Labor & Employment Update 2023

What You Need To Know To Be Compliant

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Illinois & Local Developments

Minimum Wage Increases

- City of Chicago: $15.40 per hour (21+ or more employees)
  - Effective July 1, 2022
- Cook County: $13.35 per hour
  - Effective July 1, 2022
- State of Illinois: $13.00 per hour
  - Effective January 1, 2023

Paid Leave for All Workers Act

- Passed in the “lame duck” legislative session, January 10, 2023
- Once signed by the Governor, will make Illinois the third state to enact mandatory, statewide paid leave (Nevada & Maine)
  - Effective date for compliance **1/1/24**
- All Illinois employers, regardless of size, will be required to provide covered employees up to 40 hours of paid leave per year to be used for any purpose.
  - Excludes only school districts and park districts

Paid Leave for All Workers Act

- May use other paid leave policies to satisfy obligation to provide paid leave under the Act.
- An employer is NOT required to modify its policy if:
  - the policy satisfies the minimum amount of leave required under the Act (40 hours) and
  - the employee is permitted to take paid leave for any reason
- **If you are using an existing policy to comply, an unused leave must be paid out at separation of employment**
- Cannot require that an employee seek or find a replacement worker
- Anti-discrimination and retaliation provisions,
- Cannot consider use of paid leave as a negative factor in any employment action that involves evaluating, promoting, disciplining, or counting paid leave under a no-fault attendance policy.

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Paid Leave for All Workers Act

- (p) The provisions of this Act **shall not apply to** any employer that is covered by a municipal or county ordinance that is in effect on the effective date of this Act that requires employers to give any form of paid leave to their employees, including paid sick leave or paid leave. Notwithstanding the provisions of this subsection, any employer that is not required to provide paid leave to its employees, including paid sick leave or paid leave, under a municipal or county ordinance that is in effect on the effective date of this Act shall be subject to the provisions of this Act if the employer would be required to provide paid leave under this Act to its employees.

Paid Leave for All Workers Act

- Accrual
  - All employees beginning on 1/1/24 (or the start of employment) must accrue one hour of paid leave for every 40 hours worked
  - Full-time and part-time, exempt employees will be assumed to work 40 hours per week
  - Must be able to accrue 40 hours in a 12 month period
  - 12 month period can be any 12 month period designated by the employer in writing at the time of hire
  - May “frontload” in lieu of accrual method
    - Must frontload full 40 hours
    - Can eliminate carry over rights with frontloading, unused leave is forfeited at the end of the 12 month period

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Paid Leave for All Workers Act

- Use
  - Paid time off requirements cover any need for leave, not limited to illness
  - Can restrict employees from using in the first 90 days of employment
  - May require up to 7 days' advance notice for a foreseeable reason for use. If leave is unforeseeable, employees need only provide as much notice as is practicable.
  - If an employer adopts a policy that requires advance notice for unforeseeable absences, must have written policy that contains notice procedures for the employee to provide notice
    - If Employer makes any changes to their established notice provisions, must provide employees notice of the change in writing within 5 days of the change.
  - Employers CANNOT require documentation or certification to support an employee's need for leave/use of paid time. Employees are not required to give a reason for the leave.

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Paid Leave for All Workers Act

- Use, continued
  - May set reasonable increment of use for paid leave, but cannot be greater than 2 hours.
    - If employee's shift is less than two hours, minimum increment can be the length of the shift.
  - Must receive regular rate of pay for time used
  - Unless ER is using a more generous PTO policy for compliance, Ers are not required to pay for unused paid leave time at the time of separation
  - If EE leaves and is reinstated in less than 12 months, the accrued time prior to separation must be reinstated
    - What happens with reinstatement obligation if paid time off is paid out at separation?

Paid Leave for All Workers Act

- Carry over
  - Employees may carry over up to 40 hours of paid leave from one 12-month period to the next
    - (i) Except as provided in subsection (c), paid leave under this Act shall carry over annually to the extent not used by the employee, provided that nothing in this Act shall be construed to require an employer to provide more than 40 hours of paid leave for an employee in the 12-month period unless the employer agrees to do so.
  - Application with Wage Payment and Collection Act?

Paid Leave for All Workers Act

- Notice & recordkeeping requirements
  - Must post a notice to be provided by the IDOL in a conspicuous place on the employer's premises AND include a copy of the notice in a written document, or written employee manual or policy.
  - If the employer's workforce includes a significant portion of non-English speakers, it will be required to post a notice in this language, a model of which will be provided by the IDOL.
  - Must maintain accurate records for each employee, showing the employee's hours worked, paid leave accrued and used, and remaining paid leave balance. Employers must provide this information to an employee upon request.
  - Records must be retained for at least three years and must be available for inspection by the IDOL

Illinois Paid Leave for All Workers Act

- IDOL Enforcement
  - Employees may file a complaint with the DOL within three years of an alleged violation
  - No reference to a private right of action
  - Violations may lead to damages in the form of the actual underpayment, compensatory damages, a penalty of $500-$1000, equitable relief, attorneys fees and other legal costs
  - Civil penalty of up to $2500 for each separate offense
  - For violating the notice/posting requirements, employers will be subject to a $500 civil penalty for the first audit violation and $1,000 civil penalty for each subsequent audit violation.

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Illinois Freedom to Work Act Amendments

- Effective January 1, 2022
- Compensation thresholds
  - Non-compete: minimum of $75,000, increasing $5k in 2027, 2032 and 2037
  - Non-solicitation: minimum of $45,000, increasing $5k in 2027, 2032 and 2037
- Adequate consideration
  - Codifies *Fifield v. Premier Dealer Serv.,* at least 2 years of continued employment post execution absent any other consideration
  - *"Other"* option may include a period of employment + additional professional or financial benefit or "merely professional or financial benefits"
- Notice - must provide 14 days' written notice to review the agreement before starting employment and right to consult with an attorney
- Cannot enforce with employee who is laid off or furloughed due to COVID-19 pandemic or similar circumstances
- Places parameters on "blue-pencil"

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Illinois Equal Pay Act Amendments

- Requires employers to report employee demographic information and obtain an Equal Pay Registration Certificate
  - Effective March 23, 2021
  - Beginning 1/1/23, Private employers with 100+ employees who are required to file EEO-1 are required to submit similar information to the State with their annual reports
  - Private Employers with 100+ employees are required to obtain “equal pay registration certificate” from IDOL
  - Must obtain certificate within 3 years of the effective date (no later than 3/23/24) and recertification every two years thereafter

Illinois Equal Pay Act Amendments

- SB 1847 was signed into law on June 25, 2021, which further amends IL EPA
  - Clarified that certificate must be obtained between 3/24/22 and 3/23/24, depending on whether in operation at the time of the Act
  - IDOL will assign each business a date by which it must submit an application to obtain the certificate
  - Cannot rely on IDOL failure to assign a submission deadline, but may use as a mitigating factor in the event of a violation
  - In addition to the original reporting requirements, employers must now also include “the county in which the employee works, the date the employee started working for the business, [and] any other information the Department deems necessary to determine if pay equity exists among employees.”
  - Lengthened the list of wage comparison factors an employer must consider when completing an equal pay certificate application
  - Simplified the requirements related to an employer’s approach to setting compensation.

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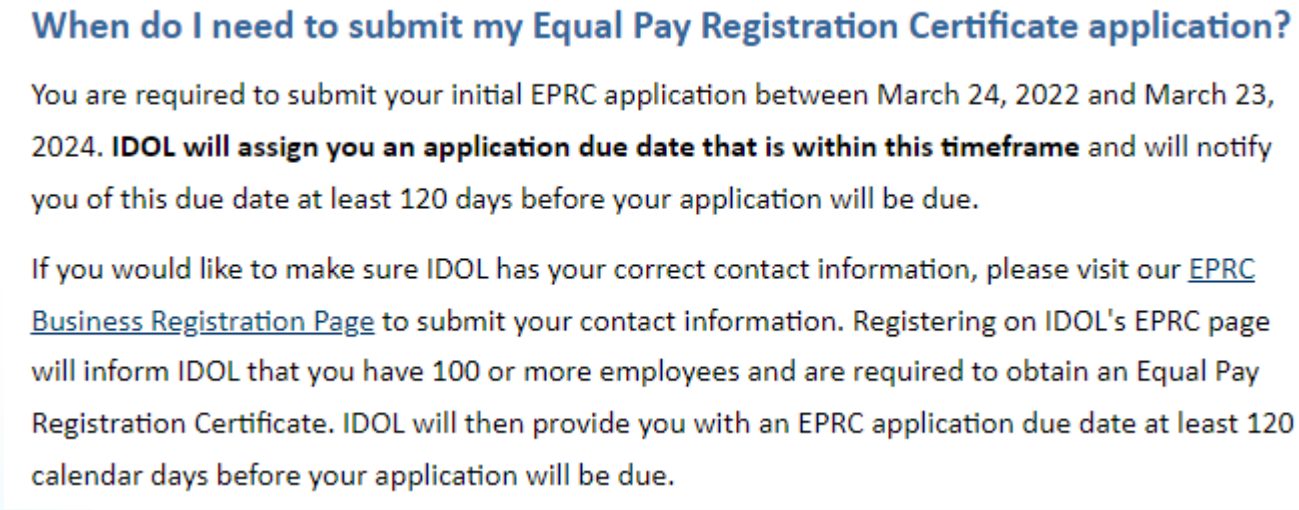
Illinois Equal Pay Act Amendments

- Helpful resources
  - https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/eparc.aspx
    - Link to the IDOL webpage with the EPRC requirements and instructions on accessing the portal and documents required
  - https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/eprc-faqs.aspx
    - IDOL FAQs



When do I need to submit my Equal Pay Registration Certificate application?

You are required to submit your initial EPRC application between March 24, 2022 and March 23, 2024. **IDOL will assign you an application due date that is within this timeframe** and will notify you of this due date at least 120 days before your application will be due.

If you would like to make sure IDOL has your correct contact information, please visit our EPRC Business Registration Page to submit your contact information. Registering on IDOL's EPRC page will inform IDOL that you have 100 or more employees and are required to obtain an Equal Pay Registration Certificate. IDOL will then provide you with an EPRC application due date at least 120 calendar days before your application will be due.

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Illinois Equal Pay Act Amendments

- Salary history ban in effect since 2019, prohibits employer from inquiring about applicant's current or prior salary, wages, benefits or other compensation and using that information to make employment or compensation decisions
- HB 1207 amends EPA to clarify that the salary history ban provisions do not prohibit employers and applicants from discussing the applicant's unvested equity or deferred compensation that would be lost if the candidate resigned from current employer. If discussed voluntarily and without prompting, employer can ask for verification of amount that would be lost
  - Effective 1/1/22

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Personnel Records Review Act Amendment

- Effective January 1, 2022
- Employers prohibited from divulging a disciplinary report, letter of reprimand, or other disciplinary action to a third party outside the employer's organization, or to a party who is not part of a labor organization representing the employee, without written notice to the employee
- Amendment allows employees to file complaint or commence action within 3 years of disclosure of disciplinary report in violation of the Act.

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VESSA Amendment

- Effective January 1, 2022
- Allows employees to take leave if they or a covered family or household member is a victim of “any crime of violence.”
- Expands the definition of “family or household member”
  - A party to a civil union, grandparent, child, grandchild, sibling, or any other person related by blood or by present or prior marriage or civil union, or any other person who shares a relationship through a child, or any other individual whose close association with the employee is the equivalent of a family relationship as determined by the employee

VESSA Amendment

- Documentation
  - Documentation provided if it is in the employee's possession and employee can choose what documentation to provide
  - Employer cannot request or require employee to submit more than one document during the same 12-month period if leave is for same reason
- Non-Discrimination
  - Expanded to protect applicants and employees who are perceived as victims
- Confidentiality
  - All information provided to the employer pursuant to VESSA must "be retained in the strictest confidence" by the employer

State Leave Benefits

- Child Bereavement Leave Act becomes the Family Bereavement Leave Act
  - Effective January 1, 2023
  - Statute previously provided for up to 10 unpaid days off for the death of a child. Expanded to include death of a “covered family member”, which now includes child, stepchild, spouse, domestic partner, sibling, parent/step-parent, mother-in-law, father-in-law, grandchild, or grandparent
  - Leave to cover funeral or other service, make arrangements necessitated by the death, grieve the death, or be absent due to (i) a miscarriage; (ii) an unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure; (iii) a failed adoption match or an adoption that is not finalized because it is contested by another party; (iv) a failed surrogacy agreement; (v) a diagnosis that negatively impacts pregnancy or fertility; or (vi) a stillbirth.

State Leave Benefits

- Employee Sick Leave Act Amendment
  - Requires Illinois employers that provide paid or unpaid personal sick leave benefits to their employees to allow employees to use such leave to attend to a covered family member's illness or injury, "on the same terms" as the employees would use their sick leave benefits for their own illness or injury.
  - A "covered family member" means an employee's "child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.
  - HB 158 signed into law on 4/27/21 expands permitted use of existing sick leave to attend to the "personal care" of a covered family member

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State Leave Benefits

- The Illinois Secure Choice Savings Program Act
- Effective January 1, 2022
- Revised the state's requirements for retirement savings programs to apply to employers with at least 5 employees in the state during every quarter of the prior calendar year. Previously employers with fewer than 25 employees were exempted.
- However, the law still does not apply to employers that offer a qualified retirement plan, "including, but not limited to, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408(k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 in the preceding 2 years."
  - Removes the requirement that employees be older than 18 to participate.

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One Day Rest In Seven Act Amendment

- Effective January 1, 2023
- Requires at least 24 consecutive hours of rest in every consecutive 7-day period
- Requires employees working more than 7.5 continuous hours be given an additional 20-minute meal period for every additional 4.5 hours worked
- Posting requirements and increased fines for non-compliance

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(More) IHRA Amendments

- HB 1838
  - Effective January 1, 2022
  - Discrimination based on disability includes unlawful discrimination because of an individuals association with a person with a disability
- HB 121
  - Effective August 2, 2021
  - Expands protected status to include work authorization status, defined as a person being born outside of the US who is not a US citizen and who is authorized by the federal government to work in the US. Crown Act

(More) IHRA Amendments

- SB 3616 – CROWN Act
  - Effective January 1, 2023
  - Create a Respectful and Open Workplace for Natural Hair
  - Expands the definition of race for purposes of protected status to include "traits associated with race, including but not limited to, hair texture and protective hairstyles such as braids, locks and twists."
  - Unlawful discrimination against a person because of his or her actual or perceived race pursuant to the IHRA now includes discrimination based on hair texture or hairstyle

Artificial Intelligence Video Interview Act Amendment

- Illinois HB 53 amends the Artificial Intelligence Video Interview Act
  - Effective January 1, 2022
- Employers who rely on artificial intelligence to screen interview candidates must gather and report race- and ethnicity-related data of selected and non-selected candidates.
- Department of Commerce and Economic Opportunity required to analyze data and report to Governor and General Assembly

Amendment to IL Constitution

- Amends Illinois Constitution to say that:

(a) Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. **No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment**.

(b) The provisions of this Section are controlling over those of Section 6 of Article VII.[4]

Chicago Human Rights Ordinance

- Amendments effective July 1, 2022
- Extends SOL to 365 days
- Mandates 1 hour of prevention training for all employees, 2 hours for supervisors/managers and 1 hour of “bystander” training for all employees
- Increases penalties from $500-$100 to $5000-$10,000
- Policy and notice requirements
  - Written policy on sexual harassment that includes updated definition, statement that sexual harassment is illegal in Chicago, reference to required training, examples of prohibited conduct and a statement on retaliation
  - Display poster
- Applies to employers that are (1) required to have a business license issued by the City of Chicago or (2) maintain a facility within the geographical boundaries of the City of Chicago
  - FAQs from the City indicate employers who do not maintain a facility within the boundaries of Chicago and have employees that occasionally go on assignment into or occasionally work within the boundaries of Chicago fall outside of the scope of the requirements
- https://www.chicago.gov/city/en/depts/cchr/supp_info/sexual-harassment.html

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“Domestic Worker” Ordinance

- Chicago ordinance effective January 1, 2022 (6-120-020)
- All employers of “domestic workers” working in the City of Chicago (2+ hours/week) must provide a written contract in the worker’s primary language setting forth the worker’s wages and “work schedule” agreed upon by the employer and employee
  - “Domestic Worker” = a person whose primary duties include housekeeping; house cleaning; home management; **caregiving, personal care or home health services for elderly persons with illnesses, injuries or disabilities who require assistance caring for themselves**; laundering; **companion services**…
  - “Work Schedule” = an employee’s shifts, including specific start and end times for each shift during a calendar week
- Fine of $500 for each offense

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Federal Developments

FTC Proposed Rule Banning Non-Competes

- On January 2, 2023, the Federal Trade Commission proposed a new rule that would ban employers from imposing noncompetes on their workers (paid or unpaid) and independent contractors
  - Based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.
  - "…employers' use of noncompetes to restrict workers' mobility significantly suppresses workers' wages…The proposed rule would ensure that employers can't exploit their outsized bargaining power to limit workers' opportunities and stifle competition."

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FTC Proposed Rule Banning Non-Competes

- Specifically, the FTC's new rule would make it illegal for an employer to:
  - enter into or attempt to enter into a noncompete with a worker;
  - maintain a noncompete with a worker; or
  - represent to a worker, under certain circumstances, that the worker is subject to a noncompete.
- Also requires employers to rescind existing noncompetes and actively inform workers that they are no longer in effect.
- The proposed rule would generally not apply to other types of employment restrictions, like non-disclosure agreements. However, other types of employment restrictions could be subject to the rule if they are so broad in scope that they function as noncompetes.

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FTC Proposed Rule Banning Non-Competes

- *Non-compete clause* means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.
- (*Worker* means a natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. The term worker does not include a franchisee in the context of a franchisee-franchisor relationship; however, the term worker includes a natural person who works for the franchisee or franchisor. Non-compete clauses between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law.

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NLRB Ruling On Use of Non-Disparagement & Confidentiality Provisions

- *McLaren Macomb and Local 40*, *RN Staff Council Office and Professional Employees International Union, AFL-CIO* (Case 07-CA-263041)
  - Intersection of Section 7 rights and employer's use of non-disparagement and confidentiality provisions in a separation agreement
  - Unfair labor practice charge under the National Labor Relations Act
    - General Counsel can find a violation of Section 8(a)(1) when an employer interferes with Section 7 rights.
    - A provision which unnecessarily chills or frustrates the exercise of Section 7 rights violates an employee's rights under the Act, regardless of whether it was created with that intent in mind or disseminated in an intentionally coercive way.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

- The Act amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers the option of bringing claims of sexual assault or sexual harassment either in arbitration or in court.
  - Employees have the option to invalidate arbitration agreements and class or collective action waivers with respect to sexual assault and sexual harassment claims.
  - Applies to all claims that arise or accrue after March 3, 2022, regardless of the date of the agreement at issue. It is not retroactive.
  - It does not affect otherwise valid arbitration agreements for claims that are not related to sexual assault and sexual harassment.

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DOL Unveils Independent Contractor Rule Proposal

- US DOL published Proposed New Rule on October 13, 2022 to clarify who is an independent contractor under the FLSA
- Proposes to rescind a 2021 rule in which two core factors, control over the work and opportunity for profit and loss, carried greater weight in determining the status of independent contractors
- Under new proposed rule, employers would use a totality of the circumstances analysis in which all factors do not have a predetermined weight
- A worker is an independent contractor, as distinguished from an “employee” under the Act, if the worker is, as a matter of economic reality, in business for themself. Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams

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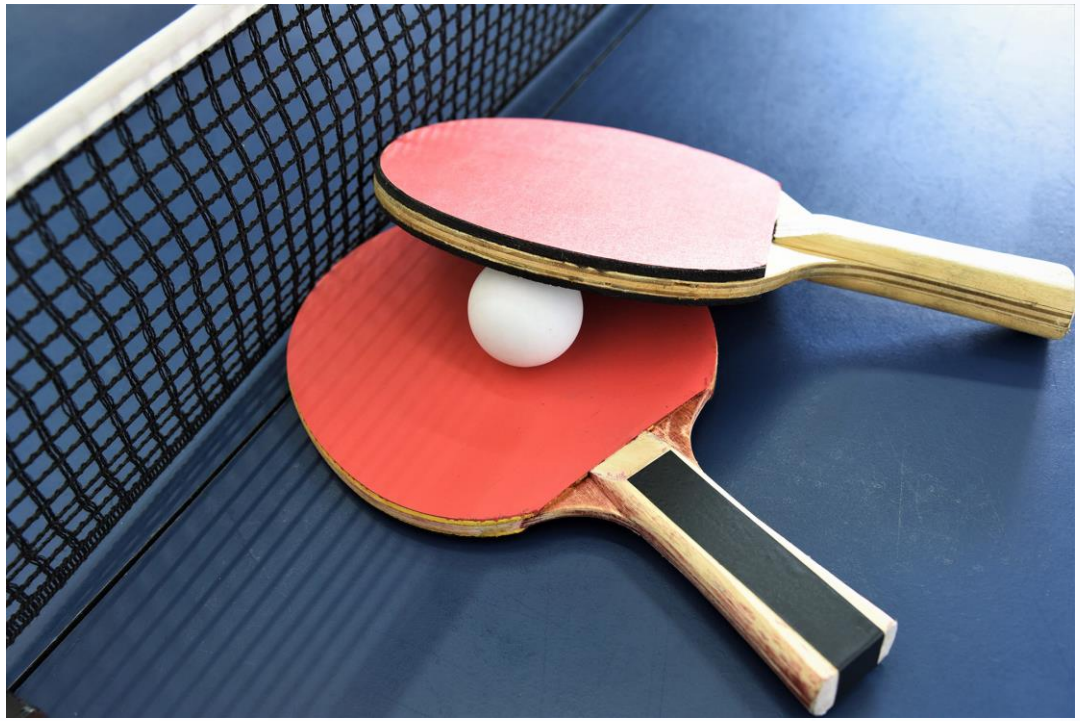
DOL Unveils Independent Contractor Rule Proposal

- Confirms use of “economic realities test”
- The outcome does not depend on any one factor, but on the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the employer for work of in business for themselves
- 6 factor test



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DOL Unveils Independent Contractor Rule Proposal

- **Opportunity for profit/loss depending on managerial skill**
  - Whether the worker determines or can negotiate the charge for the work provided
  - Whether the worker accepts or declines jobs or chooses the order and/or time in which jobs are performed
  - Whether worker engaging in marketing, advertising or other efforts to expand work
  - Whether worker hires, purchases materials and equipment or rents space
- **Investments by the worker and employer**
  - Are investments by worker capital or entrepreneurial in nature? Costs born by worker are not evidence of capital or entrepreneurial investment
- **Degree of permanence of the relationship**
  - Is relationship indefinite in duration or continuous?
  - Is the relationship project based, non-exclusive, sporadic?

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DOL Unveils Independent Contractor Rule Proposal

- **Nature and degree of control**
  - Control (including reserved control) over the performance of the work and the economic aspects of the relationship. Who sets schedule, supervises performance, controls price or rates, reserved right to discipline, limits ability to work for others?
- **Extent to which work performed is an integral part of ER's business**
  - Is the work they perform is critical, necessary, or central to the employer's principal business?
- **Skill and Initiative**
  - Does the worker use specialized skills to perform the work and those skills contribute to business-like initiative?

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NLRB Issues New Joint Employer Rule Proposal

- Proposed rule would return to a “totality-of-the-circumstances” analysis of the economic realities test for whether a worker is an employee or an independent contractor
- Factors to be Considered
  - Worker’s opportunity for profit/loss
  - Degree of control over the worker
  - Whether the work is an integral part of employer’s business

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Litigation Trends

Wage & Hour Litigation

- Increasing claims in healthcare, including ALFs/SNFs, for time required to be spent on COVID screening prior to clocking in.
  - Temperature checks, screening questionnaires, COVID testing
  - If required of employees prior to clocking in, claim is that the time was compensable and not deminimus
- Required to work on or through unpaid meal breaks
- Failure to reimburse for the business use of personal cell phones

IDOL/USDOL Audits

- “On-call” time and proper compensation for time worked during “on-call” status
- Inclusion of “hazard pay” in regular rate of pay

Thank You

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