Employer Guide to Key DOL Proposals on Latest Regulatory Agenda

Insights
9.09.25

The US Department of Labor (DOL) just released its latest semiannual regulatory agenda, and employers should tune in. The agency's current proposals include high-priority actions related to joint employer determinations, independent contractor classification, minimum wage and overtime exemptions, workplace safety, and more. Secretary of Labor Lori Chavez-DeRemer said that the DOL's "bold" agenda, which was unveiled on September 4, "focuses on flexibility, transparency, and common-sense reform." Here's your employer guide to some of the agency's key proposals.

1. Joint Employer Status Under the FLSA (RIN 1235-AA48)

The DOL will revisit the standard for determining joint employer liability under the Fair Labor Standards Act (FLSA), which has been a hot-button issue for years now. The agency plans to issue a new proposed rule in December that would guide enforcement and "help promote greater uniformity among court decisions nationwide."

While the details of this proposal remain to be seen, we think the DOL will likely push for a rule that reflects the evolving nature of flexible work arrangements – much like the business-friendly final joint employer rule issued by the agency during the first Trump administration. The 2020 rule was short-lived, as it was (essentially) struck down by a NY federal judge roughly six months after it took effect and then rescinded altogether by the Biden DOL in 2021. Here's a snapshot at how these changing standards have impacted employers:

- The DOL's 2020 final rule narrowed the scope of joint employment liability for wage and hour matters by requiring businesses to exercise "actual" control – such as hiring, firing, supervising, setting pay rates, and maintaining employment records – in order to share liability. Mere theoretical control was not enough to meet the standard. You can read more about the four-factor test here.
- The Biden administration's rescission of the 2020 rule ushered in the return of a broad definition of joint employment for FLSA purposes and a standard that focuses on whether an employer "retains the right to control" essential terms and conditions of employment – even if that right is not actually exercised. This expansive approach has major implications across industries, potentially exposing many more businesses to wage and hour liability.

Note: The National Labor Relations Board and other federal agencies may apply different joint employer tests in other contexts. Notably, the NLRB is not even included as an agency in the latest regulatory agenda, which is governmentwide.

2. Independent Contractor Classification Under the FLSA (RIN 1235-AA46)

The DOL intends to rescind a 2024 final rule that that made it harder for businesses to classify workers as independent contractors. This comes as no surprise, as the agency announced in May that it would no longer enforce the Biden-era rule (which remains under challenge in five separate lawsuits that are currently stayed) and instead would be relying for the time being on earlier enforcement guidelines.

The DOL is now considering how it will proceed with respect to independent contractor classification under the FLSA. While the agency has not yet provided any details on such plans (only that a proposal will be issued sometime this month), we would not be surprised to see it propose a rule that gives businesses more flexibility and certainty (but read more on why this will be a real litmus test for Secretary Chavez-DeRemer).

Note: The National Labor Relations Board and other federal agencies may apply different independent contractor tests in other contexts.

3. Overtime Salary Threshold Under the FLSA (RIN 1235-AA39 and RIN 1235-AA47)

The DOL is currently reviewing the Biden administration's overtime rule – which dramatically boosted the salary threshold for the FLSA's so-called "white collar" overtime exemptions but was blocked nationwide by a federal judge before its full effective date – and determining how to proceed.

But don't expect the agency to move quickly on this one – its two proposals related to the overtime rule are on a separate "Long-Term Actions" list and reflect that the DOL has not yet determined the type of actions it will take or any timeline for doing so. In the meantime, the DOL is enforcing the salary threshold set in its 2019 rule (roughly $35K).

4. FLSA Exemption for Domestic Service Workers (RIN 1235-AA55)

In addition to the proposals above, the DOL's Wage and Hour Division is also moving forward with a proposed rule, which was first issued in July, that would restore the ability of third-party employers to claim the FLSA's "companionship services" exemption and the exemptions for "live-in" domestic service workers, which have been unavailable due to a regulation issued in 2013. The comment period for the new proposed rule ended on September 3.

5. Heat Safety Rule (RIN 1218-AD39)

While many thought the Trump Occupational Safety and Health Administration (OSHA) would shelve the first-ever proposed national heat standard, the agency moved forward with the proposal earlier this year by opening a post-hearing comment period that ends September 30. OSHA is expected to consider feedback received during the comment period, with significant attention on requests for more flexibility and performance-oriented approaches. In the latest regulatory agenda, OSHA indicated that it intends to develop a final rule that "adequately protects workers, is feasible for employers, and is based on the best available evidence."

6. Other Key OSHA and MSHA Proposals

The DOL's regulatory agenda also includes other workplace safety proposals from OSHA and the Mine Safety and Health Administration (MSHA). Here are some of the key items:

- **New Emergency Response Standards (RIN 1218-AC91).** OSHA is continuing to work toward finalizing a broad emergency response standard, which was first proposed last year in an effort to overhaul and expand the fire brigade rule. OSHA is currently analyzing stakeholder feedback and plans to complete its comment analysis in November – stay tuned to see if the proposed rule ultimately gets modified or finalized as is.
- **Updates to the Respiratory Protection Standard (RIN 1218-AD48).** OSHA also is moving forward with a proposal that would remove medical evaluation requirements for filtering facepiece respirators and loose-fitting powered air-purifying respirators. The proposed rule was issued in July, and the comment period ended on September 2. In adding the rule to its regulatory agenda, OSHA said that modernizing the regulation would "allow increased productivity and reduce the regulatory burden on employers with workers who wear respiratory protection."
- **MSHA Deregulatory Proposals (RINs 1219-AC18, 1219-AC19, and 1219-AC21).** MSHA added various proposals to the regulatory agenda, including three new rules that would significantly curtail the authority of District Managers related to plan approval criteria (for roof control and mine ventilation plans) and training and retraining of miners.

Where Does OSHA's 2024 "Walkaround" Rule Stand?

- **Background:** Last year, OSHA issued a new final rule allowing employees to designate third parties – including union representatives – to accompany an OSHA inspector during a facility walkaround. The new rule, which took effect on May 31, 2024, gives labor unions an advantage because it grants union representatives access to the property of non-union employers and allows them to directly interact with non-union employees.
- **The Latest:** Unfortunately, OSHA has not yet weighed in on the validity of the walkaround rule and did not include any plans related to it on the latest regulatory agenda. However, the

rule remains under challenge in a lawsuit brought by business groups last year, so stay tuned to see how that plays out.

- **Note on State Plans:** The 2024 final rule required OSHA-approved State Plans to, within six months, adopt regulations that are identical to or "at least as effective" as OSHA's walkaround rule (unless they could demonstrate that their existing requirements are at least as effective in protecting workers) – and several of the State Plans have adopted the rule. In such states, the rule could remain applicable even if federal OSHA ultimately decides to rescind it (or if the rule is otherwise blocked by a court).

Conclusion

We will monitor the situation and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, any attorney on our PEO Advocacy and Protection Team or our Staffing Team, or any attorney in our Wage and Hour Practice Group or our Workplace Safety Practice Group.

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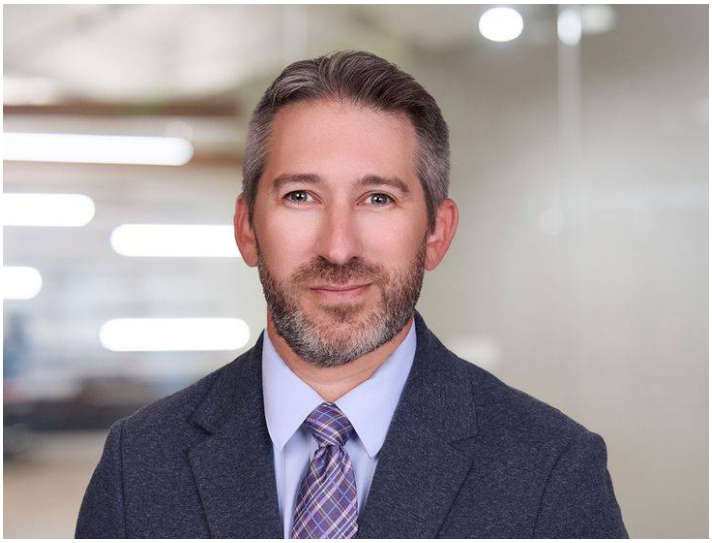

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