



Double Trouble: DOL's Wage and Hour Division and NLRB Agree to Coordinate Information Sharing, Investigations, and Enforcement Activities

Insights

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In a January 6 press release, the National Labor Relations Board (NLRB) and the Department of Labor, Wage and Hour Division's (DOL/WHD) announced that they have entered into a Memorandum of Understanding to enhance their information sharing, investigations, enforcement, training, and outreach. As a result, we can now expect greater coordination and collaboration between these two agencies as they enhance their efforts to maximize the enforcement of federal laws protecting workers' rights. This could spell trouble for employers that fail to comply with misclassification and related provisions enforced by those agencies. Now that this Memo is in effect, here is what employers need to know.

The NLRB and DOL/WHD Join Forces

The agencies have agreed to collaborate on enforcement of those regulations administered by DOL/WHD and NLRB. Practically speaking, this new partnership doubles the breadth of enforcement activities under worker protection statutes including the FLSA (wage and hour law), FMLA (Family and Medical Leave Act) and the NLRA (National Labor Relations Act, which protects workers' rights to organize and bargain collectively). The Memorandum of Understanding (MOU) provides for and encourages greater interagency enforcement through "information sharing, joint investigations and enforcement activity, training, education, and outreach."

In its press release, the NLRB explained that the MOU will allow for "better enforcement against unlawful pay practices, misclassification of workers as independent contractors, and retaliation against workers who exercise their rights." While each agency continues to retain its normal operations, the MOU provides for the sharing of information, data, and investigative files in an efficient manner to enhance each agency's enforcement mandate.

The MOU will be in effect until December 2026 (five years from the effective date). Either agency may cancel it with 90 days' advance written notice to the other. We expect that the agencies will leverage this partnership to aggressively pursue violations of the wage and hour laws and the NLRA, particularly with regard to employee misclassification, which is a high priority for the Biden administration.

What's in the MOU?

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The MOU provides direction on how the information will be exchanged through six subparts:

1. Information Sharing;
2. Points of Contact for Request of Information and Responses;
3. Coordinated Investigations and Enforcement;
4. Training, Education, and Outreach;
5. Confidentiality and Disclosure; and
6. Information Security.

Through the MOU, the agencies will explore manners to “systematize procedures to facilitate” information, documents, and data sharing. Agencies will also be able to request and share documents and information.

The agencies also have agreed to enhance their coordinated efforts in investigations and enforcement. The MOU allows each agency to advise employees about rights they may have under laws enforced by the other if alleged misconduct is believed to have occurred. For instance, if an NLRB investigator believes that an employer has violated laws enforced by the DOL/WHd, then they may advise the impacted employees of their rights.

The MOU specifically provides for coordinated investigation and enforcement to facilitate vindication of employee rights by filing a complaint or unfair labor practice charge. The agencies will also have the opportunity, where appropriate, to conduct coordinated investigations of matters that fall within their respective scope.

To increase collaboration and awareness, the agencies will train their counterpart’s staff to recognize and identify matters in which federal laws may be implicated. The agencies also will increase public outreach and education efforts to raise public awareness of their respective laws.

What Should Employers Do?

Practically speaking, the partnership between the NLRB and DOL/WHd could spell trouble for employers that fail to comply with misclassification and related provisions enforced by those agencies. Routine wage hour audits, employee complaints and alleged minimum wage or overtime violations are likely to take on broader significance, and with that greater exposure to damage awards and penalties. Organizations utilizing independent contractors should be especially mindful of increased enforcement mandates on the federal and state level.

Employers should consider refreshing themselves on the scope of the National Labor Relations Act, as we expect an increase of filings of unfair labor practice (ULP) charges even where workers are not unionized. It’s worth noting that the NLRB’s General Counsel recently issued a memo calling for employee misclassification to constitute an independent ULP, and the agency has since made clear

that it plans to revisit a Trump-era decision that had established a more employer-friendly standard for evaluating independent contractor status.

Compliance will be the key to a successful 2022 for many organizations. We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have compliance questions, consult with your Fisher Phillips attorney, the authors of this Insight, or any member of the [Wage and Hour Practice Group](#) or [Labor Relations Practice Group](#) to assess and minimize potential risks.

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