SMITH ANDERSON

Wage and Hour Update 2020 Edition

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Good news for employers (for now) . . .

- Proposed new rule on independent contractor status
- Final rule on joint employment (but not so fast . . .)
- Final rule on fluctuating workweek - overtime
- Final rule on regular rate exclusions
- Clarified exemption from overtime for certain commissioned employees of retail/service establishments
- Reprieve on USDOL requests for double damages

Proposed Rule on Independent Contractor Status

- Released September 22, 2020
- Retains but "sharpens" the existing "economic reality" test
- Ultimate inquiry – is the worker in business for self (independent contractor) or is the worker economically dependent on the putative employer for work (employee)
- USDOL hopes to "clear the cobwebs and inconsistencies"
- NOT FINAL

Proposed Rule on IC Status

- Adopts a revised "economic reality" test to determine a worker's status as an employee or an independent contractor

Proposed Rule on IC Status

- Replaces the following seven current economic reality test factors with two "core" factors and three "guidepost" factors
- Current factors:
  - Services are integral to business
  - Permanency of relationship
  - Amount of investment in facilities/equipment
  - Nature and degree of control
  - Opportunity for profit/loss
  - Initiative/judgment/foresight
  - Degree of independent business organization/operation

Proposed Rule on IC Status

- Proposed new "core" factors:
  - nature and degree of worker's control over work
    - Favors IC status when worker exercises substantial control over key aspects of performance of work
    - However, requiring worker to comply with contract terms (insurance, deadlines, QC standards, health and safety requirements) are not indicative of employee status
  - worker's opportunity for profit or loss based on initiative and/or investment
    - Exercise of personal initiative (including management skill/business acumen)
    - Management of investment in or expenditures on helpers/material/ equipment

Proposed Rule on IC Status

- Proposed new "guidepost" factors:
  - amount of skill required for work
  - degree of permanence of working relationship between worker and potential employer
  - whether the work is part of an integrated unit of production
    - Note change from "integral" to "integrated"
    - USDOL states that current focus on whether the worker's work is "integral" has "questionable probative value"
    - This factor will weigh in favor of employee status where worker is part of company's integrated production process (similar to production line), whether for goods or services

Proposed Rule on IC Status

- Advises that actual practice is more relevant than what may be contractually or theoretically possible in determining whether worker is an employee or independent contractor

Proposed Rule on IC Status

- NO IMPACT on other tests under:
  - State laws (for example, CA's AB 5, ABC tests, etc.)
  - Other federal laws (NLRB, IRS, etc.)
- Employers still must consider all applicable tests, many of which will be more likely to result in finding of employee status

Proposed Rule on IC Status

- Comment period open only 30 days
- https://www.dol.gov/agencies/whd/flsa/2020-independent-contractor-nprm

Final(?) Rule on Joint Employment

- For FLSA purposes, joint employer status is relevant to whether another entity may be jointly and severally liable for wages (minimum wage, overtime)
- Effective March 16, 2020 (but note recent court action)
- First substantive update in 60 years
- To "add certainty regarding what business practices may result in joint employer status . . . [and] promote greater uniformity among court decisions by providing a clearer interpretation of FLSA joint employer status"
- Limits circumstances under which two or more entities may be jointly liable under FLSA

Final(?) Rule on Joint Employment

- Final rule continues to recognize two situations in which employee may have joint employers:
  - Employee is employed to work for one employer and another entity simultaneously benefits from the work (vertical joint employment)
    - Example – staffing company employees working for another entity
  - Employee works a set number of hours in workweek for one employer and second set number of hours for different employer in same workweek (horizontal joint employment)

Final(?) Rule on Joint Employment

- Employee is employed to work for one employer and another entity simultaneously benefits from the work (vertical)
  - Four-factor balancing test applies
  - Does the potential joint employer actually (directly or indirectly):
    - Hire or fire employee?
    - Supervise and control employee's work schedule or conditions of employment to a substantial degree?
    - Determine employee's rate and method of payment?
    - Maintain employee's employment records? (this factor alone not determinative)
  - Reserved right to exercise control, if not actually used, will not – standing alone – establish joint employment

Final(?) Rule on Joint Employment

- Some factors and business models do not make joint employment status more/less likely:
  - Franchisor/franchisee model
  - Entering into brand and supply agreement
  - Providing optional resources/benefits (for example, sample handbook/forms/policies, offering health/retirement plan, allowing potential joint employer to operate on premises)
  - Contractor requires subcontractors to maintain certain practices/policies
    - Establishing workplace safety practices
    - Requiring background checks
    - Instituting sexual harassment policies
    - Requiring quality control standards to ensure consistent quality of work product, brand or business reputation

Final(?) Rule on Joint Employment

- Whether employee is economically dependent on potential joint employer not relevant
- Certain factors irrelevant because they assess economic dependence:
  - Whether job requires special skill, judgment, initiative
  - Whether employee has opportunity for profit/loss
  - Whether employee invests in equipment/materials
  - Number of other contractual relationships that potential joint employer has entered into for similar services

Final(?) Rule on Joint Employment

- Employee works set number of hours in workweek for one employer and second set number of hours for different employer in same workweek (horizontal)
  - Final rule does not change standard for determining joint employer status in this situation
  - If employers "sufficiently associated" with respect to employee, they must aggregate hours worked for each to determine FLSA compliance
  - Employers will be "sufficiently associated" if they have arrangement to share employee's services; one acts in the interest of the other in relation to employee; they share control of employee directly or indirectly; or if one employer is controlled by or under common control with the other

Final(?) Rule on Joint Employment

- https://www.dol.gov/agencies/whd/flsa/2020-joint-employment
- BUT:
  - September 8, 2020 – federal judge in Southern District of New York struck down most of the Final Rule as inconsistent with FLSA and too narrow
  - DOL may appeal

Final(?) Rule on Joint Employment

- So, for now, in Fourth Circuit, this test applies:
  - whether the employers jointly determine, share, or allocate power to direct, control, or supervise, directly or indirectly
  - whether the employers jointly determine, share, or allocate the power to — directly or indirectly — hire or fire or modify terms or conditions
  - permanency and duration of relationship between the employers
  - whether, through shared management or direct or indirect ownership interest, one employer controls, is controlled by, or is under common control with the other
  - whether the work is performed on premises owned or controlled by one or more of the employers
  - whether the employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as payroll, workers' compensation, paying payroll taxes, or providing facilities, equipment, tools, or materials

Final Rule on Fluctuating Workweek - Overtime

- Fluctuating workweek (FWW) method, generally:
  - Non-exempt employee
  - Paid a fixed salary as straight-time compensation for all hours worked in workweek (including hours over 40)
  - Overtime pay is calculated by dividing weekly fixed salary by number of hours worked, and dividing that number by half
  - Total pay is weekly fixed salary plus half-time rate for each hour over 40 in workweek
  - Regular rate fluctuates as hours fluctuate

Final Rule on Fluctuating Workweek - Overtime

- Prior USDOL did "about face" in 2011 and took position that employers could not use FWW and pay bonuses, commissions or other compensation in addition to the weekly fixed salary
- New rule released May 20, 2020 rejects prior USDOL position:
  - Explicitly confirms that bonuses, premium payments, commissions, hazard pay and other additional pay can be paid to employees under FWW method
  - Provides that these types of additional pay must be included in regular rate calculation unless excludable under FLSA sections 7(e)(1) through (8)
  - Provides examples of calculation of overtime showing how shift differential and production bonus would affect calculation

Final Rule on Fluctuating Workweek - Overtime

- New rule also specifically lists requirements for using FWW method:
  - Hours fluctuate from week to week (even if not under 40)
  - Fixed salary does not fluctuate with hours
  - Fixed salary sufficient to provide at least minimum wage for every hour worked (though employer may supplement in occasional high hour weeks)
  - Generally, no deductions from fixed weekly salary (except in very narrow circumstances; not like salary basis exceptions)
  - Clear and mutual understanding that fixed salary is pay for total number of hours worked regardless of number of hours (but not as to calculation)
  - Employee receives overtime, in addition to fixed salary and any bonuses, premium pay, commissions, hazard pay, and additional pay, for all overtime hours at a rate of not less than one-half of regular rate of pay for workweek

Final Rule on Fluctuating Workweek - Overtime

- Remember that some state laws restrict use of fluctuating workweek method (for example, AL, CA, NM, PA)
  - Employer must still comply with state laws
- See:
  - https://www.dol.gov/agencies/whd/overtime/fww
  - 29 C.F.R. §778.114
  - USDOL Opinion Letter FLSA 2020-14

Final Rule on Regular Rate of Pay

- Effective January 15, 2020
- First significant update in over 50 years to regulations addressing determination of "regular rate of pay" (on which overtime calculation is based)
- Generally, regular rate not limited to base wages, but calculated by dividing "all remuneration paid to, or on behalf of, the employee" by the number of hours worked in a given workweek
- New rule specifies which employer-provided perks and benefits can be excluded from regular rate

Final Rule on Regular Rate of Pay

- Excluded perks and benefits include:
  - Cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access/fitness classes, discounts on goods/services, certain tuition benefits, adoption assistance
  - Payments of unused paid leave (sick/PTO)
  - Payments of certain penalties under state/local scheduling laws
  - Reimbursed expenses (cell phone plans, credentialing exam fees, organization membership dues, and travel (even if not solely for employer's benefit))
  - Certain sign-on bonuses and longevity bonuses
  - Cost of office coffee and snacks to employees as gifts

Final Rule on Regular Rate of Pay

- Excluded perks and benefits include (cont'd):
  - Discretionary bonuses, by clarifying that the label given to a bonus does not determine whether it is discretionary
  - Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense
- https://www.dol.gov/agencies/whd/overtime/2019-regular-rate

Commissioned Employee Exemption

- Section 7(i) – provides exemption from overtime for certain commissioned employees of certain establishments
  - Limited to retail/service establishments
  - Commissions on goods/services must represent more than half of compensation for a "representative period" (not less than a month)
  - Limited to employees with regular rate during overtime weeks of 1.5x FLSA minimum wage rate (currently at least $10.89/hour)

Commissioned Employee Exemption

- Clarification to the "retail" or "service" establishment prong
  - Defined as an establishment 75% of whose annual dollar volume of sales of goods or services or both is not for resale and is recognized as retail sales or services in the particular industry
  - Decades ago, USDOL created lists of establishments "to which the retail concept does not apply" and those to which the exempt "may" apply
  - Lists created presumptions of covered and non-covered establishments, but times and industries have changed, so USDOL has withdrawn the lists
  - USDOL signaling that analysis is fact-specific; labels not determinative
- Effective May 19, 2020
- *See* 29 C.F.R. Part 779; 85 Fed. Reg. 29867 (May 19, 2020)

Reprieve on double damages under FLSA

- DOL will not seek liquidated (double) damages as a matter of course in investigations, as long as:
  - No clear evidence of bad faith/willfulness,
  - Employer's explanation shows that noncompliance was result of *bona fide* dispute of unsettled FLSA law,
  - Employer has no prior history of violations,
  - Investigation involves only individual coverage,
  - Matter involves 13(a)(1) and 13(b)(1) exemptions, or
  - Matter involves state/local government agency or nonprofit
- High-level DOL approval to seek double damages will be required


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