



"Right to Know" Initiative Apparently Expanded

Insights

11.14.13

The U.S. Labor Department has announced another proposal to conduct a survey relating to "worker classification issues" under the federal Fair Labor Standards Act.

Readers will recall our posts about a similar USDOL notice published earlier this year. Both proposals are almost certainly related to USDOL's so-called "Right to Know" initiative that first surfaced in 2010. At that time, the agency spoke of requiring among other things an employer's "notification of workers' status" or "classification".

The matter languished until this past January, when the first survey notice seemed to signal its revival. There were also glimpses of possible requirements, including:

- Formally and explicitly informing workers of their status or classification; and
- Providing in this disclosure the bases for these determinations.

What *Kind* Of "Status" Or "Classification"?

In the wage-hour area, "classification", "misclassification", and similar labels have come to be used in two different ways. In one sense, they refer to whether a worker must be categorized as an employee or may instead be treated as a non-employee (such as an independent contractor). An alternative usage has to do with whether an employee is or is not exempt from the FLSA's minimum-wage and/or overtime requirements.

There was widespread uncertainty in 2010 as to whether USDOL was including the exemption-related meaning, and agency officials seemed to be avoiding the question. Last January, USDOL said that it was using "misclassification" to refer to "the practice . . . of improperly treating a worker who is an employee under the applicable law as in a work status other than an employee (i.e., an independent contractor)."

However, it announced this most-recent survey in the context of "exemptions . . . requiring employers to classify employees to ensure adherence to proper practices." Leaving aside for now whether this is an accurate characterization of FLSA exemptions, there no longer appears to be any question but that emerging "Right to Know" requirements will include exemption-related employer obligations.

Comments Invited

USDOL seeks comments on this latest proposed survey by December 9, 2013. This is shorter than the 60-day timeframe (i) required by Section 3506 of the Paperwork Reduction Act, and (ii) provided in connection with January's proposal. The notice gives no explanation for the truncated comment period.

Moreover, USDOL did not publish the actual information request with the notice. The agency said that the material would be available via a hyperlink in the notice, but as of this writing the link does not work. We have now requested copies by e-mail.

The Bottom Line

Businesses and other organizations should study the proposed survey and should make their views known. As we said in January, it is foreseeable that the actual information collection might be orchestrated so as to set the stage for unprecedented new FLSA requirements.