating the tipped minimum wage altogether. "He firmly believes all Americans are owed a raise, and it's well past time we increase the federal minimum wage to $15 across the country," according to his campaign website (https://joebiden.com/empowerworkers/).

Independent-Contractor Status

Two additional opinion letters addressed whether certain workers can be classified as independent contractors under the FLSA or if they are actually employees.

Independent contractors are not eligible for minimum wage, overtime and other benefits that employees must receive—but they generally have more flexibility to set their own schedules and work for multiple companies.

One opinion letter focused on whether a motor carrier can order tractor-trailer truck drivers to implement legally required safety measures without jeopardizing the drivers' independent-contractor status. The other letter addressed whether distributors of a manufacturer's food products are employees or independent contractors under the FLSA.

The DOL analyzed the facts of each letter under a final rule that was scheduled to take effect on March 8. The rule would apply an economic-reality test to determine employment classification, primarily considering the nature and degree of control over the work and the worker's opportunity for profit or loss based on initiative and investment. Three other factors would serve as guideposts in determining employment status:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production (or the individual works under circumstances analogous to a production line).

The rule is now on hold pending review from the current administration.

Kartikey Pradhan, an attorney with Kaufman Dolowich & Voluck in San Francisco, noted that Biden's administration may take additional steps at the federal level to make it more difficult for businesses to classify workers as independent contractors.

Biden supports a nationwide 'ABC' test (https://joebiden.com/empowerworkers/), which employers in some states, such as California, already must apply. Under California's more-stringent test, all three of the following factors must be met for a worker to be properly classified as an independent contractor:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- The worker performs tasks that are outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Prepare for More Changes

Employers should anticipate that more changes at the federal level are likely in store. "I would suggest that employers take a wait and see approach to ascertain what regulatory activities the Biden administration's DOL will prioritize and see whether courts will give any deference to the rescinded DOL opinion letters," Freedberg said. "To the extent that the regulatory activity conformed to existing precedent, employers can feel free to rely on that precedent."

Goldstein said employers should expect the Biden administration to push forward some Obama-era initiatives that were not previously successful, such as an increase to the federal minimum wage and some form of paid family and medical leave.

"If your business implemented any workplace-related changes due to regulations or guidance issued by the Trump administration, it would be prudent to adopt a contingency plan now in the event that such regulations or guidance are withdrawn or changed," Goldstein suggested.