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LABOR DEPARTMENT TO CRACK DOWN ON THESE 7 WORKPLACE CONTRACT PROVISIONS

Insights
Oct 17, 2024

The Labor Department's top lawyer announced on Tuesday that the agency would target seven specific employment-related contract provisions that she believes could discourage workers from exercising their rights under federal workplace laws. U.S. Solicitor of Labor Seema Nanda's October 15 Special Enforcement Report on "coercive" contractual provisions serves as a stark warning to employers. But it also announces that the agency will take innovative approaches to address its concerns – including filing groundbreaking lawsuits and filing friend-of-the-court briefs to attack disobeying employers. What are the seven contract provisions under the DOL's microscope and what should employers do about this development?

7 Contract Provisions in the Crosshairs

You can read the full report here, but here's an overview of the seven areas targeted by the DOL and some examples of provisions that could land you in hot water with the agency.

1. Requiring Workers to Waive Wage and Hour Rights

The report says that employers sometimes try to get workers to sign away their Fair Labor Standards Act (FLSA) rights to minimum wage, overtime pay, and certain related damages by adding clauses that shorten the time workers have to bring claims or reduce the penalties employers face if they're found at fault. Federal law, however, makes these wage and hour protections non-negotiable. The report states that these are fundamental rights designed to prevent exploitation and ensure fair compensation. The DOL report

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says that clauses like these are illegal because they undermine workers' ability to hold employers accountable for unfair pay or excessive hours.

2. Incorrectly Classifying Workers as Independent Contractors

Some contracts label workers as "independent contractors" with the real aim of avoiding benefits and protections like minimum wage, overtime, and safety standards. However, as courts and agencies have often made clear, a label (even one included in a written contract) doesn't decide legal status. The report reminds employers that you can't legally reclassify workers as contractors just to dodge legal responsibilities, instead needing to focus on the actual working relationship to determine classification status. The DOL report warns employers that it often challenges such labels and takes action on behalf of misclassified workers, even if they are labeled as contractors. If you are unclear about the federal rules in place for classifying workers as independent contractors, check out this summary of the DOL's current position and a similar standard deployed by the National Labor Relations Board (and don't forget state rules, which might be even stricter).

3. Shifting Liability for Legal Violations to Workers or Others

Certain contracts include indemnification provisions, aiming to shift the financial risk of legal violations onto workers and forcing them to cover the company's legal costs – even if they successfully win a claim. The DOL says this tactic is illegal because it discourages workers from taking action when their rights are violated, as they create a chilling effect and effectively silence workers who fear financial retaliation for speaking out. The report warns employers not to sidestep liability by making workers financially responsible for the costs of the employers' own wrongdoing.

4. Forcing Losing Party to Pay Attorneys' Fees in Legal Disputes

Similarly, some contracts require workers to pay the employer's attorney's fees if they lose a legal dispute. These "loser pays" clauses create a financial risk so high, the report says, that many workers would avoid pursuing legitimate claims. The DOL believes this approach goes against federal laws like the FLSA, which allow fee-shifting

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only in favor of workers – meaning employees who win their cases can get their legal fees covered, but companies cannot demand the same from workers who lose. The result of such provisions is a significant deterrent to workers enforcing their rights in the eyes of the DOL.

5. Stay-or-Pay Provisions

"Stay or pay" provisions require workers who leave a job before a set period to reimburse the employer some amount, often charging them for training or relocation costs. But these steep penalties can trap workers in a job, says the DOL's report, especially those who can't afford to pay to leave, even when facing poor or unlawful working conditions. The DOL reminds employers that labor laws mandate that wages must be paid "free and clear," meaning without any strings attached. Provisions that serve as pure penalties and pull workers' wages below minimum standards or solely benefit the employer are not permitted under federal law. And the NLRB's top lawyer just came down with a blistering attack against stay-or-pay provisions that you should also keep in mind.

6. Confidentiality, Non-Disclosure, and Non-Disparagement

Workplace contracts sometimes include broad restrictions on what workers can discuss or disclose to third parties, preventing them from discussing working conditions or reporting violations outside the organization, or even cooperating with government investigations. The DOL says that these clauses make employees feel they can't report issues, effectively silencing them on workplace realities. Such restrictions can run counter to federal workplace laws, which rely on employees' ability to report issues freely and without fear. The DOL's report firmly establishes that employees must be allowed to communicate with labor enforcement agencies – and warns employers not to stop this kind of communication through contract clauses.

7. Requiring Workers to Internally Report Safety Concerns Before Going to Government

Some companies require workers to report safety concerns to management first before going to workplace safety agencies like OSHA. According to the DOL's report, this kind of policy often discourages workers from reporting violations if they think management will retaliate or ignore

the issue. The report reminds employers that federal law upholds workers' rights to report safety concerns directly to government authorities, ensuring quick and unbiased responses to potential hazards. This right is fundamental to creating safer workplaces, according to the DOL, as it prevents delays that could arise if workers feel obligated to report internally before seeking external assistance.

What Should Employers Do?

Review all of your workplace policies, applications, forms, and other agreements to determine whether you have any language that could cross the line. The agency specifically noted that it would be targeting "fine print" provisions, so make sure you review all of your language – especially provisions that may have existed for years without question.

If your contracts contain any such language, **check with your FP lawyer** to determine your risk factor. This report does not carry the force of law and may take positions that courts might not agree with.

Pay special attention to your **independent contractor agreements** since they were specifically called out by the DOL as being vulnerable to attack. Remember that simply entering into such an agreement does not guarantee that a government investigator or court will conclude that your worker is a contractor and not an employee.

Conclusion

If you have questions regarding your workplace agreements, contact your Fisher Phillips attorney or the authors of this Insight. We will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.