

# Federal Regulations Update

## ***DOL: Guidance on Misclassification of Workers; Notice of Proposed Rule on White-Collar FLSA Exemption; Interim and Final Rules Relating to the H2-B Worker Program; Proposed Black Lung Benefits Act Rule; Proposed Rule to Help Retirement Investors • OSHA: Final Rule to Protect Construction Workers in Confined Spaces; Public Comment Sought on Hazards Facing Communication Tower Workers • EEOC: Regulatory Agenda***

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### **DOL**

#### **Guidance on Misclassification of Workers**

On July 15, 2015, the Department of Labor (DOL) issued guidance regarding what it views as the widespread misclassification of employees as independent contractors. When individuals are classified as independent contractors, as opposed to employees, those workers often miss out on benefits such as minimum wage, overtime pay, workers' compensation, and unemployment insurance. Misclassification also carries with it tax implications that result in lower revenues for the government. According to DOL Administrator David Weil, who issued the guidance, "[m]isclassification of employees as independent contractors is found in an increasing number of workplaces in the United States. ..." The DOL's guidance focused on the economic realities test, providing detailed analysis and examples as to each of the various factors considered under that test. Finally, the DOL concluded that

"most workers are employees under the Fair Labor Standards Act's (FLSA's) broad definitions"—a conclusion that is likely to be cited in the ever-increasing landscape of worker misclassification litigation.

### **Notice of Proposed Rule on the White-Collar FLSA Exemption**

On June 30, 2015, the DOL announced a Notice of Proposed Rulemaking to update the FLSA regulations defining the exemption for executive, administrative, professional, outside sales, and computer employees. Generally, the FLSA guarantees a minimum wage and overtime pay at a rate of 1.5 times the employee's regular rate for any hours worked over 40 in a workweek. However, certain executive, administrative, professional, outside sales, and computer employees are exempt from overtime pay through the "white-collar" exemption if they meet certain minimum tests related to their primary job duties and are paid on a salary basis not less than a specified minimum amount. The standard salary level required for this exemption currently is \$23,660 a year and was last updated in 2004, and the required salary level for highly compensated employees is \$100,000 a year.

The DOL has long recognized the salary-level test as "the best single test" of exempt status. But if left at the same amount, the effectiveness of this test as a means of determining exempt status diminishes as the wages of employees entitled to overtime increase, and the real value of the salary threshold falls. Hence, to maintain the effectiveness of the salary-level test, the DOL proposes to set the standard salary level equal to the 40th percentile of earnings for full-time salaried workers (\$47,892 annually). The DOL also proposes to set the highly compensated employee annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually). Furthermore, to prevent the levels from becoming outdated again, the DOL proposes to include within the regulations a mechanism to automatically update the salary thresholds on an annual basis using either a fixed percentile of wages or the Consumer Price Index for All Urban Consumers (CPI-U).

### **Interim and Final Rules Relating to the H-2B Worker Program**

On April 29, 2015, the DOL, along with the Department of Homeland Security, announced an interim final rule to reinstate and make improvements to the H-2B temporary foreign nonagricultural worker program, given the uncertainty created by recent court decisions. The interim final rule strengthens the protections given to US workers, while ensuring that employers may access foreign workers on a temporary basis when US workers are not available, and seeks to expand recruitment of US workers.

Additionally, these departments announced a final rule to establish the prevailing wage methodology for the H-2B temporary foreign nonagricultural worker program.

### **Proposed Black Lung Benefits Act Rule**

On April 28, 2015, the DOL proposed a rule under the Black Lung Benefits Act, which provides compensation to coal miners and their survivors for disabilities and death attributable to pneumoconiosis arising out of coal mine employment. This proposed rule gives coal miners greater access to their health records by requiring all parties, including employers, claimants, and attorneys, to disclose all medical information developed in connection with a claim for benefits, even when the party does not intend to submit the information into evidence. Additionally, the rule requires coal mine owners to pay all benefits due before the award can be challenged through modification.

### **Proposed Rule to Help Retirement Investors**

On April 14, 2015, the DOL issued a proposed rule that seeks to mitigate the effects of conflicts of interests in the retirement-investment marketplace. An analysis by the White House Council of Economic Advisers found that such conflicts of interest result in about \$17 billion in investor losses per year. Thus, the proposed rule expands the number of persons who are subject to fiduciary best-interest standards when they provide retirement-investment advice and thus will be required to put their clients' best interests before their own profits. Those retirement advisers who wish to receive payments from companies selling products they recommend and forms of compensation that create conflicts of interest will need to rely on one of several proposed prohibited-transaction exemptions.

## **OSHA**

### **Final Rule to Protect Construction Workers in Confined Spaces**

On May 1, 2015, the Occupational Safety and Health Administration (OSHA) issued a final rule to protect construction workers in confined spaces by requiring protections similar to those in place for manufacturing and general industrial workers for more than 20 years. These protections include ensuring that hazards are continuously monitored and ensuring that multiple employers share vital safety information. Technological advances made after the manufacturing and general industry standards were instituted make

these continuous worksite evaluation and communication requirements possible. The rule also emphasizes additional training to help protect the construction workers.

## **Public Comment Sought on Hazards Facing Communication Tower Workers**

On April 14, 2015, OSHA requested from the public information relating to safety hazards for workers constructing and maintaining communication towers. Fatalities for such workers have increased significantly as the demand for wireless and broadcast communications has increased over the years. To erect and maintain communication towers, workers regularly climb between 100 to 2,000 feet and thus risk falls from great heights, as well as structural collapses and hazards associated with weather and electricity. Therefore, OSHA is requesting information from tower workers, wireless carriers, engineering and construction-management firms, tower owners, and tower construction and maintenance companies about the causes of employee injuries and fatalities and their best practices to address these hazards.

## **EEOC**

### **Regulatory Agenda**

The Equal Employment Opportunity Commission (EEOC) published its semiannual regulatory agenda on May 21, 2015. Eight regulatory agenda items were identified.

#### *1. Revising the Complaint Process*

The EEOC issued an Advance Notice of Proposed Rulemaking seeking public input on issues associated with the federal-sector Equal Employment Opportunity (EEO) complaint process. The EEOC indicated that it was primarily interested in suggestions as to how to make the complaint process more efficient and user friendly as well as more effective in identifying and redressing employment discrimination. As noted by the EEOC, the federal-sector complaint-process procedures were first promulgated by the Civil Service Commission (CSC) in 1966, and the basic framework contained in those procedures was adopted by the EEOC in 1979 when it was given oversight authority over the federal-sector EEO process. The process has undergone numerous changes since 1966; however, the EEOC is now seeking

input from the public as to potential changes. In requesting input, the EEOC posed the following questions:

- Should the process include an investigative stage?
- Should agencies pick from a pool of investigators made up of in-house personnel from various agencies so that no agency is investigated by one of its own investigators?
- Should investigators from the EEOC conduct all investigations (similar to the process as to when an individual from the private sector files an EEOC charge)?
- Should there be a hearing as of right, or should a hearing be discretionary?
- What time limits should be imposed at various stages of the process?
- What enforcement mechanisms can the EEOC use to ensure agency compliance with discrimination laws?

## *2. Revising Time Limits for Filing a Complaint*

In a similar vein, the EEOC discussed a proposed revision to the federal-sector regulation on time limits for filing a civil action. The revision would affect the time limits applicable to a complainant's right to file a civil action and further define when a complainant is deemed to have exhausted his or her administrative remedies after filing an appeal with the EEOC.

## *3. Revising Procedures for Disability-Discrimination Complaints*

The EEOC proposed revisions to procedures for complaints or charges of discrimination based on disability subject to the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. The EEOC issued a joint regulation with the Department of Justice (DOJ) to explain how federal agencies that provide financial assistance should process disability-based employment discrimination complaints/charges against entities subject to both Title I of the ADA (prohibiting discrimination in employment) and Section 504 of the Rehabilitation Act (prohibiting discrimination in programs or activities receiving federal financial assistance). The proposed rule would amend the joint regulation to revise the definitions of certain terms and clarify the procedures for referring these complaints/charges between agencies. Additionally, the EEOC will explore ways to make the rule more consistent with the recently revised Memorandum of Understanding (MOU) between the EEOC and the DOL's Office of Federal Contract Compliance Program

(OFCCP), which addressed the processing and investigation of complaints/charges alleging employment discrimination.

#### *4. Coordinate Processing of Disability-Based Complaints for Government Contractors*

Together with the OFCCP, the EEOC issued a joint regulation to coordinate the processing of disability-based employment discrimination charges/complaints filed against employers holding government contracts or subcontracts, where the complaints/charges appear to state a claim under both Section 503 of the Rehabilitation Act (requiring affirmative action and prohibiting disability-based employment discrimination by federal government contractors) and subcontractors and Title I of the ADA (prohibiting disability-based discrimination in employment). Similar to the proposed revisions to procedures for complaints or charges of discrimination based on disability subject to the ADA and Section 504 of the Rehabilitation Act, the proposed rule would amend the joint regulation to revise the definitions of certain terms and clarify the procedures for referring these complaints/charges between agencies and explore ways to make the rule more consistent with the MOU between the EEOC and the OFCCP addressing the processing and investigation of complaints/charges alleging employment discrimination.

#### *5. Revising Procedures for Complaints against Recipients of Federal Financial Assistance*

The EEOC also announced a similar revision to procedures for complaints of employment discrimination filed against recipients of federal financial assistance. Together with the DOJ, the EEOC issued a joint regulation explaining how federal agencies that grant financial assistance or revenue-sharing funds should process complaints of employment discrimination subject to various EEOC statutes, including Title VII of the Civil Rights Act of 1964, as amended (Title VII), and the Equal Pay Act (EPA). Again, the proposed rule would amend the joint regulation to revise the definitions of certain terms and clarify the procedures for referring these complaints/charges between agencies and explore ways to make the rule more consistent with the MOU between the EEOC and the OFCCP addressing the processing and investigation of complaints/charges alleging employment discrimination.

#### *6. Addressing the Federal Sector's Obligation to Hire Employees with Disabilities*

As part of the semiannual regulatory agenda, the EEOC once again discussed the federal sector's obligation to be a model employer of individuals

with disabilities. This topic has been described in prior editions of the Federal Regulations Update.

### *7. Revising Regulations Related to Incentives Offered under Wellness Programs*

The EEOC issued a proposed rule amending the regulations under the ADA to address the interaction between Title I of the ADA and financial inducements and/or penalties associated with employer wellness programs offered through health plans. The EEOC has indicated that it also plans to address other aspects of wellness programs that may be subject to the ADA's non-discrimination provisions. Similarly, the EEOC announced a proposed rule amending the regulations on the Genetic Information Nondiscrimination Act of 2008 (GINA) to address inducements to employees' spouses or other family members who respond to questions about their current or past medical conditions on health risk assessments (HRA).

### *8. Updates to Pregnancy Antidiscrimination Guidance*

On June 25, 2015, the EEOC issued updated guidance on avoiding pregnancy discrimination. The updates to the guidance are limited to a description of the Supreme Court's decision in *Young v. UPS* (575 U.S. \_\_\_ (2015), 135 S. Ct. 1338). The EEOC indicated that, in its view, the decision in *Young* does not alter the majority of the July 2014 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues. The EEOC stressed its position that the decision in *Young* establishes that women may be able to prove unlawful pregnancy discrimination if an employer accommodated some workers but refused to accommodate pregnant women.

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