Employment Law Day 2021

Changes: A New Chapter in Employment Law

February 9, 2021

Presented by:

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PALEY ROTHMAN

What's Next from the DOL
Jessica Summers

WHAT'S NEXT FROM/FOR THE DOL?

Bottom Line

- During his campaign, President Biden set forth an ambitious agenda on labor and employment issues – many of which hearken back to many of the priorities that the Obama Administration wasn't able to get across the finish line.
- However, given the tight margins in the Senate, there will be an important distinction between those items that the Administration and the DOL already have authority to act on and those that will require Congressional cooperation.

WHAT'S NEXT FROM/FOR THE DOL?

Paid Leave

- ***Short Term***- Families First Coronavirus Response Act (FFCRA) leave extension?
  - FFCRA leave requirements expired on Dec. 31, 2020
    - Note – the tax credit is still available through March 31, 2021 for employers that voluntarily provide FFCRA leave.
  - President Biden's COVID response proposals include resurrecting FFCRA leave rights and extending the tax credit for small businesses through September 2021 with the following modifications:
    - expansion to businesses with more than 500 employees
    - increase in the amount of leave from 12 weeks to 14 weeks.
    - elimination of exemptions for employers with less than 50 employees

WHAT'S NEXT FROM/FOR THE DOL?

Paid Leave

- ***Long Term***
  - Bi-partisan support for the concept – no agreement on how to pay for it
  - Family and Medical Insurance Leave Act (FAMILY Act) and Healthy Families Act likely to be reintroduced this Congress

INDEPENDENT CONTRACTOR RULE

- The DOL's independent contractor rule technically only applies to worker classifications for the purposes of federal wage and hour laws BUT if the DOL makes the standard more rigorous it will force businesses hands across the board.
- The DOL currently uses the economic realities test.
- New DOL Final Rule – originally slated to go into effect March 8, 2021
  - Would emphasize the factors of control and opportunity for profit and loss over the other three factors in the economic realities test. Would also allow businesses to offer certain benefits to independent contractors without impacting the classification.
  - Rule is now on hold pending review from the new Administration – likely to be pulled.
- Potential for an ABC Test Rule
  - ABC test (defined):
    - a worker is free from the employer's control and/or direction while working;
    - the individual's work is outside the usual course of the employer's business; and
    - the worker is customarily engaged in an independently-established trade, occupation, profession or business.

PAY EQUITY AND THE PAYCHECK FAIRNESS ACT

- Passed the House in 2019 but wasn't brought for a vote in the Senate
- Co-Sponsored by every Democrat in Congress and two Republicans
- The legislation would:
  - expand on the Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act
  - prohibit employers from asking job applicants how much they made in a prior position
  - prohibit employers from establishing rules to bar employees from discussing their salaries
  - expand the EEOC's pay data collection

MINIMUM WAGE INCREASE

- On January 22, President Biden signed an Order directing the U.S. Office of Personnel Management to prepare recommendations for raising the minimum wage for federal employees to $15 per hour.
- The President's $1.9 trillion stimulus proposal would include an increase in the federal minimum wage to $15
  - This is likely a non-starter with Republicans (at this point)
  - A minimum wage increase could not be enacted through the reconciliation process.
- Local reminders:
  - VA Minimum Wage increases on May 1, 2021
  - MD Minimum Wage increased on January 1, 2021
  - Montgomery County Minimum Wage increases on July 1, 2021

REMOTE WORKERS

- The DOL has issued guidance on posting for remote workers (see enclosed materials)
- Will we ever get guidance on *de minimus* work in the electronic age?

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UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

December 23, 2020

FIELD ASSISTANCE BULLETIN No. 2020-7

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Electronic posting for purposes of the FLSA, FMLA, Section 14(c) of the FLSA, EPPA, and SCA

This Field Assistance Bulletin ("FAB") provides guidance to Wage and Hour Division (WHD) field staff regarding the posting of required notices electronically under certain criteria described below.

Introduction

As more employees work remotely due to the COVID-19 pandemic, WHD has received questions from employers regarding the use of email or postings on an internet or intranet website, including shared network drive or file system, to provide employees with required notices of their statutory rights. This Field Assistance Bulletin (FAB) provides guidance to WHD field staff on when, as a matter of enforcement policy, WHD will consider these forms of electronic notice to satisfy the notice requirements under the following statutes and their corresponding regulations: the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Section 14(c) of the FLSA (Section 14(c)), the Employee Polygraph Protection Act (EPPA), and the Service Contract Act (SCA).[1] In most cases, these electronic notices supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice. Whether notices are provided electronically or in hard-copy format, it is an employer's obligation to provide the required notices to all affected individuals.[2]

[1] WHD issued Field Assistance Bulletin No. 2019-3 on March 15, 2019 on the subject of compliance with the H-1B Notice Requirement by Electronic Posting, and nothing in this FAB replaces the guidance in that previously issued Field Assistance Bulletin.
[2] EPPA and FMLA also require notices to be readily seen by both employees and applicants for employment. 29 C.F.R. §§ 801.6, 825.300(a)(1).

General Principles

Continuous Posting

As explained below, several of the statutes and their corresponding regulations administered by WHD, such as the FLSA, and FMLA, require employers to "post and keep posted" or require the posting of a notice "at all times" and, thus do not permit employers to meet their notice obligations through a direct mailing or other single notice to employees. If a statute and its regulations require a notice to be continuously posted at a worksite, in most cases, WHD will only consider electronic posting an acceptable substitute for the continuous posting requirement where (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times. This ensures the electronic posting satisfies the statutory and regulatory requirements that such postings be continuously accessible to employees. Where an employer has employees on-site and other employees teleworking full-time, for example, the employer may supplement a hard-copy posting requirement with electronic posting and the Department would encourage both methods of posting.

Individual Notices

As explained below, some of the statutory provisions discussed in this FAB, such as the SCA and Section 14(c), permit employers to meet notice requirements by delivering individual notices to each employee. Where particular statutes and regulations permit delivery of notices to individual employees, the notice requirements may be met via email delivery (or another similar method of electronic delivery), only if the employee customarily receives information from the employer electronically. This is consistent with WHD's existing regulations, which permit electronic delivery of required communications only where employees already regularly use such electronic communications. *See, e.g.*, 29 C.F.R. §§ 13.26, 13.5.

Access

If an employer seeks to meet a worksite posting requirement through electronic means, such as on an intranet site, internet website, or shared network drive or file system posting, the electronic notice must be as effective as a hard-copy posting. As a number of the statutory provisions below require that affected individuals be able to readily see a copy of the required postings, where an employer chooses to meet a worksite posting requirement through electronic means, the same requirements apply in the electronic format. As a practical matter, a determination of whether affected individuals can readily see an electronic posting depends on the facts. For instance, the affected individuals must be capable of accessing the electronic posting without having to specifically request permission to view a file or access a computer. *See, e.g.*, Field Assistance Bulletin No. 2019-3. Consistent with its existing regulations, WHD will not consider electronic posting on a website or intranet to be an effective means of providing notice if an employer does not customarily post notices to affected employees or other affected individuals electronically. *See, e.g.*, 29 C.F.R. §§ 13.26, 13.5

Furthermore, consistent with WHD practice, if the employer has not taken steps to inform employees of where and how to access the notice electronically, WHD will not consider the employer to have complied with the posting requirement. *See, e.g.*, Field Assistance Bulletin

No. 2019-3. Posting on an unknown or little-known electronic location has the effect of hiding the notice, similar to posting a hard-copy notice in an inconspicuous place, such as a custodial closet or little-visited basement. Moreover, if the affected individuals cannot easily determine which electronic posting is applicable to them and their worksite, WHD will consider the posting insufficient.

Fair Labor Standards Act

An employer employing any employees subject to the FLSA's minimum wage, overtime, or Break Time for Nursing Mothers provisions is required to post and keep posted a notice explaining the FLSA in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy, *see* 29 C.F.R. § 516.4. Given the requirement that employers maintain a continuous FLSA posting in every *establishment* where employees are employed where every employee can *readily observe a copy*, WHD will consider an electronic posting to be sufficient to meet the above requirements only if (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times. For example, where all employees exclusively work from home and communicate with the employer through electronic means, an employer may satisfy the FLSA posting requirements by posting the required FLSA notice on an employee information internal or external website, or shared network drive or file system that is accessible at all times to all employees. In this circumstance, where there is no physical establishment where employees are employed and employees can access the electronic posting at any time, WHD will consider such electronic posting to meet the regulatory requirements that the notice be posted in a conspicuous place where employees are employed so as to permit them to readily observe a copy. *See* 29 C.F.R. § 516.4.

Family and Medical Leave Act

The FMLA regulations permit electronic posting of the general FMLA notice as long as the electronic posting otherwise meets the regulatory posting requirements, which require each employer covered by the FMLA to post and keep posted, in conspicuous places on the premises where employees are employed a general notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with WHD. 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300(a)(1). The notice must be posted prominently where it can be readily seen by employees and applicants for employment, and the poster and text must be large enough to be easily read and contain fully legible text. 29 C.F.R. § 825.300(a)(1). Consistent with the statute and its implementing regulations, WHD will consider electronic posting to satisfy the FMLA posting requirements where, for example, all hiring and work is done remotely and an employer posts the appropriate FMLA notice on an internal or external website that is accessible to all employees and applicants. In this circumstance, where there is no physical establishment where employees are employed or where interviewing or hiring takes place and the electronic posting is accessible to employees and applicants at all times, WHD will consider such electronic posting to meet the regulatory requirements that the notice be posted in a conspicuous place where employees are employed so as to permit employees and applicants to readily observe a copy. *See* 29 C.F.R. 825.300(a)(1).

Section 14(c) of the Fair Labor Standards Act

An employer who has workers employed under Section 14(c) subminimum wage certificates is required at all times to display and make available to employees a poster as prescribed and supplied by the Administrator. 29 C.F.R. § 525.14. Such a poster must explain, in general terms, the conditions under which subminimum wages may be paid and shall be posted in a conspicuous place on the employer's premises where it may be readily observed by the workers with disabilities, the parents and guardians of such workers, and other workers. *Id.* Where the employer finds it inappropriate to post such a notice, the regulations permit an employer to satisfy this requirement by providing the poster directly to all employees subject to its terms. *Id.* Therefore, if an employer finds it inappropriate to post a physical notice to employees, an employer may satisfy the Section 14(c) posting requirements in 29 C.F.R. § 525.14 by emailing or direct mailing the poster to workers employed under 14(c) subminimum wage certificates or, where appropriate, the parents and/or guardians of such employees.

Employee Polygraph Protection Act

An employer subject to the Employee Polygraph Protection Act (EPPA) must post and keep posted a notice explaining the EPPA in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment. 29 C.F.R. § 801.6. Given the requirement that employers maintain a continuous EPPA workplace posting, electronic posting may be sufficient to meet this posting requirement if, as discussed above, (1) all employees exclusively work remotely and the hiring process for applicants occurs remotely, (2) all employees and applicants customarily receive information from the employer via electronic means, and (3) all employees or applicants have readily available access to the electronic posting at all times. For example, where all hiring and work is done remotely and employees and applicants communicate with the employer via electronic means, an employer may satisfy the EPPA posting requirements by posting this notice on an employee information internal or external website, or network shared drive or filing system that is accessible at all times to all employees and applicants. In this circumstance, where there is no physical establishment where employees are employed or where interviewing or hiring takes place and employees and applicants can access the electronic posting at all times, WHD will consider such electronic posting to meet the regulatory requirements that the notice be posted in a prominent or conspicuous place where employees are employed so as to permit employees and applicants to readily observe a copy. *See* 29 C.F.R. § 801.6.

Service Contract Act

All contractors and subcontractors (hereafter referred to generally as contractors) subject to the SCA working on contracts in excess of $2,500 are required to notify employees commencing work on which the SCA applies of the required compensation and fringe benefits by using WH Publication 1313 and any applicable wage determination to provide such notice. *See* 41 § U.S.C. 6703(4); 29 C.F.R. §§ 4.183-4.184. This notice may be delivered to each employee (including via email, if email is customarily used by that employee to communicate with the contractor regarding their work on the contract), or posted in a prominent and accessible place at the worksite where it may be seen by employees performing work on the contract. 29 C.F.R. § 4.184. Where, as described above, (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times,

WHD would consider this worksite posting requirement to be met if an electronic posting of WH Publication 1313, and the applicable wage determination, is as readily accessible to those workers as a hard-copy posting would be. As described above, an electronic posting will not be considered readily accessible if an employee must specifically request access to a computer or ask for file permissions to view the posting, and an employer must take steps to inform employees of how and where to access the electronic posting.

Please forward questions about this FAB to the National Office, Office of Policy, via regular channels.

Agency Watch
Hayes Edwards

EEOC

(Republican majority until 2022, so change could come later)

- Policy Goals: expected to more aggressively enforce harassment, equal pay and discrimination claims
  - Advice: Make sure your harassment policies are up to date, and that handbooks have strong language on discrimination based on protected classes (and don't forget the Supreme Court's *Bostock* decision, finding termination on the basis of sexual orientation to be discriminatory).
- EEO-1 Reporting: Likely to be reinstated, so employers should be aware of deadlines for submission and the potential appearance of discrimination in the data
- Conciliation Process: Expected to undergo changes to reduce the "amount of transparency required from the Commission."

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NLRB

New Democratic majority by end of year

- Generally: More employee-friendly rulings are expected, limiting employer's ability to deter and punish organizing or related conduct.
  - Expected to find violations of NLRA where employers impose rules that would prohibit "harmonious interactions or relationships" or "abusive or threatening language to anyone on company premises."
- No More Balancing Test: Expected to drop the employer-friendly test for violations that balance the impact on employees' Section 7 rights against the employer's legitimate justifications
- Joint-employer standard" (*Browning-Ferris Industries, 2015*): allowing collective bargaining with companies who contract for worker's service with their employers.

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OFCCP
(OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS)

New Chairman is former EEOC member

- Diversity Training: Biden has un-done Trump's executive Order (EO 13950) prohibiting contractors from providing training using "critical race theory" or which treats people differently based on race.
  - EO 13895 has stopped enforcement completely
- Pay Equity Enforcement – New leadership expected to scrutinize EEO-1 data correlating gender and pay or other disparities
  - Advice: Conduct audits to identify any appearances of bias and prepare to defend compensation systems against accusations of bias; employ policies to identify all relevant factors that contractors rely upon to assign salaries
- *OFCCP v. Oracle* (filed in 2017, decided in 2020): ALJ's decision limits OFCCP's ability to rely on statistics to prove disparate treatment and impact
  - Assumptions and correlation are not enough to establish proof and causation

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NO, NO and NO!!!
Jim Hammerschmidt

ARBITRATION PROVISIONS:
ARE THEY HEADED FOR EXTINCTION?

- Federal Arbitration Act – Sets strong federal preference for arbitration
- Epic Systems (2018) - Supreme Court upheld class and collective action waivers in the employment context
- Arbitration Pros – Faster, less costly, confidential and private, avoids runaway juries
- Arbitration Cons – Arbitrators compromise, employer may pay all costs, avoid class actions, unlikely to get early dismissal or summary judgment

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ARBITRATION PROVISIONS:
ARE THEY HEADED FOR EXTINCTION?

"Forced arbitration is a secretive, closed system that deprives Americans of their day in court and shields corporations from accountability and scrutiny for abusive conduct." … "We must ensure victims of sexual assault, racial discrimination, and other forms of corporate abuse and misconduct have a fair chance to hold their employers accountable."

Rep. Jerrold Nadler, D-N.Y.

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ARBITRATION PROVISIONS:
ARE THEY HEADED FOR EXTINCTION?

- A complete ban will require Congressional action
- JoeBiden.com sets forth that "Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation."
- Forced Arbitration Injustice Repeal (FAIR) Act - Passed House in 2019 and banned pre-dispute arbitration agreements

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CLASS ACTION WAIVERS: GOING THE WAY OF THE DODO BIRD?

- Class action waivers - mandate the resolution of employment-related claims on an individual basis in an arbitration proceeding, thereby minimizing their exposure to potential class-wide liability
- Expect reinvigoration of efforts to invalidate class action waivers
- FAIR Act – Prohibits agreements including class action waiver
- "Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."

INCREASING PRESSURE ON USE OF NON-COMPETE AGREEMENTS

- More court scrutiny than ever
- State and local legislation filling the current federal void
  - **Maryland & Virginia** – Restrict agreements with low wage earners
  - **District of Columbia** ("California East") – Broad ban on non-competes
- Treasury Report – March 2016

INCREASING PRESSURE ON USE OF NON-COMPETE AGREEMENTS

- In 2015, Vice President Joe Biden condemned these contracts for depriving workers of the "freedom to negotiate for a higher wage with a new company, or to find another job after they've been laid off."
- In December 2019, candidate Joe Biden said, "[w]e should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages."
- JoeBiden.com – Announced plans for eliminating non-compete agreements because they:
  - suppress employee mobility
  - suppress employee wages and wage growth
  - trap workers in abusive work relationships
  - reduce business competition

INCREASING PRESSURE ON USE OF NON-COMPETE AGREEMENTS

- Congressional action – Some bi-partisan support but maybe not enough
- Federal Trade Commission Regulations – Treat as an antitrust issue to regulate

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NO-POACHING AGREEMENTS WILL BE UNDER INCREASED SCRUTINY BY FTC AND DOJ

- No-poaching agreements – Employers agree not to hire each others' workers
- FTC/DOJ – Joint Guidance for HR Professionals (October 2016)
- Department of Justice – Agreements to fix wage or not hire one another's employees are unlawful
- FTC/DOJ – Re-focus on unlawful agreements and reliance on criminal liability

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COVID...a Year Later
Scott Mirsky

COVID-19 VACCINATIONS

Mandatory Vaccinations?

- Exclude workers who are unable to be vaccinated due to:
  1. an ADA disability; or
  2. a sincerely-held religious belief
- Must accommodate these workers (unless undue hardship for employer)
- Banning employee from workplace is acceptable but do not terminate
- Consider strong encouragement instead of mandating vaccination
- Additional rules if employer plans to setup a "vaccination clinic" for workforce

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PPP LOANS 2.0

PPP Round 2

- How to qualify?
- What changed?
- Interplay with unemployment insurance
- Families First Coronavirus Response Act ended but tax credit is still available

OTHER COVID-RELATED ISSUES/POLICIES

Update/Create **Return to Work Policy**

- Who will return
- Work schedule
- PPE
- Liability issues:
  - ✓ Some states are mandating COVID-19 workplace safety rules

OTHER COVID-RELATED ISSUES/POLICIES

Update/Create **Telework Policy**

- Does your policy address the following:
  - ✓ Job expectations
  - ✓ Work hours/restricting overtime
  - ✓ IT issues and remote access protocols
  - ✓ Workers compensation issues
  - ✓ Telework is not a substitute for childcare

OTHER COVID-RELATED ISSUES/POLICIES

Update/Review **Leave Policy**

- Does your policy address the following:
  - ✓ Accrual rates
  - ✓ Year-to-year rollover issues
  - ✓ Payout/forfeiture at termination
  - ✓ Compliance with local and state leave laws
- Leave benefits under the Families First Coronavirus Response Act ended December 31, 2020

OTHER COVID-RELATED ISSUES/POLICIES

Update/Create **Employee Travel and Events Policy**

- Does your policy address the following:
  - Restrictions on business-related travel
  - Personal travel to high risk areas or outside of the local area (holidays and vacations)
    - Policy on quarantining upon return
    - Policy on testing upon return
  - Personal attendance at large gatherings (weddings, etc.)
    - Policy on disclosing
    - Policy on returning to workplace

OTHER COVID-RELATED ISSUES/POLICIES

Understanding **WARN Act** Requirements

- When extended furloughs will trigger WARN Act requirements
- MD WARN Act was recently enacted (delayed implementation until April 1, 2021)

THANK YOU!

For legal counsel, please contact our Employment Law attorneys.

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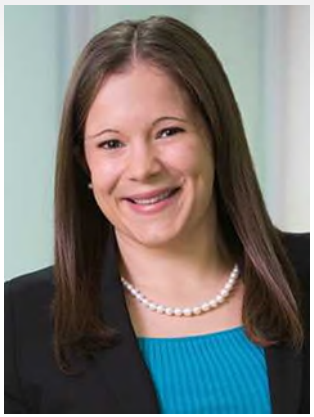

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