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TIA ON THE HILL

A Weekly Advocacy Update from TIA

The Latest News and Updates from TIA's Government Affairs Department

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DOL Releases NPRM On FLSA

This past week the Department of Labor (DOL)released a notice of proposed rulemaking (NPRM) in the Federal Register. The notice calls to modify the Wage and Hour Division (WHD) regulations to revise its opinion on classifying employees vs. independent contractors as outlined in the Fair Labor Standards Act (FLSA). The goal of this revision is to be more consistent with judicial precedent and the act's original purpose.

TIA worries this rule will complicate the process of determining a worker's employment status, while also increasing costs and disrupting the brokerage marketplace.

For more than seven decades, the DOL and the courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. Specifically, the Agency and courts have used a "totality-of-the-circumstances analysis," considering multiple factors to determine the worker's status. In 2021, the Department published a rule that provided the classification of independent contractors under the FLSA. This 2021 began under the Trump Administration. The rule identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor. Two of the five identified factors – the nature and degree of control over the work and the worker's opportunity for profit or loss were designated as "core factors" that are the most probative and carry the greatest amount of weight in the analysis. Essentially, the rule narrowed the focus of the analysis and sought to identify the key core factors versus a plethora of potential factors.

There were several delays and challenges in court to implementing this rule, but ultimately a district court in Texas issued a decision vacating the Delay and Withdrawal Rules, and the rule became effective on the original effective date of March 8, 2021.

Obviously, for political reasons, the Biden DOL did not support this decision and does not believe it comports with the FLSA text and purpose and court opinions and interpretations. The DOL could have waited to see potential impacts but has decided through this NPRM to not wait and release this proposed rule to rescind the 2021 IC rule, revert to the totality-of-the-circumstances analysis, and propose a "non-exhaustive" six-factor test.

These six factors include:

- Opportunity for profit or loss depending on managerial skill.
- Investments by the worker and the employer.
- Degree of permanence of the working relationship.
- Nature and degree of control.
- The extent to which the work performed is an integral part of the employer's business.
- Skill and initiative.

The Agency notes that it may consider additional factors behind the six listed above. Furthermore, the Agency proposes a further analysis of the control factor, including how scheduling, supervision, price setting, and the ability to work for others should be considered when analyzing the degree of control over a worker.
In an interview with the Acting head of the WHD, the Agency was asked how this compares to California's AB5 law, and the Agency noted that President Biden has been pushing Congress to pass the PRO Act to enact AB5 at the federal level, but this proposed rule would adhere to U.S. Supreme Court precedent.

Dems Push Infrastructure Vision

The Administration released a new action plan on Thursday that involves every sector of business imaginable. They plan to use the federal and state governments in collaboration with trade groups, think tanks, and other entities to accomplish their goal of creating new infrastructure in a timely manner.
Democrats plan to go on offense when it comes to marketing their infrastructure vision. Mayors, Governors and industry experts were present as they commended the Administration on what was described as "heading in the right direction." However, Democrats are sure to go on defense too as they know the inevitable criticism that will come from Republicans.

On Thursday, Secretary of Transportation, Pete Buttigieg, explained the three most common roadblocks that burden progress on their vision: lack of data, lack of technology, and need for greater capacity.
Mitch Landrieu, the White House Infrastructure Coordinator, praised President Biden and Vice President Harris for making sure communities had all the information and resources needed to access funding from the bipartisan infrastructure bill. Three of the sectors he highlighted in helping with the project were construction workers, broadband, and the electrification sector.

DOT's Volpe research center has been designated as the central resource for local and state project managers to share ideas and learn the best methods from each other. Republicans are concerned with the Democrats' troublesome record with approving work permits – something they pride themselves in on their infrastructure plans. Senator Shelley Moore Capito (R-WV) claims this type of red tape slows the progress of infrastructure implementation that would be otherwise possible. This point was backed up by citing the average environmental impact statement is 661 pages. Secretary Buttigieg claims this process ensures accurate feedback and helps the timeline of the project.

Mitch Landrieu claims the speediness of these projects are not solely up to the federal government. In fact, he says 90% will be left to states, local governments, and industry partners.

EV Tax Credit Dilemmas Can Be Resolved

Katherine Tai of the U.S. Trade is confident the Biden administration can tame concerns on electric vehicle tax credits not being applicable to foreign made cars. When asked about complaints from the EU and other trade partners, Tai pointed to past resolved conflicts as an indicator of a healthy relationship with the EU. The EU isn't the only unhappy camper; South Korea and Japan have also made their grievances known.

The window to correct the issues is closing and if the treasury department – the department Implementing the new credits – doesn't fix the problems on its own, it is assumed Congress will have to get involved.

The EU Trade Commissioner, Valdis Dombrovskis stated last week that European companies need to be exempt from the policies dictating where electric vehicles must be made to be eligible for the tax credits. He hopes through negotiation the differences can be solved, but that remains to be seen.

Senator Raphael Warnock (D-GA) introduced legislation late last month that would give a grace period for automakers to adjust to the new rules of origin of car parts. TIA will keep you updated.

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