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EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION'S DEPARTMENT OF LABOR WILL UPEND MANY EMPLOYER-FRIENDLY REGULATIONS

In this, the final installment in our series discussing the Biden Administration's workplace initiatives, we will now discuss some of the potential changes forthcoming from the U.S. Department of Labor that employers should note, including changes to the independent contractor test under the Fair Labor Standards Act, a narrowing of the "joint employer" test under the National Labor Relations Act, an expansion of the Family and Medical Leave Act to provide paid leave through passage of the Family and Medical Insurance Leave Act, and a determined Congressional effort to raise the federal minimum wage to $15 per hour.

Independent Contractor Test Under FLSA

Back in September 2020, the Trump Administration proposed a new rule broadening the independent contractor test to make it easier for companies to classify workers as independent contractors, rather than employees, under the Fair Labor Standards Act (FLSA). Under the FLSA, only employees are entitled to minimum wage and overtime compensation. The new rule proposed by the Trump Administration was set to take effect on March 8, 2021. Now, however, the U.S. Department of Labor has delayed the effective date to May 7, 2021.

The Trump Administration's proposed rule was intended to provide more clarity to the multifactor economic reality test that is presently used in determining independent contractor status under the FLSA. The Trump Administration believed that the economic reality test would benefit from additional clarity because of the way courts have evolved from the text and Supreme Court precedent. The existing economic realities test assesses workers' economic dependence on a potential employer, and many supporters of the proposed independent contractor test argued that the new test was necessary to address concerns that: (1) the core concept of economic dependence remains vague and under-developed; (2) the test lacks guidance about how to balance the multiple factors; and (3) the lines between many of the factors are blurred. The shortcomings of the economic realities test have become more apparent in the new modern and gig economy.

On March 5, 2021, however, the Biden Administration's Department of Labor sent to the

White House of Office Information and Regulatory Affairs a new proposal entitled "Independent Contractor Status Under the Fair Labor Standards Act". It is expected that the Biden Administration will adopt new regulations upending the Trump Administration's employer-friendly independent contractor test and will provide a more employee-friendly interpretation relative to whether an individual is an employee or an independent contractor under the FLSA. The U.S. Department of Labor is nearing completion of a regulatory update to the Trump Administration's proposed independent contractor rules and is simply waiting for White House of Information and Regulatory Affairs' pending regulatory review before releasing the new proposal. Stay tuned for updates as they develop.

Joint Employer Test Under NLRA

In March 2020, the Trump Administration's Department of Labor adopted a final rule narrowing the definition of "joint employer" under the National Labor Relations Act (NLRA) limiting the circumstances under which multiple entities could be deemed the employer of a single worker. The Trump-Era regulation provided that an entity may be considered a joint employer of a separate employer's employees when it has direct control over the employees' essential terms and conditions of employment.

The rule primarily impacts businesses that rely on franchisees or leased workers. The Trump Administration's rule essentially reversed the Obama-Era standard set forth in the National Labor Relations Board's (NLRB) 2015 decision in *Browning-Ferris*. The NLRB's 2015 decision in *Browning-Ferris* lowered the bar for proving an entity was a joint employer by holding that it was no longer necessary that an entity actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately for a entity to be a joint employer. Fortunately, the NLRB had an opportunity to revisit its *Browning-Ferris* decision in 2020 on remand from the U.S. Court of Appeals for the District of Columbia Circuit. In its 2020 decision, the NLRB reversed course from its 2015 decision, holding that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees in order to be held a joint employer under the NLRA.

Employers should expect the Biden Administration to attempt to override the new Trump-Era "joint employer" regulation and the NLRB's 2020 decision in *Browning-Ferris* through passage of the controversial Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), which codifies an expansive "joint employer" standard, which would result in businesses having liability for workplaces that they don't control and workers they don't employ. On March 9, 2021, the U.S. House of Representatives passed 225-206 the PRO Act, again, along party lines. The 2021 version of the PRO Act, among other things, revises the definition of "joint employer" under the NLRA by requiring the NLRB and courts to consider not only an entity's direct control, but to also consider an entity's indirect control, over an individual's terms and conditions of employment including any reserved authority to control such terms and

conditions, which standing alone, can be sufficient to make a finding of a “joint employer” relationship.

The U.S House of Representatives previously passed the PRO Act in 2020, but it stalled out in the U.S. Senate. The recently passed Pro Act will continue to have a challenging time in the U.S. Senate unless the Democrats can get around the filibuster rules which will most likely again stall the bill in the U.S. Senate. Nonetheless, employers should pay close attention to the PRO Act and the Biden Administration’s attempt to return to the Obama-Era “joint employer” test where an entity’s indirect or unexercised contractually reserved right to control could, alone, warrant finding of a joint-employer relationship.

Family and Medical Insurance Leave Act

The Biden Administration will attempt to expand the Family and Medical Leave Act (FMLA) by supporting job-protected paid leave benefits. Currently, FMLA leave is unpaid unless the employee chooses, or the employer requires, substitution of paid leave (e.g., vacation or PTO).

The Biden Administration will attempt to obtain paid FMLA leave for employees working for private employers through the Family and Medical Insurance Leave (FAMILY) Act (S. 248) which has been recently introduced in the U.S. Senate by Sen. Kristen Gillibrand (D-NY). The FAMILY Act would allow employees to receive up to 12 weeks (60 days) of paid leave in a year for caring for a newborn or newly adopted fostered child, for employee’s or employee’s family member’s serious health condition, or dealing with qualifying exigencies arising from the deployment of a family member in the Armed Services.

However, unlike the FMLA, the FAMILY Act would apply to all employers across the country regardless of their size. That is, eligibility for FAMILY Act benefits would not be tied to FMLA employer coverage and would be available to every individual who has the earnings and work history necessary to qualify for Social Security Disability Insurance. The benefits under the FAMILY Act would be paid through a national family and medical leave insurance fund which would be funded through a payroll tax contribution of 0.20%.

Increase in Federal Minimum Wage to $15

In this series, we previously addressed the Democrats’ efforts to increase the federal minimum wage to $15 per hour through a provision in the American Rescue Plan Act of 2021 (i.e., the $1.9 Trillion coronavirus-relief package). Since the posting of our article, the U.S. Senate parliamentarian dealt a deadly blow to the Democrats’ efforts to increase the federal minimum wage when she ruled that the bill’s proposal did not meet the U.S. Senate’s guidelines for reconciliation, and, therefore, the proposal could not be included in the coronavirus-relief package which was passed by both chambers of Congress this week and

signed into law by President Biden on March 11, 2021.

Congressional Democrats, however, did not give up without a fight when they attempted to circumvent the U.S. Senate's reconciliation guidelines and the U.S. Senate's parliamentarian ruling by proposing tax penalties for employers with $2.5 billion or more in gross revenue who do not pay their employees at least $15 an hour instead of having a provision in the bill that directly raised the federal minimum wage. Supporters of addressing a federal minimum wage increase through amendment of the tax code finally relented when the complexity of such a maneuver would delay quick passage of the relief bill which the Democrats wanted completed by March 14, 2021.

The Democrats big push to include a federal minimum wage increase in the corona-virus relief package was an attempt to avoid the U.S. Senate's filibuster rules that a non-budgetary piece of legislation would be subject to under U.S. Senate rules. The Biden Administration, however, will now have to seek an increase in the federal minimum wage through a legislative bill and may have a difficult time getting the bill through the U.S. Senate given the U.S. Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. We will keep you posted on the Biden Administration's efforts to raise the federal minimum wage.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding any of the new workplace policies or proposed legislation that will be ushered in during the Biden Administration.