Virtual
Wage and Hour
CLE Breakfast

Wage and Hour Law Under the Second Trump Administration

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April 8, 2025

Agenda

- USDOL Leadership Under the Trump Administration
- Minimum Wage
- The Overtime Rule
- Independent Contractor Classification
- Joint Employment Rules
- Tipped Employees
- DEI-Related Wage and Hour practices

USDOL Leadership

USDOL Leadership Under the Trump Administration

- **Lori Chavez-DeRemer** – Secretary of Labor (Confirmed 67-32 on March 11, 2025)
  - U.S. House Representative for Oregon's 5th district (2023-2025)
  - Mayor of Happy Valley, Oregon (2011-2019)
  - Co-sponsored and supported the proposed Protecting the Right to Organize (PRO) Act while in Congress but distanced herself from it at confirmation hearing.
- **Keith Sonderling** – Deputy Secretary of Labor (Confirmed 53-46 on March 12, 2025)
  - Served as Acting and Deputy Administrator of the Wage and Hour Division (WHD) during the first Trump administration.
  - Most recently served as a Commissioner of the U.S. Equal Employment Opportunity Commission (2020-2024).

USDOL Leadership Under the Trump Administration

- **Andrew Rogers** – Nominee for Administrator, WHD (Nominated March 31, 2025)
  - Served as a Senior Advisor in the WHD during the first Trump administration.
  - Other government experience includes Acting General Counsel of EEOC (as of Feb. 2025) and Chief Counsel and Chief of Staff to then Commissioner and now acting EEOC Chair Andrea Lucas (2020-2025).
- **Jonathan Berry** – Nominee for Solicitor of Labor (Nominated March 31, 2025)
  - Managing Partner, Boyden Gray PLLC (Washington, D.C.)
  - Served as Regulatory Policy Officer at the USDOL during the first Trump administration, at the DOJ's Office of Legal Policy, and was Chief Counsel to the President-Elect Trump Transition.

Minimum Wage

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Trump's Stance on the National Minimum Wage

- Only Congress can increase the federal minimum wage applicable to all employers.
- The last time it was increased was in 2009 (to $7.25 per hour).
- 2020 Presidential Debate:
  - Expressed some willingness to increase to $15 per hour:
    - "I would consider it to an extent … but not to a level that is going to put [small] businesses out of business."
- December 2024 Meet the Press Interview:
  - Called $7.25 per hour a "very low number" but warned against raising it too high, again citing concerns for small businesses.
  - Suggested that a uniform federal minimum wage may not be practical.
    - "[I]t would be nice to have just a minimum wage for the whole country, but it wouldn't work because you have places where it's very inexpensive to live."
  - Blamed California's high minimum wage for state's economic issues.
  - Would consult state governors before considering an increase.

Minimum Wage for Federal Contractors: EO 14026 Rescission

- On March 14, 2025, President Trump issued an Executive Order (EO), "*Additional Rescissions of Harmful Executive Orders and Actions*," which rescinded EO 14026, among other items.
- EO 14026, issued by President Biden, had increased the minimum wage for federal contractors to $15 per hour in 2022, rising to $17.75 per hour in 2025.
- The increased minimum wage under EO 14026 and its implementing rules had been the subject of legal challenges and a Circuit split.
  - *State of Nebraska v. Su,* 121 F.4th 1 (9th Cir. 2024) – Invalidated the EO and its implementing rules.
  - *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707 (10th Cir. 2024) – Upheld district court's refusal to enjoin the EO and its implementing rules.
  - *State of Texas v. Trump*, 127 F.4th 606 (5th Cir. 2025) – Reversed Texas district court's decision invalidating the EO and its implementing rules. (Since vacated as moot.)

Minimum Wage for Federal Contractors: EO 14026 Rescission

- The Supreme Court declined to resolve the Circuit split in January 2025 when it denied a cert petition in *Bradford v. U.S. Dep't of Labor*, ---S.Ct.---, 2025 WL 76436 (U.S. Jan 13, 2025).
- The USDOL has announced that it is no longer enforcing EO 14026 and will take steps to implement and effectuate its revocation, including rescinding the implementing regulations.
- President Trump's March 14 EO did not rescind EO 13658, issued by President Obama, or its implementing regulations.
  - EO 13658 had raised the minimum wage for federal contractors to $10.10 per hour, with periodic increases based on the CPI, the latest of which set the rate at $13.30 per hour.
- EO 14026 has no impact on state and local minimum-wage or prevailing-wage laws.

What to Expect Moving Forward

- The federal minimum wage will likely remain at $7.25 per hour.
- Federal law creates a floor, not a ceiling, for minimum wage requirements. States and/or localities will continue setting their own minimum wage rates.
- As of 2025, 34 states, territories, and districts have minimum wages above the federal minimum wage of $7.25 per hour.
  - New York (NYC, Long Island and Westchester County): $16.50 per hour
  - Rest of New York State: $15.50 per hour
  - Washington D.C.: $17.50 per hour
  - California: $16.50* per hour (*Some cities and counties have higher minimum wage rates.)
  - Massachusetts: $15.00 per hour
- Congressional action is unlikely. The Raise the Wage Act has repeatedly failed in Congress, most recently in 2023.

The Overtime Rule

The EAP and HCE Exemptions Under Federal Law

- FLSA Overtime Requirement (29 U.S.C. § 207(a)(1)): “[N]o employer shall employ any of his employees … for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”
- Executive, Administrative, and or Professional (EAP) Exemptions (29 U.S.C. § 213(a)(1)): “The provisions of section[] … 207 of this title shall not apply with respect to—any employee employed in a bona fide executive, administrative, or professional capacity.”
  - To qualify for an EAP exemption, an employee must meet both a salary basis test and a duties test.
- Certain highly compensated employees (HCEs) may qualify for an overtime exemption if they earn above a specified total annual compensation level and customarily and regularly perform at least one duty of an EAP-exempt employee. (29 C.F.R. § 541.601).

Salary Basis Requirement

- To be eligible for the EAP exemptions under the FLSA, in addition to satisfying the duties test, employees generally must receive a guaranteed salary, exclusive of board, lodging, or other facilities, which is not subject to reduction due to variations in the quality or quantity of work performed.
- The current salary threshold for EAP-exempt employees is $684 per week ($35,568 annually).
- The current total annual compensation threshold for HCEs is $107,432.

How We Got Here: The 2016 Obama USDOL Overtime Rule

- In 2016, under the Obama administration, the USDOL issued a final rule increasing the salary threshold for certain overtime exemptions.
  - The rule raised the salary threshold from $455 per week to $913 per week ($23,660 to $47,476 annually).
  - The HCE threshold increased from $100,000 to $134,004 annually.
  - The rule would have automatically updated the salary levels every 3 years to align with wage growth.
- Before the rule was set to take effect, Judge Mazzant in the Eastern District of Texas issued a nationwide preliminary injunction blocking its enforcement and later granted the Plaintiffs' motion for summary judgment, invalidating the rule.
  - *See State of Nevada v. U.S. Dep't of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017).

2019 Trump USDOL Overtime Rule

- After the *State of Nevada* ruling, the USDOL, under the first Trump administration, issued a Request for Information to gather public input on revising the FLSA overtime exemption rules.
- In 2019, the USDOL issued a final rule that became effective on January 1, 2020:
  - Raised the salary threshold for EAP-exempt employees from $455 per week ($23,660 annually) to $684 per week ($35,568 annually).
  - Increased the HCE threshold from $100,000 to $107,432 annually.
  - Did not include automatic updates.
- The USDOL withdrew the appeal of the *State of Nevada* ruling in 2020 that had been held in abeyance by the Fifth Circuit pending further rulemaking.
- The 2019 rule was challenged in *Mayfield v. U.S. Dep't of Labor,* 693 F. Supp. 3d 712 (W.D. Tex. 2023)
  - Judge Pitman in the Western District of Texas granted the USDOL's motion for summary judgment. Mayfield appealed to the Fifth Circuit.

2024 Biden USDOL Overtime Rule

- While the *Mayfield* appeal was pending, the USDOL, under the Biden administration, issued a new final rule that went into effect on July 1, 2024:
  - Increased the EAP-exempt salary threshold to $1,128 per week ($58,656 annually).
    - The rule would have been implemented incrementally with the salary threshold increasing to $844 per week ($43,888 annually) on July 1, 2024, and a full increase to $1,128 per week on January 1, 2025.
  - Increased the HCE threshold to $151,164 annually.
  - Included automatic updates every three years, starting July 1, 2027.

2024 Biden USDOL Overtime Rule

- Several legal challenges to the final rule emerged almost immediately, echoing the arguments used to strike down the 2016 rule:
  - In June 2024, Judge Jordan of the Eastern District of Texas preliminarily enjoined the rule, blocking enforcement of the rule against Texas as an employer but not applying the injunction nationwide, allowing the rule to otherwise take effect on July 1, 2024. *State of Texas v. U.S. Dep't of Labor*, 738 F. Supp. 3d 807 (E.D. Tex. Jun. 28, 2024).
  - In November 2024, Judge Jordan vacated the rule in its entirety, finding that the USDOL exceeded its authority. *State of Texas v. U.S. Dep't of Labor*, ---F. Supp. 3d---, 2024 WL 4806268 (E.D. Tex. Nov. 15, 2024).
  - A month later, Judge Cummings of the Northern District of Texas also ruled against the USDOL and vacated the rule. *Flint Ave., LLC v. U.S. Dep't of Labor*, 5:24-cv-00130 (N.D. Tex. Dec. 30, 2024.)

Spotlight on the Fifth Circuit Court of Appeals

- The USDOL has appealed both Texas district court rulings.
  - *State of Texas v. U.S. Dep't of Labor*, 24-40777 (5th Cir. Dec. 4, 2024): The Biden USDOL appealed the ruling in December 2024. The Trump USDOL has since requested extensions of time to file an opening brief, which is currently due on May 6, 2025.
  - *Flint Ave., LLC v. U.S. Dep't of Labor*, 25-10349 (5th Cir. Mar. 5, 2025): The Trump USDOL appealed this ruling on March 5, 2025. The opening brief is due on May 5, 2025.

Spotlight on the Fifth Circuit Court of Appeals

- Meanwhile in *Mayfield v. U.S. Dep't of Labor*…
  - In September 2024, the Fifth Circuit affirmed the lower court's ruling, holding that the USDOL has authority to set a minimum salary threshold for EAP exemptions under the FLSA, albeit with some meaningful limitations.
  - *"Using salary as a proxy for EAP status is a permissible choice because … the link between the job duties identified and salary is strong. That does not mean, however, that use of a proxy characteristic will always be a permissible exercise of the power to define and delimit. If the proxy characteristic frequently yields different results than the characteristic Congress initially chose, then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them. That is not the case here."*
    - *17 F.4th 611, 619 (5th Cir. 2024).*

What to Expect Moving Forward

- On February 14, 2025, the Fifth Circuit denied rehearing *en banc* in *Mayfield*, potentially setting the issue up for Supreme Court review.
- With opening briefs due in *Flint Ave., LLC* and *State of Texas* next month, it is difficult to predict what position the agency will take in appeals.
  - One possibility is that the Trump USDOL filed an appeal in *Flint Ave., LLC* , and has not withdrawn its appeal in *State of Texas*, because it wants to preserve all options as it considers next steps and will ultimately withdraw the appeals.
  - Another possibility is that the USDOL will want to advocate not for the 2024 Biden overtime rule, but for its ability to set a salary threshold that is more modest than the invalidated 2024 rule.
- The last salary threshold increase to survive was the Trump's USDOL's 2019 rule of $684 per week for the EAP exemptions and $107, 432 for the HCE exemption. The 2019 rule remains in effect and will likely serve as the baseline for any future changes. Any new rule will likely avoid automatic updates.
- Employers who raised the EAP-exempt salary threshold to $844 week after July 1, 2024, may legally reverse course, but should consider whether that makes sense for business and employee morale reasons. **Employers must also remain mindful of state minimum salaries for exemption.**

Independent Contractor Classification

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Independent Contractor Classification

- The federal rules on independent contractor classification under the FLSA have been rife with change in the last several presidential administrations.
- Federal courts evaluating misclassification claims have historically applied the “economic realities” test, which focuses on the “economic reality” of the relationship between the worker and the entity that benefits from the services provided to determine whether the worker is an employee or independent contractor.
- The primary factors considered are:
  - The degree of control exercised by the employer over the worker.
  - The worker’s opportunity for profit or loss and their investment in the business.
  - The degree of skill and independent initiative required to perform the work.
  - The permanence or duration of the working relationship.
  - The extent to which the work is an integral part of the employer’s business.

Independent Contractor Classification

- Courts focus on a “totality of the circumstances” to address the ultimate question of whether “as a matter of economic reality, the workers depend on someone else’s business for the opportunity to render services or are in business for themselves.”
  - *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988 (citing *Bartels v. Birmingham*, 322 U.S. 126, 130 (1947)).

Obama-Era Guidance and Its Withdrawal

- Historically, the USDOL's guidance had generally tracked the judicial test for employee status.
- In 2015, the Obama USDOL issued Administrator's Interpretation No. 2015-1, applying a broad definition of "employment" under the FLSA. It emphasized the economic realities test to determine whether a worker is economically dependent on the employer, using six factors:
  - (1) Is the work performed to the employer's business?
  - (2) Does the worker's managerial skill affect their opportunity for profit or loss?
  - (3) How does the worker's relative investment compare to the employer's investment?
  - (4) Does the work performed require special skill and initiative?
  - (5) Is the relationship between the worker and employee permanent or indefinite?
  - (6) What is the nature and degree of the employee's control?
- In 2017, the first Trump USDOL withdrew the interpretation amid criticism that it bypassed formal rulemaking procedures and advanced a pro-worker agenda without public input.

Trump USDOL's 2021 Rule and Biden USDOL's Reversal

- In January 2021, during the final days of the Trump administration, the USDOL finalized a rule narrowing the independent contractor test, prioritizing two "core factors":
  - (1) The worker's control over their work, and
  - (2) The worker's opportunity for profit or loss.
- The rule also considered three other "less probative" factors:
  - (1) The amount of skill required for the work;
  - (2) The degree of permanence of the working relationship between the individual and the potential employer; and
  - (3) Whether the work is part of an integrated unit of production.
- The Biden USDOL froze the rule in January 2021, and then in May 2021 withdrew the rule, stating that it conflicted with the FLSA's text and purpose, undermined the balancing approach that the economic realities test provided, and risked stripping workers of FLSA protections.
- In March 2022, a federal court in the Eastern District of Texas held that the withdrawal of the rule was unlawful and restored it. *See Coalition for Workforce Innovation v. Walsh*, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).
- The Fifth Circuit vacated this decision after the USDOL issued a new independent contractor rule in 2024. *See Coalition for Workforce Innovation v. Su*, 2024 WL 2109472 (5th Cir. Feb. 19, 2024).

Biden USDOL's 2024 Independent Contractor Rule

- The USDOL appealed the *Coalition for Workforce Innovation* decision in May 2022, but then moved to hold the case in abeyance while pursuing new rulemaking and ultimately secured vacatur of the district court's decision from the Fifth Circuit in February 2024.
- In 2024, the Biden DOL issued a new final rule which returned to a six-factor, totality-of-the-circumstances approach to determine whether, as a matter of economic reality, the workers are either dependent on the potential employer for work or in business for themselves:
  - (1) Opportunity for profit or loss depending on managerial skill;
  - (2) Investments by the worker and the potential employer;
  - (3) Degree of permanence of the work relationship;
  - (4) Nature and degree of control;
  - (5) Extent to which the work performance is an integral part of the employer's business; and
  - (6) Skill and initiative.
- The 2024 rule took effect on March 11, 2024.

Biden USDOL's 2024 Independent Contractor Rule

- The 2024 rule quickly drew legal challenges. Plaintiffs in multiple lawsuits have alleged that the rule is arbitrary and capricious and exceeds the USDOL's statutory authority.
- A couple of cases are up on appeal and awaiting the Trump USDOL's position.
  - *Frisard's Transp., LLC v. U.S. Dep't of Labor*, 24-30223 (5th Cir. Apr. 8, 2024): On April 7, 2025, the USDOL informed the court that it intends to reconsider the 2024 rule, including the potential for rescission through new rulemaking. The USDOL requested the case be held in abeyance pending this process.
  - *Warren v. U.S. Dep't of Labor*, 24-13505 (11th Cir. Oct. 23, 2024) – The USDOL has requested an extension through May 5, 2025 to file a response to the appellant's opening brief. On April 4, 2024, moved to hold the appeal in abeyance and notified the court that it is reconsidering the 2024 rule, including the potential for rescission. The earlier request for an extension remains pending.

Recent Legislative Efforts

- On February 13, 2025, Rep. Kevin Kiley (R-CA) introduced the *Modern Worker Empowerment Act* and the *Modern Worker Security Act.*
- The *Modern Worker Empowerment Act:*
  - Would amend the FLSA and the NLRA to create a new standard whereby a worker would be an IC if:
    - (1) The entity engaging them does not exercise significant control over the way the individual performs the work, even if the entity exercises control over the final result, and
    - (2) If, while performing the work, the individual has "the opportunities and risks inherent with entrepreneurship, such as the discretion to exercise managerial skill, business acumen, or professional judgment."
  - Would prohibit the consideration of other factors in the analysis, including whether the entity engaging the worker:
    - (1) Requires compliance with legal, statutory or regulatory requirements.
    - (2) Requires compliance with health and safety standards that are more stringent than otherwise applicable health and safety standards.
    - (3) Requires the individual to carry insurance.
    - (4) Requires the individual to meet contractually agreed upon performance standards such as deadlines.

Recent Legislative Efforts

- The *Modern Worker Security Act*
  - Would allow businesses to offer "portable benefits,"—*i.e.* "work-related benefits" an individual could maintain regardless of whether they continue to perform work for that business—without such offer of benefits being considered in the classification analysis of whether an individual is an employee or independent contractor under the FLSA or NLRA.
  - "Work-related benefits" include those "of a type that are commonly provided to full-time employees" such as:
    - Workers' compensation
    - Skills training
    - Professional development
    - Paid leave
    - Disability coverage
    - Health insurance coverage
    - Retirement savings
    - Income security
    - Short term savings
  - "Work-related benefits" also includes business contributions to such benefits.

What to Expect Going Forward

- Watch for whether proposed legislation such as the Modern Worker Empowerment Act and the Modern Worker Security Act make it out of committee.
- As of April 7, 2025, the Trump USDOL has indicated it is considering whether to rescind the 2024 rule through a new rulemaking process.
- The Trump USDOL may attempt to reinstate the 2021 rule, issue a new rule, or step back from rulemaking altogether, in light of the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
- Even if the Trump USDOL reinstates the 2021 rule or issues a more business-friendly rule, organizations should keep in mind that this will only offer limited relief in states that apply stricter tests and actively enforce them through state agencies and courts (*e.g.*, the ABC test in California, New Jersey, and other states).

Joint Employment Rules

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Joint Employment Under the FLSA

- "The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act."
  - *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (citing *Falk v. Brennan*, 414 U.S. 190, 195 (1973)).
- There are two generally recognized categories of joint employment:
  - **Vertical joint employment**, where an employee of one employer is also, with regard to the work performed for the intermediary employer, economically dependent on another employer.
    - *E.g.*, individual works for subcontractor or staffing agency.
  - **Horizontal joint employment**, where two (or more) employers each separately employ an employee but are sufficiently associated with or related to each other with respect to the employee.
    - *E.g.,* individual works at two different stores/restaurants owned by same company.

Joint Employment: Obama vs. Trump USDOL Approaches

- Obama USDOL (Administrator's Interpretation No. 2016-1):
  - **Vertical joint employment**: Assessed using an economic realities test focused on the worker's dependence on the potential joint employer.
  - **Horizontal joint employment**: Focused on the degree of association and shared control between employers.
- The Trump USDOL withdrew Administrator's Interpretation No. 2016-01 in June 2017 and issued a new final rule in January 2020.
  - **Vertical joint employment**. Applied a narrow four-factor test based on the employer's actual control, asking whether the employer:
    - (1) Hired or fired the employee;
    - (2) Supervised and controlled the employee's work schedule and conditions of employment to a substantial degree;
    - (3) Determined the employee's rate and method of payment; and
    - (4) Maintained the employee's employment records.
    - Excluded economic dependence from the analysis.
  - **Horizontal joint employment**: Focused on whether employers were sufficiently associated in relation to the employee's work.

Repeal of 2020 Rule

- In *New York v. Scalia*, 17 states and the District of Columbia challenged the 2020 rule under the APA. The court vacated the vertical joint employment standard as arbitrary, capricious, and inconsistent with the FLSA.
  - *See* 490 F. Supp. 3d 748 (S.D.N.Y. Sep. 8, 2020).
  - The court also held that the horizontal joint employer standard was unlawful under the APA, but allowed the severable, non-substantive revisions to stand.
- The USDOL appealed the decision in November 2020, but that appeal was eventually mooted.
- In March 2021, the Biden USDOL formally rescinded the 2020 rule, citing its inconsistency with the FLSA and reinstated a broader totality-of-the-circumstances test.
  - "[A] joint employment determination must consider the employment situation in totality, including the economic realities of the working relationship." *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40939, 40947 (July 30, 2021).

What to Expect Going Forward

- This is another area of unpredictability.
  - The USDOL may seek to reinstate the 2020 rule, which narrowed joint employer liability by requiring direct control over essential employment terms and excluded economic dependence from the analysis.
  - But that would not address the issues raised in the SDNY litigation. So the USDOL could issue a modified version of the 2020 rule to address those vulnerabilities.
  - It is also possible that the USDOL takes no action, as the Biden USDOL rescinded the 2020 rule but did not replace it.
- Republicans may introduce proposed legislation to more narrowly define joint employment under the FLSA.
  - For example, Republicans introduced the Save Local Business Act during the 118th Congress, but it failed to pass.

Tipped Employees

Trump’s Push to Eliminate Taxes on Tips

- At a January 2025 rally in Las Vegas, President Trump reaffirmed his campaign promise to eliminate federal taxes on tips, aiming to appeal to workers in Nevada’s hospitality-driven economy.
- His proposal goes beyond the GOP platform, which aimed to limit federal taxes on tips to restaurant and hospitality workers.
  - President Trump suggested that his proposal would eliminate taxes on tips across all occupations.
- Critics argue the proposal offers limited benefit, citing among other things, the small portion of the workforce who work in traditionally tipped occupations.
  - They have suggested that President Trump’s plan could also reduce payroll tax revenues, discourage wage increases, and expand tip-based pay models across more industries.

No Tax on Tips Act

- Proposals advanced by Republicans in Congress this term have been more measured.
- The No Tax on Tips Act (H.R. 482 / S. 129), introduced in the 119th Congress and referred to committee, would amend the tax code to allow a deduction of up to $25,000 per year for tip income in traditionally tipped occupations.
- The Treasury Department would be required to publish a list of eligible occupations, and the bill includes income limits to exclude high earners from claiming the deduction.
- Trump’s broader proposal includes no income limits or job restrictions. While the bill has bipartisan sponsors, Democratic support comes solely from Nevada, where a significant share of the workforce depends on tip-based earnings.

Tip Tax Termination Act

- In addition to the No Tax on Tips Act, another proposal in the 119th Congress would provide temporary tax relief for tip income through an exclusion.
- The Tip Tax Termination Act (H.R. 558), introduced in the House and referred to committee, would amend the tax code to exclude up to $20,000 per year in tip income from gross income.
- It would apply to positions which generally rely on tips as part of wages, including food service, hospitality, and cosmetology.
- The exclusion would sunset after December 31, 2029.

What To Expect Going Forward

- While President Trump has called for a full exemption of tipped income from federal income tax, Congressional Republicans have signaled support for a more limited approach.
- Wait and see as to whether any proposed legislation will gain traction.

DEI-Related Wage and Hour Practices

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DEI in the Spotlight

- In January 2025, President Trump issued two executive orders targeting diversity, equity, and inclusion efforts.
  - EO 14151: “Ending Radical and Wasteful Government DEI Programs and Preferencing”
  - EO 14173: “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- Multiple lawsuits have been filed challenging these orders, including *National Association of Diversity Officers in Higher Education v. Trump.*
  - On February 21, 2025, the Maryland district court issued a nationwide injunction blocking the enforcement of EO 14151 and 14173. ---F.Supp.3d---, 2025 WL 573764 (D. Md. Feb. 21, 2025).
  - On March 14, 2025, the injunction was stayed by the Fourth Circuit, allowing enforcement to proceed while legal challenges continue through the courts. 25-01189 (4th Cir. Mar. 14, 2025).

EEOC’s Focus on DEI-Related Practices

- On March 19, 2025, the EEOC and DOJ released guidance stating that DEI-related practices may violate Title VII if employment actions are based, in whole or in part, on race, sex, or any other protected trait.
  - Covered individuals need only show that a DEI initiative or policy caused them “some harm” in any term, condition or privilege of employment, including as it relates to:
    - Hiring, firing, or compensation
    - Fringe benefits
    - Access to training and leadership programs
    - Mentoring, sponsorship, and networking opportunities
    - Internships, fellowships, and summer associate programs

Wage and Hour Implications

- With the heightened focus on DEI programs and policies, employers should carefully evaluate the legal risks associated with their DEI-related wage and hour practices.
- Practices likely to face scrutiny include:
  - Diversity referral bonuses
  - Compensation tied to the achievement of DEI-related goals
  - Paying for time spent in Employee Resource Groups (ERGs)
  - Paid diversity internships and fellowships

Diversity Referral Bonuses

- Over the past decade, many employers have introduced referral bonus programs designed to support DEI goals by incentivizing referrals of candidates from underrepresented backgrounds.
- To the extent such bonuses exceed those paid to employees for referring non-diverse candidates, they could be the subject of challenges under Title VII.

Compensation Tied to Achievement of DEI-Related Goals

- By the early 2020s, may companies began linking executive and management bonuses to the achievement of DEI-related goals and/or metrics.
- The legal risks associated with these compensation structures depend largely on the nature of the underlying benchmarks.

Paying for Time Spent In Employee Resource Groups

- Many employers have recognized and sponsored employee resource groups, sometimes called ERGs or affinity groups, where employees with shared characteristics, interests, or identities meet to foster a sense of community and support, often focusing on DEI initiatives.
- Depending on the circumstances, the time spent by non-exempt employees in ERG meetings, events, and other activities may qualify as “hours worked” and therefore be compensable under federal and/or state law, and potentially at an overtime rate.
- Even if such time is not required to be compensated, some employers choose to pay nonexempt employees for time spent in voluntary ERGs or affinity group activities – and in some cases, provide extra pay to employees who serve as group leaders or on DEI councils, even when not legally required to do so.
- Employers should evaluate their pay practices with respect to time spent in ERGs.

Paid Diversity Internships and Fellowships

- Many organizations offer structured diversity-focused internships and fellowship programs to support underrepresented groups through career, mentorship and professional development opportunities.
  - In addition to compensation, many of these programs offer exposure to clients and day-to-day operations of the workplace.
- Organizations that compensate participants in these programs but do not similarly compensate other types of interns or fellows may be exposed to disparate treatment or disparate impact claims.
- These types of internships and fellowships are common in the financial services and professional services industry, among others.

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