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UPDATED: MAY 12, 2021

PUBLISHED: APRIL 14, 2021

The Labor Law Insider: The Biden Administration - Expected Changes at the Department of Labor

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On March 22, 2021, former two-term Boston Mayor Marty Walsh was confirmed as U.S. Secretary of Labor in a 68-29 Senate vote. The U.S. Chamber of Commerce (Chamber) supported Walsh's nomination as Secretary of Labor due in part to his practice of building a consensus among stakeholders through collaboration with constituencies, including the business community. Meanwhile, Walsh testified at his confirmation hearing that he intends to act quickly and collaboratively with stakeholders and other agencies to implement changes that not only advance workers' rights but that are also pro-economy. What does the new leadership at the Department of Labor (DOL) mean for the Wage and Hour Division and the Occupational Safety and Health Administration (OSHA)?

Walsh assumes the role of Secretary of Labor

1. Who is Labor Secretary Walsh?

ANSWER: Secretary Walsh's experiences as a first-generation immigrant, a former union worker, president of the Laborers' Union Local 223, general agent for the Building Trades Council, 16 years as a state representative, and his role as Mayor of Boston have shaped his perspective and policies. He views his role as "pro-economy," by advancing workers' rights as well as creating opportunities for economic growth that benefit businesses and workers alike.

During Walsh's tenure as Mayor of Boston, he enacted a Boston ordinance providing up to six weeks of paid parental leave for men, women and same-sex couples who were employed by the City of Boston for at least one year and that ran concurrently with unpaid job-protected leave. As one of his last acts as

Mayor of Boston, Walsh announced on March 19, 2021, that the 2017 ordinance would be expanded for eligible city employees to provide a maximum of 12 weeks of paid protected parental leave and would apply to both nonunion and union employees covered by a collective bargaining agreement that explicitly provides for the benefit. While his policies and actions as mayor demonstrated his staunch support for workers, Walsh simultaneously earned a reputation for his successful collaborations with the business community in Boston.

As Secretary of Labor, Walsh is expected to advance the Biden administration's labor and employment agenda while seeking conciliation around more controversial subjects to mobilize support among the business community and on Capitol Hill. On April 30, 2021, in apost on the DOL blog, Walsh re-iterated the administration's priority as a "renewed focus on strengthening worker protections," including rescinding the past administration's rules and prioritizing worker's rights under OSHA regulations.

Independent contractor final rule withdrawn

2. What is the current state of the independent contractor rule under the Fair Labor Standards Act (FLSA)?

ANSWER: Effective May 6, 2021, the DOL withdrew the Independent Contractor Status Final Rule promulgated by the prior administration. The Trump administration's Independent Contractor Final Rule had adopted a new standard using an economic realities test that made it easier for employers to classify workers as independent contractors under the FLSA. After review of comments solicited before withdrawal of the Independent Contractor Final Rule, the DOL concluded that the new final rule: 1) was inconsistent with the FLSA's text and purpose which requires an expansive definition of the term "employ"; and 2) departed from long-standing legal precedent interpreting the economic realities test. The DOL also previously rescinded two Trump-era opinion letters FLSA 2021-9 and FLSA 2021-8 based on the Trump administration's Independent Contractor Rule.

The DOL has not issued new guidance or begun new rulemaking with respect to the independent contractor rule. Employers should continue to apply the legal analysis used prior to the publication of the new DOL final rule to determine an employee's status as an employee or independent contractor. The DOL suggests that employers continue to rely on public guidance and Fact Sheet 13, which do not include changes related to the withdrawn final rule, to assist in the classification of workers.

3. What changes are expected under the Biden administration with regard to the independent contractor rule?

ANSWER: It is expected that the Biden administration will support regulatory and legislative changes that provide more protections for workers and expand the types of workers that are

considered employees. One way to achieve such changes is to make it more difficult to classify workers as independent contractors.

Unlike employees, independent contractors are not: a) guaranteed a minimum wage; b) entitled to overtime at one and a half the regular rate of pay for work over 40 hours a week; c) eligible for unemployment insurance or for workers' compensation insurance in the event of a work-related injury; d) covered by worker safety protection standards and regulations; or e) eligible to join unions. Additionally, employers are not responsible for employment taxes and employee benefits for independent contractors.

The Biden administration has previously articulated support for a federal independent contractor standard that applies to labor, employment and tax laws based on the ABC test. The ABC test begins with the presumption that the worker is an employee and tests that presumption against three factors: A) whether the worker is free from the hiring party's control over performance; B) whether the work is outside of the hiring party's usual line of business; and C) whether the worker is engaged in an independent trade. All three of the factors must be answered affirmatively to rebut the presumption and to classify a worker as an independent contractor. The Protecting the Right to Organize (PRO) Act, which was passed by the U.S. House of Representatives, adopts the ABC test for determining employee and independent contractor status.

The DOL can choose either to begin new rulemaking procedures to propose a new independent contractor standard or to publish new guidance that does not require public notice and comment under the Administration Procedure Act's rulemaking process. While the DOL can implement guidance quickly, such guidance lacks the binding authority of a final rule.

Overall, we expect to see efforts by the DOL and Secretary Walsh to broaden the scope of workers that are classified as employees. We also expect to see an increase in investigations and enforcement actions against employers that misclassify workers.

Joint employer rule also is expected to be revised

4. What is the current state of the joint employer rule under the FLSA?

ANSWER: On March 11, 2021, the DOL proposed to rescind the Trump administration's final rule that interpreted joint employer status under the FLSA. The comment period relating to the recission of the Joint Employer Status Final Rule closed on April 12, 2021. The DOL has not released any information on new rulemaking with respect to the joint employer rule at this time.

The Trump administration's final rule significantly narrowed the definition of "joint employer," adopting a four-factor balancing test to assess whether a business could be jointly liable for any FLSA

violations. The test required the business to exercise significant control over the employee's work, rather than merely reserving authority to control the work.

Eighteen states challenged the final rule in court, and on September 8, 2020, the district court for the Southern District of New York subsequently struck down a major portion of the rule, essentially nullifying its effect.

On March 31, 2021, the DOL asked the Second Circuit to postpone its appeal of the decision vacating the final rule. The Second Circuit denied the DOL's request, forcing the DOL to either file a brief defending the rule or to forego filing a brief at all. A coalition of businesses has intervened in the lawsuit to defend the final rule in the event the DOL opts against doing so.

5. What changes are expected under the Biden administration with respect to the joint employer rule?

ANSWER: The Biden administration is expected to expand the definition of "joint employer," returning to an employee-friendly standard enacted during the Obama administration.

The PRO Act that recently passed the House of Representatives codifies the expansive joint employer doctrine articulated in *Browning-Ferris Industries of California, Inc.* (2015). Notably, under the PRO Act, "joint employer" is defined to include not only a business that exercises direct control but also a business that reserves authority to control or indirectly control terms and conditions of employment.

The 2016 Administrator's Interpretation (AI) previously issued by the DOL also sheds some light on the anticipated changes. In the 2016 AI, the DOL adopted the "economic realities" test in determining joint employer status that takes into consideration the following seven factors:

Directing, controlling or supervising the work performed by the employee beyond a reasonable degree of contract performance oversight;

Controlling employment terms and conditions;

Permanency and duration of employment relationship;

Repetitive and rote nature of work;

Integral part of the potential joint employer's business;

Work performed on premises owned or leased by the potential joint employer;

Performing administrative functions commonly performed by employers such as handling payroll, providing tools and materials required for work.

While the substance of a new regulation is still unclear, given the new administration's swift recission of Trump-era rules, it is recommended that employers review franchising or staffing arrangements to address any potential joint employer issues.

Changes in wage and hour laws, rulemaking and enforcement activity are anticipated

6. Will the Biden administration continue to pursue an increase in the federal minimum wage?

ANSWER: Possibly. The Biden administration supports an increase in the federal minimum wage to $15 per hour and has supported eliminating the tipped minimum wage, which allows for the payment of a lower minimum wage for tipped workers. While serving as Mayor of Boston, Secretary Walsh launched a task force to study a $15 per hour minimum wage for Boston workers and to gather input from stakeholders and to determine the effects of the increase. He also supported increases in the minimum wage as a Massachusetts state representative. The current federal minimum wage is $7.25 per hour and has not been increased since 2009. It is likely that Secretary Walsh will be dispatched to Capitol Hill to gather support for an increase in the federal minimum wage.

In the event of an increase in the federal minimum wage, employers will need to increase certain nonexempt employees' compensation to meet the minimum hourly rate or to convert those employees to exempt status (which generally requires the employee be paid a minimum salary).

7. Will the Biden administration increase the minimum salary thresholds required to qualify for minimum wage and overtime exemptions?

ANSWER: Possibly. This is one area under the FLSA that is an attractive target for change because it allows the Biden administration to make binding law without congressional involvement. Most of the DOL's rulemaking under the FLSA involves interpreting the law and warrants less than total deference by the courts. Not so here. Congress expressly delegated authority to the DOL for defining the exemptions from the FLSA's minimum wage and overtime rules for bona fide executive, administrative and professional employees, and its regulations in this area are therefore binding.

Shortly before the 2016 election, the Obama administration sought to increase the minimum salary threshold for employees to be exempt from $23,660 to $47,476 per year and from $100,000 to $134,004 for highly compensated employees, respectively. That increase was struck down just before it was to take effect by a federal district court that ruled it exceeded the DOL's statutory authority by creating a de facto salary-only rule for exemptions that eliminated the requirement that the employees be executive, administrative or professional. The Trump administration chose not to appeal that decision and instead implemented more modest increases, raising the exemption threshold to $35,568 annually and the highly compensated threshold to $107,432.

Given the certainty that any significant increase in the salary threshold would be challenged in court (as was the case for the Obama increases) and the uncertainty over whether such a challenge would be successful, the Biden administration may not prioritize raising the thresholds to the levels sought by the Obama administration. Instead, it is more likely that the Biden administration will choose to implement more modest, stepped increases to the thresholds or to create a mechanism that automatically increases the thresholds based on changes in nationwide labor statistics.

8. Has the DOL rescinded the final rule regarding tipped employees under the FLSA?

ANSWER: Yes, in part. The DOL has issued two separate notices of proposed rulemakings (NPRMs) regarding portions of the Final Rule, Tip Regulations Under the FLSA (Tip final rule). The NPRMs propose to delay the effective date of three provisions of the Tip final rule until December 21, 2021, and to withdraw and revise the same provisions of the Tip final rule. The three provisions at issue are: a) assessment of civil monetary penalties under the FLSA for violation of the prohibition on keeping employee's tips; b) the definition of a "willful violation" for the purpose of assessing civil monetary penalties; and c) the use of the FLSA tip credit by employers for tipped employees who perform "dual jobs" meaning that the employee engages in tipped and nontipped duties.

A permanent federal paid family and medical leave law has support

9. What are the prospects for enactment of federal paid leave legislation in the next four years?

ANSWER: Enactment of a permanent paid leave law during the Biden administration is conceivable. The pandemic has exposed the need for paid leave for families even after the COVID-19 crisis subsides. States such as California, New York, New Jersey and Rhode Island have adopted paid family leave programs that provide medical leave to attend to a serious health condition of a family member. On February 5, 2021, U.S. Senator Kirsten Gillibrand and U.S. Representative Rosa DeLauro re-introduced the Family and Medical Leave Insurance (FAMILY) Act to create a permanent, national paid family and medical leave program that would apply to all employers, regardless of size, and would include self-employed or part-time employees. The Biden administration supports a program that provides 12 weeks of paid family and medical leave for all workers and up to seven days of sick, family and safe leave.

Additionally, the Chamber has announced its support of a uniform federal paid family and medical leave law that enables multi-state employers to opt into the federal program and relieves them of the difficulty of complying with a patchwork of state and local leave laws. The Chamber advocates for a paid family leave model that largely adheres to the existing Family and Medical Leave Act (FMLA) model with regard to scope of coverage, including exemption provisions for businesses with less than 50 employees, imposing employee eligibility standards at least equivalent to minimum standards

regarding hours worked and compensation levels under the FMLA, and limiting the benefit period to 12 weeks in a 12-month period.

Changes in OSHA regulatory and enforcement activity are expected

10. Who is Doug Parker, the nominee for the position of Assistant Secretary for OSHA and James Frederick, the Acting Deputy Assistant Secretary of OSHA

ANSWER: Immediately after his Inauguration, President Biden appointed James Frederick as the Acting Deputy Assistant Secretary (DAS) of OSHA. Prior to his appointment, Acting DAS Frederick was employed by the United Steelworkers Union, providing technical guidance on matters related to occupational health and safety for approximately 25 years. Frederick will lead OSHA until President Biden's nominee, Doug Parker, is confirmed by the Senate as Assistant Secretary for OSHA. Parker is currently the chief of California's Division of Occupational Health and Safety (Cal/OSHA). He, along with Julie Su, the current Secretary of the California Labor and Workforce Development Agency and President Biden's nominee for the position of U.S. Deputy Secretary of Labor, oversaw the adoption and implementation of Cal/OSHA's emergency temporary standards on COVID-19 infection prevention.

11. What are OSHA's priorities under Acting DAS Frederick and Secretary Walsh?

ANSWER: OSHA's priorities were outlined in one of the Biden administrations first executive orders (EO), EO 13999, Protecting Worker Health and Safety. EO 13999 directed OSHA to:

Issue revised guidance to employers on workplace safety during the pandemic;

Consider issuing an emergency temporary standard on COVID-19 by March 15, 2021, as determined to be necessary;

Review enforcement efforts by OSHA related to COVID-19;

Identify and prioritize changes needed to protect the workforce;

Launch a national program focused on OSHA enforcement efforts related to COVID-19 and violations that place the largest number of workers at the most serious risk; and

Coordinate with State Plan states to ensure workers are adequately protected as well as state and local government entities and public sector unions.

As a result of the EO, on January 29. 2021, OSHA issued new guidance to mitigate and prevent the spread of COVID-19 in the workplace that is intended to be updated to reflect new developments and standards.

In addition, on March 12, 2021, OSHA issued a new National Emphasis Program (NEP) that targets for programmed inspections: a) establishments, industries and work tasks that are at a heightened risk for COVID-19 exposures; and b) employers that retaliate against employees who report or complain about unsafe working environments. Unprogrammed COVID-19-related inspections will be conducted at businesses with a high frequency of close contact exposures. Inspections under the NEP begin on March 12, 2021, the effective date of the NEP. According to Appendix A of the NEP, industries targeted for programmed inspections include physician and dental offices, nursing care facilities, hospitals, and residential facilities for the elderly, meat processing facilities, supermarkets, restaurants and correctional facilities.

12. What is the status of OSHA's rulemaking process with respect to OSHA's COVID-19 emergency temporary standard?

ANSWER: On April 26, 2021, OSHA submitted its COVID-19 emergency temporary standard (ETS) to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review. OIRA is responsible for reviewing all final and proposed drafts of Executive branch regulations. According to the OIRA website, the OSHA ETS is under review, and the language of the proposed standard has not been released as this time. Review of the ETS by OIRA is the final step in the review process before the rule is released to the public.

An ETS can be issued if the standard is necessary to address a hazard that poses a grave danger and is necessary to protect workers. Due to the public safety emergency, issuance of an emergency temporary standard bypasses the normal notice and comment periods of the rulemaking process but is limited in duration to a period of six months before it must be replaced by a permanent standard that complies with the Administrative Procedure Act's rulemaking process.

Several states with OSHA State Plans already have enacted COVID-19 emergency temporary rules or standards, such as California, Virginia, Michigan and Oregon.

Contact us

The Husch Blackwell Labor and Employment team will continue to keep you updated on new legal developments affecting the workplace and employers as a result of changes adopted by the Biden administration. If you have questions, contact A.J. Weissler, Scott Meyers, Donna Pryor, Erik Dullea, Damiya Park or your Husch Blackwell attorney.

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our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.