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What's On Deck? Labor Department Regulatory Agenda Updates

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AGENDA

- Refresher on Rulemaking Process/APA
- Refresher on Making Effective Comments
- Overview of Regulatory Agenda
- DOL Proposed Regulations
 - OSHA
 - WHD
 - EBSA
 - OFCCP
- Key Takeaways
- Q&A

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Refresher

Administrative Procedure Act

Rulemaking Process

Refresher – Administrative Procedure Act Rulemaking Process

- **Source of Agency Authority**

- Delegation from President

OR

- Pursuant to a law passed by Congress.

****Agencies cannot take action that goes beyond their statutory authority or violate the Constitution.**

- **How does Rulemaking Start?**

- Congress can direct an agency to take action on a certain subject and set a schedule for the agency to follow

OR

- The agency can survey its area of legal responsibility and then decide the issues / goals for rulemaking.



Refresher – Administrative Procedure Act Rulemaking Process (Cont.)


- **General Rulemaking Process (cont.):**
 - Agencies must follow an open public process when issuing regulations.
 - Agencies must publish a “Regulatory Plan” once a year (fall) and an “Agenda of Regulatory and Deregulatory Actions” (spring and fall).
 - Agencies gather information about issues (formally and informally).
 - Agencies issue a Notice of Proposed Rulemaking (“NPRM”)
 - Officially announces the rule and explains the agency’s plan and goals.
 - Can avoid publishing a proposed rule if they show “good cause” that the notice and comment process would be “impracticable, unnecessary, or contrary to the public interest.”
 - NPRM is published in the *Federal Register*.
 - The public can submit comments.
 - Comment periods can vary (e.g., 30, 60, 180 days).



FEDERAL REGISTER
The Daily Journal of the United States Government

Refresher – Administrative Procedure Act Rulemaking Process (Cont.)

- **General Rulemaking Process (cont.):**
 - The President and the Office of Information & Regulatory Affairs can review draft proposed rules and draft final rules.
 - Final rule is published in the *Federal Register*.
 - Final rule contains:
 - Summary
 - Effective Date
 - Basis and Purpose
 - Legal authority for issuing the rule
 - Final rule's regulatory text
 - Final rule takes effect no less than 30 days post-publication unless the agency shows "good cause" (persuasive reasons) for earlier effective date.
 - Significant / major rules must have a 60-day delayed effective date.

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Refresher Effective Comments

Refresher – Effective Comments

- Agencies must take public comments into account.
- EO 12866 meetings are very useful way to bring attention to your comments.
- Effective comments focus on:
 - Improving specific language in the proposed regulatory text – especially re: legal sufficiency or vagueness/ambiguity
 - Addressing regulatory burden
 - Answering questions posed by the NPRM with specific information
 - Providing examples or hypotheticals that may cause the NPRM to look arbitrary, capricious, or likely to cause a harm it is seeking to address
 - Providing specific anecdotes that support or undermine the purpose of the NPRM
 - Identifying legal precedents that have not been addressed
 - Identifying conflict with other federal agencies or state law



DOL Fall 2023 Regulatory Agenda

DOL Fall 2022 Regulatory Agenda

- **Nearly 80 Agenda Items**

- Outlines regulatory actions Federal agencies are considering in the coming months.
- Focused on building on the progress the Biden/Harris Administration has made in various areas, including growing the economy from the bottom up and middle out, tackling the climate crisis, improving public health, and advancing equity, by:
 - Continuing to protect workers' health and safety;
 - Delivering on the President's commitment to promote competition economic opportunity;
 - Improving customer experience and access to critical government services and benefits;
 - Advancing the Administration's climate and clean energy agenda; and
 - Building a more equitable economy that reduces barriers to opportunity, and roots out discrimination.
- Focused on implementing the legislation passed in 2022, including the Inflation Reduction Act, the PACT Act, the CHIPS and Science Act, and the Bipartisan Safer Communities Act, and continuing to implement the Bipartisan Infrastructure Law.

Source: Jan. 4, 2023 White House Press Release (<https://www.whitehouse.gov/omb/briefing-room/2023/01/04/2022-unified-regulatory-agenda-and-regulatory-plan/>)

DOL Fall 2022 Regulatory Agenda

- **Comparison to Spring 2022 Regulatory Agenda**
 - One less agenda item than Spring 2022 agenda.
 - Some new items that weren't on either of the 2022 agendas.
 - Some items have moved from Proposed Rule Stage to Final Rule Stage.
 - Some items have had their NPRM deadlines and other deadlines extended.
 - Some items have moved back.
 - Proposed Rule → Prerule
 - Final Rule → Proposed Rule
 - Still no EEOC pending actions.
 - May change if the Commission's composition changes (currently two Democratic commissioners and three Republican commissioners)

OSHA Regulations

OSHA: COVID-19

- **General COVID-19 Safety Standard**

- Permanent COVID-19 Safety Standard not on Fall 2022 Regulatory Agenda.
 - Was not on Spring 2022 Regulatory Agenda.
- Consistent with OSHA's prioritization of a permanent standard for healthcare workers.

- **Occupational Exposure to COVID-19 in Healthcare Settings (RIN 1218-AD36)**

- **Moved to Final Rule Stage**

- Sent to the White House Office of Management and Budget, but not yet made public
 - Unions and worker groups:
 - Do not want the rule to merely revive the expired COVID-19 emergency temporary standard.
 - Want the rule to address the COVID-19 hazards that have arisen from lack of adequate PPE, lack of notification of potential exposures, and lack of PTO for quarantining.



OSHA: Infectious Diseases

■ Status

- **Still in Proposed Rule Stage**
- NPRM now scheduled for September 2023
 - Initially April 2022
 - Then May 2023
 - Now September 2023
- Final rule could take a few years to be issued
 - In the meantime, OSHA can continue to rely on the General Duty Clause and other existing rules



■ Summary

- RIN 1218-AC46
- Initial Request for Information was published in 2010
- Would create a standard to protect employees in health care and other high-risk environments (e.g., correctional facilities, homeless shelters, drug treatment programs) from infectious disease hazards, such as TB, measles, SARS, and COVID-19

OSHA: Tracking of Workplace Illnesses

- **Status**
 - **Moved to Final Rule Stage**
 - Proposed Rule was issued in March 2022
 - Comment Period closed on June 30, 2022
 - 92 total comments (some submitted post-June 30, 2022)
 - Final Rule scheduled for March 2023
- **Summary**
 - RIN 1218-AD40
 - Proposed Rule:
 - Entities in **certain high-hazard industries** (e.g., construction) **with 100+ employees must electronically submit** OSHA information from the OSHA Form 300 and OSHA Form 301.
 - Entities in **certain high-hazard industries with 20+ employees** must continue to electronically submit Form 300A electronically once a year.
 - Current Rule:
 - 2019 final rule that removed provisions of a 2016 final rule
 - Entities are only required to electronically submit information from the OSHA Form 300A

OSHA: Tracking of Workplace Illnesses (Cont.)

- Examples of Comments
 - Against: Requiring electronic submission of this information will place companies in legal liability due to **privacy** law restrictions.
 - Company submission
 - Against: The change puts **undue hardship and burden** on businesses without any apparent corresponding benefit.
 - National business association submission
 - For: This data it will be a resource for workers who want to know the **safety history** of their employer or potential employer.
 - Individual submission
 - For: It is important to use a rate of cases-per-100- employees, as close as possible to the national average, to get information from industries with **above-average case rate**.
 - State OSHA department submission
 - Request for Clarification: **Clarify** the obligations of or make reporting easier for companies with 100 employees across multiple sites.
 - Company submission
 - Request for Clarification: **Estimated to take more like 15-20 minutes** per case, rather than OSHA's estimate of 10 minutes per case.
 - Company submission

OSHA: Tracking of Workplace Illnesses (Cont.)

REMINDER

Form 300

- Employee name
- Date and location of injury or illness onset
- Description of injury or illness

Form 301

- Employee name, address, date of birth, date hired, and physician/health care professional information
- Treatment received
- Description of injury or illness
- Etc.

Form 300A (required now)

- High-level summary of injuries and illnesses
- No employee names
- No dates or descriptions of injuries or illnesses

OSHA: Prevention of Workplace Violence in Health Care and Social Assistance (Cont.)

- **Status**
 - **Still in Prerule Stage**
 - RIN 1218-AD08
- **History**
 - December 2016:
 - OSHA published a Request for Information asking for information on the impacts of violence in these settings, prevention strategies, and other information.
 - Aimed primarily at health care employers, workers and other subject matter experts.
 - OSHA ultimately reviewed over 150 public comments.
 - Strong support for implementing a standard.
 - January 2017:
 - A coalition of labor unions and the National Nurses United petition OSHA for a standard preventing violence in healthcare.
 - Spring 2018:
 - Added to DOL Regulatory Agenda.
 - Has been on each DOL Regulatory Agenda in Prerule Stage since Spring 2018.

OSHA: Prevention of Workplace Violence in Health Care and Social Assistance (Cont.)

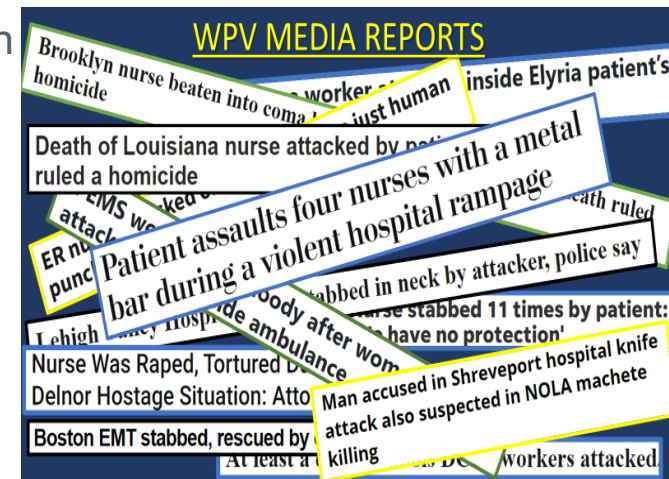
- **Summary Framework of Draft Standard:**
 - Workplace Violence Prevention Program
 - Workplace violence hazard assessment
 - Control measures
 - Training
 - Violent incident investigation and recordkeeping
- **Next Steps:**
 - Convene a Small Business Advocacy Review Panel this year.
 - Comprised of members of the Small Business Administration's Office of Advocacy, OSHA, and Office of Management and Budget's Office of Information and Regulatory Affairs.
 - Listen to Small Entity Representatives
 - Hold teleconferences open to the public

Source: Ryan Tremain (Dir. of Standards and Guidance, Office of Physical Hazards, OSHA) PowerPoint Presentation for Small Business Labor Safety (OSHA/MSHA) Roundtable (Jan. 20, 2023)

OSHA: Prevention of Workplace Violence in Health Care and Social Assistance (Cont.)

■ Why Necessary?

- Healthcare and Social Assistance:
 - **30x** more violence per 10,000 employees than non-healthcare industries
- Residential Mental Health Care Facilities:
 - **85x** more violence per 10,000 employees than non-healthcare industries
- Psychiatric and Substance Abuse Hospitals:
 - **270x** more violence per 10,000 employees than non-healthcare industries
- 2010 – 2020:
 - OSHA conducted 770 workplace violence inspections.
 - 530 of those inspections were in healthcare or social service facilities (over 68%)



Source: Ryan Tremain (Dir. of Standards and Guidance, Office of Physical Hazards, OSHA)
 PowerPoint Presentation for Small Business Labor Safety (OSHA/MSHA) Roundtable (Jan. 20, 2023) – Figures as of 2020

WHD Regulations

WHD: Overtime Rule / White Collar Exemptions

- **Update**

- **Still in Proposed Rule Stage**
- NPRM now scheduled for May 2023
 - Initially April 2022
 - Then October 2022
 - Now May 2023

- **Summary**

- RIN 1235-AA39
- Primary goal is to update the salary level requirements for these exemptions.
 - Current: \$684/week ; \$35,568
 - Designed to promote greater stability by:
 - Avoiding disruptive salary level increases that can result from lengthy gaps between updates; and
 - Providing appropriate wage protection.
- The DOL has not explained what changes it is considering.
- Could also include changes to how these exemptions are defined.
- Has engaged in stakeholder calls and conducted regional listening sessions.



WHD: Independent Contractor Rule

- **Status**
 - **Proposed Rule Stage**
 - **NEW REGULATORY AGENDA ITEM**
 - Extended comment period ended on December 13, 2022
 - Final Rule scheduled for May 2023
- **History**
 - RIN 1235-AA43
 - Jan. 2021: the DOL published an independent contractor rule at the end of the Trump administration that was scheduled to take effect in March 2021.
 - “Economic reality” test -- prioritized the nature and degree of a worker’s control over their work and the opportunity for profit or loss.
 - Made it easier for a worker to be classified as an independent contractor.

WHD: Independent Contractor Rule (Cont.)

- **History (cont.)**

- Feb. 2021:

- The DOL published NPRM to delay the rule's effective date to May 2021.

- March 2021:

- The DOL published a final rule to delay the rule and a NPRM to withdraw the rule.

- May 2021:

- The DOL withdrew the rule.
 - Claimed the rule was inconsistent with the FLSA's text and purpose.

- March 2022:

- Judge (EDTX) vacated the DOL's final rules delaying and withdrawing the independent contractor rule, finding that the Trump administration's rule took effect in March 2021.

- May 2022:

- The DOL filed a notice of appeal.

WHD: Independent Contractor Rule (Cont.)

- History (cont.)

- Later:

- The DOL abandoned its appeal so it could focus on developing a proposed rule
 - The DOL held forums for interested parties to provide their perspectives.

- October 13, 2022:

- The DOL published a Notice of Proposed Rulemaking

- December 13, 2022:

- Extended comment period ended



WHD: Independent Contractor Rule (Cont.)

- **According to the DOL, the proposed rule will:**
 - Rescind the 2021 Independent Contractor Rule.
 - Assist with the proper classification of employees and independent contractors under the FLSA.
 - Align the department's approach with courts' FLSA interpretation and the **economic reality test**.
 - Economic reality factors include the investment, control and opportunity for profit or loss factors, as well as the integral factor (whether the work is integral to the employer's business).
 - Restore the multifactor, **totality-of-the-circumstances** analysis to determine whether a worker is an employee or an independent contractor under the FLSA.
 - Ensure that **all factors are analyzed** without assigning a predetermined weight to a particular factor or set of factors.
 - Provide consistency for regulated entities.

WHD: Independent Contractor Rule (Cont.)

■ Proposed Rule - Economics Realities Test

- Is the worker economically dependent on an employer for work or is the worker in business for themselves?
- Lays out a **6-factor totality of the circumstances** test:
 1. Opportunity for Profit or Loss Due to Managerial Skill
 - *No such opportunity = the worker is likely an employee*
 - Can the worker negotiate the fee paid for the services?
 - Does the worker undertake marketing or other efforts to expand their business?
 - Does the worker make decisions to hire others, buy materials / equipment, or rent space?
 2. Capital or Entrepreneurial Investments by the Worker and the Employer
 - *No such investments = the worker is likely an employee*
 - Investments that “generally support an independent business and serve a business-like function, such as increasing the worker’s ability to do different types of or more work, reducing costs, or extending market reach.”

WHD: Independent Contractor Rule (Cont.)

- **Proposed Rule - Economics Realities Test (cont.)**
 - 6-factor totality of the circumstances (cont.):
 3. Degree of Permanence of Work Relationship
 - *Indefinite / continuous / exclusive = the worker is likely an employee*
 - *Definite / non-exclusive / project-based / sporadic = the worker could be an independent contractor*
 - BUT “[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers’ own independent business initiative, this factor is not indicative of independent contractor status.”
 4. Nature and Degree of Control
 - *The more control = the more likely the worker is an employee*
 - Active control over and the right to control the work and economic aspects of the relationship
 - Does the employer set the worker’s schedule?
 - Does the employer supervise the performance of the work, or reserve the right to supervise or discipline the worker?
 - Does the employer limit the worker’s ability to work for others or place demands on the workers’ time that do not allow them to work for others or work when they choose?
 - Does the employer uses “technological means of supervision (such as by means of a device or electronically)”?
 - Does the employer control the prices or rates for services and the marketing of the services or products provided by the worker?

WHD: Independent Contractor Rule (Cont.)

- **Proposed Rule - Economics Realities Test (cont.)**
 - 6-factor totality of the circumstances (cont.):
 5. Extent to Which the Work Performed is an Integral Part of the Business
 - *The more integral it is = the more likely the worker is an employee*
 - Is the *function* the worker performs is an integral part of the business — “critical, necessary, or central to the [engaging entity’s] principal business.”
 - The question is NOT whether any individual worker in particular is an integral part of the business
 6. Skill and Initiative
 - *The less specialized the skill / the more dependent the worker is on the employer for training = the more likely the worker is an employee*
 - Considers whether the worker uses specialized skill and whether those skills contribute to “business-like initiative.”
- The DOL: “Additional factors may be relevant in determining whether the worker is an employee or independent contractor ... if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”

WHD: Independent Contractor Rule (Cont.)

- **Refresher: Current Rule's Economic Realities Test**
 - Lays out 5 factors aimed at determining whether the worker is “economically dependent” on the employer.
 - But narrowly focuses on 2 factors:
 - The employee's nature and degree of control over the work
 - The worker's opportunity for profit or loss
 - Includes examples of facts weighing in one direction or another and examples of how the test should be applied in various situations.

EBSA Regulations

EBSA: Definition of Term “Fiduciary”

■ Update

- Remains in Proposed Rule Stage
- NPRM was previously scheduled for December 2022
- No update to NPRM schedule

■ Summary

- RIN 1210-AC02
- Would amend 29 C.F.R. § 2510.3-21(c)’s definition of “fiduciary” to more appropriately define when people who give investment advice for a fee to employee benefit plans and IRAs are fiduciaries ERISA and the Internal Revenue Code.
 - E.g., amended definition would account for how advisers are compensated and how that compensation can create conflicts of interest
- EBSA has periodically tried to update the definition since 2010.

EBSA: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

- **Update**
 - **Final Rule Issued in November 2022; Two lawsuits have been filed**
- **Summary**
 - Clarifies how ERISA's fiduciary duties of prudence and loyalty apply to selecting investments and investment courses of action and exercising shareholder rights such as proxy voting.
 - Clarifies that a fiduciary's duty of prudence must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis.
 - Such factors may include the economic effects of climate change and other ESG considerations on the particular investment or investment course of action
 - Retains the core principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan.
 - Reiterates a second core principle, which is that when a plan's assets include shares of stock, the fiduciary duty to manage plan assets includes the management of shareholder rights related to those shares, such as the right to vote proxies.

EBSA: Other Rulemakings

- Secure Act Pooled Employer Plan Rulemaking
- Secure 2.0 Act implementation
 - Reopened amendments to the Voluntary Fiduciary Correction Program and Prohibited Transaction Exemption 2002-51
- Improving ERISA plan disclosures

OFCCP Regulations

OFCCP: Pre-enforcement Notice and Conciliation Procedures

■ Update

- NPRM issued in March of 2022
- Final Rule anticipated in March of 2023 (Coming Soon)

■ Summary

- Would amend regulations issued in 2020 that established procedural and substantive framework for evaluating compliance with nondiscrimination obligations
- Would rescind substantive framework in an effort to increase agency discretion
- Would continue procedural requirement
- 12 comments filed



OFCCP: Notification of Supply and Service Subcontract Awards

■ Update

- This rulemaking is being watched closely by federal contractors.
- NPRM date moved to March 2023.

■ Summary

- Would add provisions to the regulations implementing EO 11246, requiring contractors to provide notice to OFCCP when they award supply and service subcontracts.
 - **EO 11246:**
 - Prohibits federal contractors who do over \$10,000 USD in government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.
 - Requires government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.
 - Prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.
- The notice would include information currently unavailable to OFCCP, enabling it to schedule supply and service subcontractors for compliance evaluations.

Modernizing Affirmative Action and Nondiscrimination Obligations for Federal Contractors and Subcontractors

- NPRM is anticipated in April 2023; may take longer though as this rulemaking addresses affirmative action and Supreme Court decisions on affirmative action in higher education are pending
- This rulemaking would update and modernize affirmative action and recordkeeping obligations; could draw a challenge to affirmative action in employment so OFCCP will be careful
- Includes further implementing EO 13988 as to these obligations in relation to sexual orientation and gender identity as protected classes

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BONUS

NLRB Regulatory Agenda – Joint
Employer Rule

National Labor Relations Board: Joint Employer Rule

■ Update

- Notice of Proposed Rulemaking issued on Sept. 6, 2022
- Extended comment period ended in December 2022

■ Summary

- Would rescind and replace a 2020 joint employer rule.
 - Consistent with the DOL's rescission of the Trump Administration's joint employer rule under the FLSA.
- 2+ employers would be considered joint employers if they:
 - "Share or codetermine those matters governing employees' essential terms and conditions of employment"
 - E.g., wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules.
- The NLRB would consider direct evidence of control and evidence of reserved and/or indirect control over these essential terms and conditions of employment.



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Key Takeaways

Key Takeaways

- **In General:**
 - Pay close attention to [reginfo.gov](https://www.reginfo.gov).
 - Comments make an impact.
 - Include information about regulatory burden.
 - Use EO 12866 meetings with OMB.
 - Be ready for major changes coming to consequential areas of law.
 - Watch for possible litigation and nationwide injunction.



Key Takeaways (Cont.)

- **OSHA:**

- OSHA's COVID-19 focus is almost exclusively in the healthcare field at this juncture, both through the COVID Healthcare rulemaking and the Infectious Disease rulemaking.
- Keep a close watch on Tracking of Workplace Illnesses rulemaking as potentially significant burden to those companies or industries that end up with additional reporting obligations.

- **EBSA:**

- Key focus remains expanding fiduciary obligations to additional parties.
- Plan fiduciaries will likely be able to consider ESG principles broadly, and more investment advisers will likely have fiduciary obligations; this is a clear Administration priority so is likely to occur.

- **WHD:**

- Likely to see higher salary thresholds for Executive, Administrative, Professional, Outside Sales, and Computer Employees Exemptions so that more employees are non-exempt
- Independent contractor rulemaking likely to lead to more workers categorized as employees, although also likely to be challenged; this is an issue that may continue to go back and forth across changes in Administration

- **OFCCP:**

- Major rulemakings in the works related to how OFCCP evaluates compliance with nondiscrimination obligations and relating to affirmative action in employment
- OFCCP will likely be requiring subcontractors to certify affirmative action plans in the next two years.

The image features a central white horizontal band. Above and below this band is a blue abstract background composed of overlapping, semi-transparent geometric shapes, creating a sense of depth and movement. The colors range from a bright cyan to a deep navy blue.

Q&A

K&L GATES