7 Wage And Hour Issues To Watch Under Biden

By **Michael Kun and Paul DeCamp**

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Last week saw the inauguration of our 46th president.

Although perhaps not at the very top of the list of questions about the Biden administration, these two questions have to be somewhere on the list: What changes will we see in wage and hour law? And will the policies of former President Donald Trump remain in place?

Of course, it is not unusual for a new administration, with a newly appointed secretary of labor, to reverse — or refuse to enforce — the prior administration's policies.

Indeed, it was just four years ago that the new administration's U.S. Department of Labor abandoned the Obama administration's DOL rule that would have increased the salary threshold for most white collar exemptions under the Fair Labor Standards Act, or FLSA, from $23,660, or $455 a week, to $47,476, or $913 a week.

Eventually, the new DOL raised the salary threshold for most white collar exemptions to $35,568.

And eight years earlier, the former President Barack Obama's incoming administration withdrew close to two dozen wage and hour opinion letters issued in the final days of the George W. Bush administration — most of which the Trump DOL eventually restored.

There are a number of issues that the administration of President Joe Biden and a new DOL may focus on at some point during the next four years, be it through legislation, new rules implemented by the DOL or even executive orders.

These issues may include the following.

1. An Increase in the Federal Minimum Wage

The last time the federal minimum wage was increased was more than 11 years ago — in July 2009 — when it was increased from $6.55 an hour to $7.25. Since 1938, this is the longest Congress has gone without increasing the minimum wage.

With more and more states and local governments increasing their minimum wages to $15 an hour or more, a push to increase the minimum wage seems likely from the new administration at some point in the next four years.

Indeed, this effort has already begun, with a minimum wage increase included as part of a recent pandemic-related stimulus bill.

2. Abandoning the DOL's New Independent Contractor Test

On Jan.6, **the DOL released its much-anticipated final rule** addressing independent contractor status under the Fair Labor Standards Act.

The final rule provides as follows:

- The ultimate inquiry is whether an individual is "economically dependent" on another for work.

- To evaluate economic dependence, one examines the economic reality of the situation.

Economic reality, in turn, depends on several factors.

Two of those factors, deemed core factors, carry significantly more weight in the analysis than the other factors. Those two core factors are:

- The "nature and degree of control over the work"; and

- The "individual's opportunity for profit or loss."

In addition to these core factors, three additional factors also influence the economic reality analysis:

- "The amount of skill required for the work";

- "The degree of permanence of the working relationship between the individual and the potential employer"; and

- "Whether the work is part of an integrated unit of production."

The rule provides that the list of economic reality factors is not exhaustive, and other considerations may be pertinent in any given case.

In evaluating these various factors "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."

It is certainly possible that the new administration may make efforts to push back the effective date of the final rule or invoke the Congressional Review Act to strike it, in line with the day-one directive to executive branch agencies regarding pending regulations.

If Congress does not overturn the rulemaking, it seems likely that the validity of the new standard will end up in the courts.

If the courts uphold the final rule, then the DOL has the option of proceeding with a new rulemaking to put in place a different standard.

3. Adoption of a new Test for Independent Contractor Status — Perhaps one Based on California's Controversial A.B. 5

If the new DOL should decide to replace the final rule regarding independent contractor status, it is not difficult to see where it might look for a new standard.

In a campaign plan titled "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining and Unions," Biden pledged to "enact legislation that makes worker misclassification a substantive violation of law under all federal labor, employment, and tax laws with additional penalties beyond those imposed for other violations."

Biden also pledged to "fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort."

What might Biden have in mind?

And what might he be looking at as a model?

Little more than a year ago, California adopted a controversial independent contractor statute known as A.B. 5, which established an onerous ABC test that must be satisfied for workers in most industries to be classified as independent contractors.

California's ABC test requires that each of the following three elements be established:

(A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The worker performs work that is outside the usual course of the hiring entity's business.

(C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Practically speaking, factor B is the most difficult for most companies to establish.

Without it, an individual will be considered the company's employee, not an independent contractor.

During his campaign, Biden expressed his admiration for A.B. 5 and suggested that he would like to see it implemented nationwide.

It would not be surprising to see that desire resurface at some point during his presidency.

4. Rejecting the DOL's new Tip Pooling Rule

Rules relating to tip credit and pooling have resulted in a significant amount of litigation in the hospitality industry, and, in many cases, substantial liability or settlements.

In late December, the DOL announced its final rule that revises current regulations pertaining to tipped employees.

The final rule specifically addresses tipped occupations that qualify for application of a tip credit, as well as permissible and impermissible tip pooling practices.

The final rule codifies the DOL's previous guidance that employers may take a tip credit for any amount of time an employee in a tip-earning occupation spends on nontipped duties performed contemporaneously with, or within a reasonable time immediately before or after, the tipped duties.

The final rule identifies certain front-of-the-house tasks, including cleaning and setting tables, making coffee, and occasionally washing dishes or glasses as related nontipped duties that qualify as time for which a tip credit may be taken.

In addition to these examples, the final rule provides that a nontipped duty is related to a tip-related occupation if the duty is identified as a task of a tip-producing occupation in the Occupational Information Network, or O*Net.

This is distinguishable, however, from work unrelated to the tipped occupation, which would then be considered a dual job for which a tip credit could not be taken by an employer.

The final rule reiterates the provision in the Consolidated Appropriations Act of 2018 that prohibits employers, managers and supervisors from keeping any tips received by employees. In other words, the house may never retain tips intended for nonmanagerial employees, without exception.

In addition, the final rule amends its previous regulation to remove language that had imposed restrictions on an employer's use of tips when the employer does not take a tip credit, meaning that back-of-the-house employees, such as cooks and dishwashers, can now participate in a tip pool.

The final rule does not alter the DOL's current regulation that provides that employers who take a tip credit against tipped employees' wages may maintain a tip pool among only tipped employees, i.e. front-of-the-house workers, and not employees who do not customarily and regularly receive tips, i.e. back-of-the-house workers.

It is possible that the Biden administration will seek to curtail enforcement of the final rule or perhaps pursue new rulemaking to effectively reverse the final rule, or portions thereof.

5. Raising the Salary Threshold for White Collar Exemptions

As we discussed at the beginning of this article, near the end of the Obama administration, the DOL issued a rule increasing the salary threshold for most white collar exemptions from $23,660 to $47,476.

Only an eleventh-hour injunction and new, post-election DOL leadership stopped that rule from being implemented. Instead, under the new DOL leadership, the salary threshold for most white collar exemptions was raised to $35,568.

That, of course, remains the law. But will it remain the law for the next four years?

Might the Biden administration look to push the salary threshold up to that same $47,476 figure that had come so close to being implemented — or something close to it, or perhaps even higher to account for four-plus years of inflation? Of course.

6. Not Defending the DOL's Joint Employer Rule in Court

The standard for joint employers has been debated and redefined repeatedly over the years. During the current administration, the DOL issued a business-friendly rule defining the term.

The validity of that rule is currently a matter of appeal before the U.S. Court of Appeals for the Second Circuit.

The Biden administration could effectively put an end to that rule by simply choosing not to defend it in court, though the early filing of the government's brief in the final days of the Trump administration may complicate efforts by the Biden DOL to change course on appeal.

The DOL posited two joint employment scenarios, what it describes as vertical joint employment and horizontal joint employment.

According to the final rule, vertical joint employment exists where the employee has an employment relationship with one employer, e.g., a staffing agency or subcontractor, whereas horizontal joint employment exists where the employee has employment relationships with multiple and related or associated employers.

The DOL in its final rule arguably departed from the economic reality analysis, adopting a four-factor balancing test for evaluating potential vertical joint employment relationships focused exclusively on control,[1] which includes whether the putative joint employer (1) hires or fires the employer, (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records.

In response to the final rule, certain jurisdictions, including New York, Pennsylvania, California, Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Washington, Vermont, Virginia and the District of Columbia, filed suit to vacate it and to enjoin its implementation under the Administrative Procedure Act, or APA, which sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by courts.

Pursuant to the APA, agency actions, including rules, may be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The parties filed cross motions for summary judgment to decide the fate of the final rule.

U.S. District Judge Gregory Woods for the U.S. District Court for the Southern District of New York found that the final rule's changes to horizontal joint employer liability are severable, and that because the final rule makes only nonsubstantive revisions to existing law for horizontal joint employer liability, they can function independently from the changes to vertical joint employer liability.

Judge Woods, however, granted the plaintiffs motion to vacate the final rule as it pertains to vertical joint employment.

The court found numerous infirmities, faulting the DOL's application of different tests for primary and joint employment when the FLSA does not provide a separate definition of, or test to determine, joint employment.

Judge Woods further opined that the final rule's test for joint employment is impermissibly narrow where the four factors are really just "a proxy for control," which is inconsistent with the DOL's previous interpretive guidance, as well as a significant body of case law.

Notably, Judge Woods acknowledged that an agency rule is "entitled to a measure of respect, and the weight accorded to such interpretations depends on their thoroughness, validity, consistency and power to persuade," but then concluded that the DOL's interpretation is "unpersuasive," "conflicts with prior department interpretations," and in any event, "contradicts the FLSA."

In addition, Judge Woods held the final rule to be arbitrary and capricious because the DOL failed to adequately explain why it departed from its prior interpretations, failed to consider consistency within the DOL's existing regulations, and did not adequately consider the final rule's cost to workers.

On this last point, Judge Woods alluded to the DOL's notice of proposed rulemaking, in which the DOL provided that reducing the number of joint employers — through issuance of the final rule — would not affect the wages due employees because such employees could still recover the wages due from the employees' primary employer.

Rejecting this proposition, Judge Woods commented that the DOL's rationale is "silly" because taken to its logical conclusion, if (primary) employers— primary ones — always fulfill their legal obligations, then the final rule serves no purpose.

7. Amending Federal Laws to Preclude Class and Collective Action Waivers

In the 2018 Epic Systems Corp. v. Lewis decision, the U.S. Supreme Court confirmed that class and collective action waivers can be enforceable.

It is no secret that, in response, many employers have implemented arbitration agreements that include class and collective action waivers as a means of avoiding the large wage-hour class and collective actions that have become so prevalent over the past two decades.

Is it possible that the Biden administration might push for legislation that would effectively put an end to such class and collective action waivers?

While there has not been much buzz about this issue, it certainly seems like it would be something the Biden administration might consider if it wanted to have a large impact on wage-hour law.

Of course, whether they can accomplish it is another matter entirely.

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[1] Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).

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