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The Witch's Brew: A Hodgepodge of 2024's Top Agency Actions

Presented by Michael W. Bowling



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- Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Michael W. Bowling, or another licensed attorney.





DOL: Increases to Salary Basis Test

- » DOL final rule raised minimum salary requirement for executive, administrative, and professional exemptions
- » New minimum salary levels:
 - Previous minimum salary \$684/week (\$35,766/ year)
 - July 1, 2024 - \$844/week (\$43,888/ year)
 - January 1, 2025 - \$1,128/ week (\$58,656/ year)
 - July 1, 2027 and every 3 years thereafter, the minimum salary threshold will be automatically increased
- » New rule does not impact the duties test for the white-collar exemptions

DOL: Increases to Highly Compensated Minimums Too

- » DOL final rule also raised minimum salary requirement for highly compensated employees
- » New minimum levels:
 - Previous minimum compensation \$107,432/year
 - July 1, 2024 - \$132,964/year
 - January 1, 2025 - \$151,164/year
 - July 1, 2027 and every 3 years thereafter, the minimum compensation threshold will be automatically increased



DOL: Don't Forget Impact of Non-Discretionary Incentives

- » Up to 10% of minimum salary for EAP exemptions may be non-discretionary incentive payments
 - Bonuses
 - Commissions
 - Incentive pay
- » Failed to meet salary basis minimum? You can make a “catch up” payment at the first pay period following measurement year
 - Catch up payments count toward prior year's salary only – no double dipping



DOL: What Is a Non-Discretionary Incentive?

- » Incentives are nondiscretionary when employees know about and expect them
- » May not make bonus “discretionary” simply by retaining right to suspend or end incentive program
- » Examples of nondiscretionary incentive payments:
 - Commissions
 - Incentives based on predetermined formula, such as individual or group production bonuses
 - Incentives for quality and accuracy of work
 - Incentives announced to employees to induce them to work more efficiently
 - Incentives for attendance bonuses
 - Safety bonuses (i.e., number of days without safety incidents)

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DOL Rescinds Trump Independent Contractor Test

- » DOL rescinded 2021 Independent Contractor Rule
- » Resets back to former totality of the circumstances” analysis as part of economic reality test
- » Not “new” development; this test was used for many years prior to 2021

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Old Is New Again: Economic Reality Test

Economic realities under the new rule/old way:

1. Worker's opportunity for profit or loss
2. Investments by worker and potential employer must be comparable
3. Degree of permanence of work relationship
4. Nature and degree of control by employer over worker
5. Extent to which work performed is integral part of employer's business
6. Level of skill and initiative required

Additional factors may be considered as well if they are relevant to whether worker is in business for themselves or is economically dependent on employer for work.



DOL: Increase to Federal Contractor Minimum Wage

- » Federal contractor minimum wage increases on January 1, 2025 – from \$17.20 to \$17.75
- » Minimum wage on federal contracts dependent upon contract date for each contract
- » New minimum will apply to federal contracts entered into, modified, or amended on or after January 1, 2025
- » While multiple courts have upheld president's authority, one court has found opposite; may end up at Supreme Court





NLRB: Fair Choice – Employee Voice Rules

- » Reverses Trump Board’s April 2020 amendments
- » Unions may once again use “blocking charges” to delay elections
- » Minority of employee may not challenge voluntary recognition of union until six months has passed

NLRB: Further Changes on the Horizon (Maybe)

- Generic disclaimers in handbooks
- Non-compete agreements
- Training cost repayment agreements
- Banning mandatory union education meetings (even if paid and on company time)
- Expanding employee rights to use company email and other electronic communication platforms
- Expanding union right to access company property

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Occupational
Safety & Health
Administration

OSHA: Worker Walk Around Final Rule (I)

- » Under section 8(e) of Occupational Safety and Health Act, employees and employers are permitted to have a representative accompany OSHA Compliance Officers during physical inspections of worksites as part of OSHA inspections
- » On April 1st OSHA clarified its final rule regarding the rights of employees to authorize a representative to accompany an OSHA Compliance Officer during walk arounds.
- » Final rule now permits the employee to authorize another employee or non-employee to accompany

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OSHA: Worker Walk Around Final Rule (II)

- » “Non-Employee”? Yes, but non-employee must be reasonably necessary to conduct of inspection
- » Any employer objection should focus on qualifications of third-party to assist with inspection; any concerns should be raised with compliance officer immediately
- » OSHA compliance officer decides who is “reasonably necessary”
- » If non-employee permitted to accompany, employer should take steps to safeguard confidential information and trade secrets during walk arounds

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OSHA: Heat Injury & Illness Proposed Rule (I)

- » OSHA proposed rule would require employers to develop protective measures to prevent heat-related injuries and death
- » Two-tiered approach:
 - First threshold – Combined temperature and relative humidity reaches 80 degrees for more than fifteen minutes in any given sixty-minute period, the employer is required to provide drinking water and rest breaks
 - Second threshold – When heat index reaches 90 degrees (“high heat trigger”), employer is required to provide minimum paid breaks of at least 15 minutes every two hours and to actively monitor employees for signs of heat-related stress or symptoms

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OSHA: Heat Injury & Illness Proposed Rule (II)

- » Proposed rule sets forth written policy requirement for employers with 10 or more employees:
 - “Comprehensive list of the types of work activities covered by the” standard;
 - Description of how employer complies with OSHA standard;
 - Means employer will use to monitor temperatures (e.g., heat index or web bulb globe temperature);
 - Emergency phone numbers and procedures employees must follow when employee experiences signs and symptoms of heat-related illness; and
 - List of “heat safety coordinators” with “authority to ensure compliance”

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OSHA: Heat Injury & Illness Proposed Rule (III)

- » Employers will be required to “review and evaluate” effectiveness of their programs whenever recordable heat illness occurs and update “as necessary”
- » Required protective measures to be implemented by employers
- » Required to develop emergency response procedures
- » Provide training on program, risk factors for heat stress, importance of taking breaks and drinking water, recognizing signs of heat-related illness, and prohibition against retaliation for taking breaks
- » Additional training requirements for supervisors related to monitoring temperatures and what to do when an employee shows signs of heat-related illness

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OSHA: Heat Injury & Illness Proposed Rule (IV)

- » Comment period open till December 31, 2024
- » Harris Win: OSHA likely to issue final rule – following close of comment period in 2025
- » Trump Win: OSHA *may* withdraw standard for reconsideration

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Multi-State Compliance

- » With fifty states and a myriad of local jurisdictions, new rules and regulations come throughout the year
- » Common areas of state/local regulations in 2024:
 - Pay transparency in job postings; disclosure of salary ranges
 - Minimum wage increases
 - “Captive audience” bans
 - CROWN Acts
 - Paid sick leave





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