



"Right to Know" Back On The Table?

Insights

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As we speculated in November, the U.S. Labor Department apparently *does* intend to reinvigorate its so-called "Right to Know" initiative. This vague and ambiguous proposal first surfaced in 2010 but was eventually shelved. USDOL has now announced its intention to conduct a survey "to collect information about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees' experience with worker misclassification."

"Right to Know" About *What*?

In 2010, USDOL said that such a rule would require among other things the "notification of workers' status as employees or some other status such as independent contractors, and whether that worker is entitled to the protections of the [federal Fair Labor Standards Act]." Many wondered at the time whether the provision would extend to disclosures about management's decisions as to which employees are considered to be exempt from the FLSA's pay requirements, and Wage and Hour Division officials seemed to be avoiding the question. USDOL's recent announcement says, "Worker misclassification can be understood as the practice, intended or unintended, 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)." For the moment, then, the focus appears to be upon erroneously deeming workers to be independent contractors or incorrectly considering them to be functioning in some other non-employee capacity.

The announcement also provides at least some hint of what a "Right to Know" regulation will entail. USDOL notes that "federal labor laws" do not require an employer to:

- ◇ Inform workers of their status as employees or non-employees;
- ◇ Provide the basis for these status determinations; or
- ◇ Notify the workers of their hours worked, pay rates, and wages paid.

Presumably, any "Right to Know" rules will obligate employers to provide this information, although to whom, when, in what form, to what extent, and at what level of detail remain unknown.

What Happens Next?

USDOL seeks comments on its proposed information collection by March 12, 2013. However, it did not publish the actual information request. Instead, a copy of this document must be obtained

separately, raising the question of whether USDOL's announcement complies with the notice requirements of the Paperwork Reduction Act. In any event, we have asked for a copy and will post the document when we receive it.

The notice specifies 30 months as the evaluation timeframe but then says in the same sentence that the period ends in March 2014. Perhaps USDOL will later clarify which of these is its intention.

Businesses and other organizations (particularly those whose operational models include the use of non-employee workers) would be wise to take the opportunity to weigh-in on this proposed survey, to participate in the survey when it occurs, and otherwise to follow these developments closely. It is foreseeable that the actual information collection might be orchestrated so as to provide a predicate for unprecedented new requirements.