Federal Law Alerts - January to February 15th

New OSHA COVID-19 Workplace Guidance

On January 29, 2021, the U.S. Department of Labor announced that its Occupational Safety and Health Administration (OSHA) issued new worker safety guidance to:

- Help employers and workers implement a coronavirus protection program; and
- Identify risks that could lead to exposure and contraction;

The guidance recommends several essential elements in a prevention program:

- Conduct a hazard assessment.
- Identify control measures to limit the spread of the virus.
- Adopt policies for employee absences that don't punish workers as a way to encourage potentially infected workers to remain home.
- Ensure that coronavirus policies and procedures are communicated to both English and non-English speaking workers.
- Implement protections from retaliation for workers who raise coronavirus-related concerns.

The guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of existing mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in recognizing and abating hazards likely to cause death or serious physical harm as part of their obligation to provide a safe and healthful workplace.

Form I-9 Flexibility Extended to March 31, 2021

On January 27, 2021, the U.S. Immigration and Customs Enforcement (ICE) announced the Employment Eligibility Verification (Form I-9) flexibility rule will be extended to March 31, 2021 because of COVID-19 and the need for precautions. This flexibility rule, applicable only to remote workplaces, defers the physical presence requirement for in-person verification of the Form I-9 identity and employment eligibility documentation. However, the flexibility rule does not apply if there are employees physically present at the workplace. If there are employees physically present, then an employer must verify their Form I-9 identity and employment eligibility documentation in-person.

On March 19, 2020, the DHS first announced that the physical presence requirements were deferred due to COVID-19. The DHS and ICE websites provide additional updates about when the extensions will end and when normal operations will resume.

Law Extends COVID-19 Tax Credit for Employers That Keep Workers on Payroll

On January 26, 2021, an Internal Revenue Service press release (IR-2021-21) reminded employers to take advantage of the extended employee retention credit for businesses that choose to keep their employees on the payroll despite the challenges posed by COVID-19. The Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted December 27, 2020, changed the employee retention tax credits previously made available under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), including modifying and extending the Employee Retention Credit (ERC), for six months through June 30, 2021. Several of the changes apply only to 2021, while others apply to both 2020 and 2021.

As a result of the new legislation, eligible employers can now claim a refundable tax credit against the employer share of Social Security tax equal to 70 percent of the qualified wages they pay to employees after December 31, 2020 and through June 30, 2021. Qualified wages are limited to $10,000 per employee per calendar quarter in 2021. Thus, the maximum ERC amount available is $7,000 per employee per calendar quarter, for a total of $14,000 in 2021.

Employers can access the ERC for the 1st and 2nd quarters of 2021 prior to filing their employment tax returns by reducing employment tax deposits. ***Small employers***, those with an average of 500 or fewer full-time employees in 2019, may request advance payment of the credit (subject to certain limits) on Form 7200, *Advance of Employer Credits Due to COVID-19*, after reducing deposits. In 2021, advances are not available for employers larger than this.

Effective January 1, 2021, employers are eligible if they operate a trade or business during January 1, 2021 through June 30, 2021, and experience either:

- A full or partial suspension of the operation of their trade or business during this period because of governmental orders limiting commerce, travel or group meetings due to COVID-19; or
- A decline in gross receipts in a calendar quarter in 2021 where the gross receipts of that calendar quarter are less than 80 percent of the gross receipts in the same calendar quarter in 2019 (to be eligible based on a decline in gross receipts in 2020 the gross receipts were required to be less than 50 percent).

Employers that did not exist in 2019 can use the corresponding quarter in 2020 to measure the decline in their gross receipts. In addition, for the first and second calendar quarters in 2021, employers may elect (in a manner provided in future IRS guidance) to measure the decline in their gross receipts using the immediately preceding calendar quarter (the fourth calendar quarter of 2020 and first calendar quarter of 2021, respectively) compared to the same calendar quarter in 2019.

In addition, effective January 1, 2021, the definition of qualified wages was changed to provide:

- For an employer that averaged more than 500 full-time employees in 2019, ***qualified wages*** are generally those wages paid to employees that are not providing services because operations were fully or partially suspended or due to the decline in gross receipts.
- For an employer that averaged 500 or fewer full-time employees in 2019, ***qualified wages*** are generally those wages paid to all employees during a period that operations were fully or partially suspended or during the quarter that the employer had a decline in gross receipts regardless of whether the employees are providing services.

Retroactive to the March 27, 2020, enactment of the CARES Act, the law now allows employers who received Paycheck Protection Program (PPP) loans to claim the ERC for qualified wages that are not treated as payroll costs in obtaining forgiveness of the PPP loan.

Read more about COVID-19-related employee retention credits and how to claim the employee retention credit here.

CDC COVID-19 Workplace Testing Guidelines Emphasize Consent and Disclosure

On January 21, 2021, the Centers for Disease Control and Prevention (CDC) updated its guidance on COVID-19 workplace testing. The guidance emphasizes that workplace-based testing should not be conducted without employees informed consent so they understand the testing process and may act independently to make choices that align with their values, goals, and preferences.

The guidance details the disclosures that an employer must provide to its employees, for instance:

- Test manufacturer, name, purpose, and type.
- How the test will be performed.
- Known and potential risks of harm, discomforts, and benefits of the test.
- What a positive or negative test result means, including:
    - Test reliability and limitations; and
    - Public health guidance to isolate or quarantine at home, if applicable.

The guidance also addresses topics employers should be prepared to discuss with their employees, such as test scheduling and payment, testing sites, communication and interpretation of results, employee privacy, and how to get assistance.

The CDC also provides a SARS-CoV-2 Testing Strategy: Considerations for Non-Healthcare Workplaces website, updated October 21, 2020, which identifies additional, important disclosures that employers should give to employees contemplating testing.

DOL Opinion Letters Addressing FLSA Exemptions and Worker Classification

On January 19, 2021, the U.S. Department of Labor released the following new opinion letters addressing Fair Labor Standards Act (FLSA) compliance:

- FLSA2021-6: Addressing whether the FLSA's "retail or service establishment" exemption applies to staffing firms that recruit, hire, and place employees on assignments with clients.
- FLSA2021-7: Addressing whether certain local small-town and community news source journalists are creative or learned professionals under Section 13(a)(1) of the FLSA.
- FLSA2021-8*: ***(withdrawn as of 1/26/21)*** ~~Addressing whether certain distributors of a manufacturer's food products are employees or independent contractors under the FLSA.~~
- FLSA2021-9*: ***(withdrawn as of 1/26/21)*** ~~Addressing whether requiring tractor-trailer truck drivers to implement legally required safety measures creates control by the motor carrier for worker classification (employee or independent contractor) under the FLSA and whether certain owner-operators are correctly classified as independent contractors.~~

**2021-8 and 2021-9 were withdrawn. They were determined to be issued prematurely because they were based on rules that were not in effect. These withdrawals are an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259, and these letters may not be relied upon as statements of agency policy as of their withdrawal date.*

DOL Releases Opinion Letters for Two FLSA Topics: Tipped Workers and Establishment Workers

On January 15, 2021, the U.S. Department of Labor released the following Fair Labor Standards Act (FLSA) opinion letters:

- FLSA 2021-5: This letter provided a step-by-step calculation of overtime pay under the FLSA when a tipped employee works as a server and bartender, receives tips, and also receives automatic gratuities or service charges.
- FLSA 2021-4*: ***(withdrawn as of 1/26/21)*** ~~This letter found that a restaurant can implement a nontraditional tip pool under the FLSA's new regulatory changes, not yet effective but set to be soon, so long as it does not include any managers or supervisors, the employer does not take a tip credit, and it pays the full minimum wage to both the tipped employees (servers) who contribute to the pool and the non-tipped employees (hosts or hostesses) who receive tips from the pool. A ***nontraditional tip pool*** includes both tipped employees and non-tipped employees.~~
- FLSA 2021-3: This letter assessed three different entities and whether they satisfy the FLSA's establishment requirement, which provides an exemption from minimum wage and overtime provisions for workers of an amusement or recreational establishment, and whether an accrual method of accounting may be used to satisfy the FLSA's Receipts Test.

**2021-4 was withdrawn. It was determined to be issued prematurely because it was based on a rule that has not taken effect. The withdrawal is an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259, and the letter may not be relied upon as a statement of agency policy as of the withdrawal date.*

EEOC and Religious Discrimination Clarifications

On January 15, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) approved revisions to its Compliance Manual Section on Religious Discrimination. The updated guidance describes how Title VII of the Civil Rights Act of 1964 protects against religious discrimination in the workplace and details legal protections available to religious employers. Importantly, the EEOC states that "the manual does not have the force and effect of law and is not meant to bind the public in any way. It is intended to provide clarity to the public on existing requirements under the law and how the EEOC will analyze these matters in performing its duties."

Replacement Sticker Extending Permanent Resident Card (Green Card) Validity and Form I-9

On January 12, 2021, the U.S. Citizenship and Immigration Services (USCIS) announced that it is replacing the currently issued sticker that extends the validity of a Form I-551, Permanent Resident Card (PRC), or Green Card, with a revised Form I-797, Notice of Action, receipt notice of Form I-90, Application to Replace Permanent Resident Card. The revised notice will extend the validity of a PRC for 12 months from the "Card Expires" date on the front of the PRC. This change ensures that certain lawful permanent residents have documentation for completing Form I-9, Employment Eligibility Verification.

Employees may present their expired PRC together with this notice as an acceptable List A document that establishes identity and employment authorization for Form I-9 purposes. When completing a Form I-9, employers should enter the information from this document combination in Section 2, under List A:

- In the Document Number field, enter the card number provided on the expired PRC.
- In the Expiration Date field, enter the date that is 12 months from the "Card Expires" date on the expired PRC.
- In the Additional Information box, write "PRC Ext" and the I-90 receipt number from the Form I-797.

Employers who retain copies of documents should retain copies of both the PRC and Form I-797 with the employee's Form I-9. Employers may not reverify Lawful Permanent Residents who present this document combination.

Read more about acceptable documents at I-9 Central or in The Handbook for Employers, Guidance for Completing Form I-9.

FLSA Opinion Letters: Administrative Employee Exemption and Ministerial Exception

On January 8, 2021, the U.S. Department of Labor announced the following new opinion letters that provide compliance assistance related to the federal Fair Labor Standards Act (FLSA):

- FLSA2021-1: Addressing whether account managers at a life science products manufacturer qualify for the administrative employee exemption under the FLSA. The DOL concluded that the account managers were administrative employees because they met all three requirements, discussed thoroughly in the letter, necessary to qualify for the exemption (from the FLSA minimum wage and overtime pay requirements).
- FLSA2021-2: Addressing whether the ministerial exception allows a private religious daycare and preschool to pay its teachers on a salary basis that would not otherwise conform with the requirements of the FLSA. The DOL concluded that the exception would allow the school to do so if the teachers qualify as ministers.

OSHA Penalty Amount Increases

On January 8, 2021, the U.S. Department of Labor announced the following 2021 adjustments to the Occupational Safety and Health Administration (OSHA) civil penalty amounts:

- Serious violations: minimum of $964 per violation and maximum of $13,653 per violation.
- Other-than-serious violations: minimum of $0 per violation and maximum of $13,653 per violation.
- Willful or repeated violations: minimum of $9,639 per violation and maximum of $136,532 per violation.
- Posting requirements violations: minimum of $0 per violation and maximum of $13,653 per violation.
- Failure to abate violation: $13,653 per day unabated beyond the abatement date, which is generally limited to 30 days maximum.

These increases apply to penalties assessed after January 15, 2021.

Final Rule Clarifies Independent Contractor Status under the Fair Labor Standards Act

On January 6, 2021, the U.S. Department of Labor, Wage and Hour Division announced a final rule clarifying whether an individual is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). The rule:

- Reaffirms the “economic reality” test which determines whether an individual is in business for themselves (independent contractor) or is economically dependent on a potential employer for work (FLSA employee).

- Identifies and explains two core factors to determine whether a worker is economically dependent on someone else's business (employee) or is in business for themselves (independent contractor):
    - The nature and degree of control over the work; and
    - The worker's opportunity for profit or loss based on initiative and/or investment.

If those two primary core factors do not point to the same classification, then the rule identifies the following additional factors to determine status:

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the worker and the potential employer; and
- Whether the work is part of an integrated unit of production.

The rule also:

- Identifies that the actual practice of the worker and the potential employer is more relevant than what may be contractually or theoretically possible.
- Provides six fact-specific examples applying the factors.

The rule is effective March 8, 2021.

COVID-19 Relief for Employers Using the Automobile Lease Valuation Rule

On January 4, 2021, the Internal Revenue Service released Notice 2021-07 which provides temporary relief in response to the ongoing COVID-19 pandemic for employers using the automobile lease valuation rule to value an employee's personal use of an employer-provided automobile for:

- Income inclusion;
- Employment tax; and
- Reporting.

Due solely to the COVID-19 pandemic, if certain requirements are satisfied, employers and employees using the automobile lease valuation rule to determine the value of an employee's personal use of an employer-provided automobile may instead use the vehicle cents-per-mile valuation rule beginning March 13, 2020.

2021 IRS Forms

On December 31, 2020 and January 5, 2021, the federal Internal Revenue Service released the following new forms and publications, among many others, for use in 2021:

- Form W-4 — Employee's Withholding Certificate
- Form W-4P — Withholding Certificate for Pension or Annuity Payments
- Publication 531 — Reporting Tip Income