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Compliance Connection

September 2022

Federal Compliance Update

NLRB Proposes Rule on Standard for Determining Joint-employer Status

The National Labor Relations Board (NLRB) recently [issued](#) a notice of proposed rulemaking on the standard for determining joint-employer status under the National Labor Relations Act (NLRA), replacing the final rule that took effect on April 27, 2020. Employers would be considered joint employers if they “share or codetermine those matters governing employees’ essential terms and conditions of employment,” including scheduling, wages and benefits.

According to the proposed rule, the changes are designed to explicitly ground the joint-employer standard in established common-law agency principles. They would also provide relevant guidance to parties covered by the NLRA regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control employees’ essential terms and conditions of employment.

Joint employers share liability for unfair labor practices and responsibility for bargaining with the union. Expanding the joint-employer standard could have major consequences in the franchising industry and for organizations sourcing workers through contracts, temporary staffing agencies and other business-to-business arrangements. The proposed rule reflects the NLRA’s aims to promote collective bargaining and stabilize labor relations by easing organizing and collective bargaining for staffing, franchise, and other workers with ties to multiple employers.

“In an economy where employment relationships are increasingly complex, the Board must ensure that its legal rules for deciding which employers should engage in collective bargaining serve the goals of the National Labor Relations Act.” -NLRB Chair Lauren McFerran

What’s Next?

On September 7, 2022, the NLRB formally published the proposed rule in the Federal Register. Public comments regarding the proposed rule must be received by the board on or before November 7, 2022. Subsequently, the NLRB will review comments and determine whether to move forward with a final rule.

Federal Agencies Issue Toolkit on Labor Partnership and Worker Organizing

As part of the Biden administration’s efforts to promote unions, the U.S. Small Business Administration (SBA)—together with the U.S. Department of Labor (DOL), the National Labor Relations Board (NLRB) and the U.S. Federal Mediation and Conciliation Services (FMCS)—recently released an online [toolkit](#) to aid employers in responding to employee interest informing or joining unions. Developed through collaboration across federal agencies, the toolkit executes the Biden administration’s goal of promoting and supporting unionization and collective bargaining.

The toolkit is directed toward small businesses and appears to highlight the mutual benefits of labor-management partnerships and collective bargaining to employers and workers. It's presented as an FAQ on the SBA's website and provides access to DOL, NLRB and FMCS guidance on federal labor and collective bargaining laws.

The toolkit builds on the administration's recent efforts intended to strengthen workers' ability to organize, including President Joe Biden's April 2021 [executive order](#) establishing the White House Task Force on Worker Organizing and Empowerment and the NLRB's notice of proposed rule-making on the standard for determining joint-employer status under the National Labor Relations Act.

"SBA's toolkit is an invaluable resource for employers looking for information and guidance on unions and the value of collective bargaining. Worker interest in forming unions is higher than we've seen in decades, and this resource will be an important tool in helping employers respond positively to worker organizing campaigns." -Secretary of Labor Marty Walsh

Employer Takeaways

There are currently around 16 million workers in the United States who are union members or in a job that provides union representation, according to the Bureau of Labor Statistics. Still, employee interest in unionizing is currently extremely high. According to an August 2022 Job case report, 70% of skilled and hourly U.S. workers said they would consider joining a union if given the opportunity for higher pay, improved employee benefits and better job protections. Additionally, the number of union petitions filed in the first nine months of fiscal year 2022 has increased by 58%, according to the NLRB.

State Compliance Update

Just a reminder...

Colorado Paid Family and Medical Leave is coming January 1, 2023

On Nov. 3, 2020, Colorado voters passed Proposition 118, creating a paid family and medical leave insurance program (FAMLI) for workers in the state. The Division of Family and Medical Leave Insurance within the Colorado Department of Labor and Employment administers the program and has created a website about the benefit.

Per the Colorado Department of Labor and Employment (CDLE) website, benefit rules have been adopted:

"After considering nearly 300 written and oral comments received on specific provisions of our benefits rules, we have revised and adopted [7 CCR 1107-3](#) Benefits and Employer Participation Requirements. The adopted rules will have an effective date of October 15, 2022. Notable changes from the proposed version of the rules include but are not limited to:

- When using leave to "care for a new child," benefits are limited to individuals standing in loco parentis to the child (previously listed as "legal parents.")
- Deadlines for submitting an application for FAMLI benefits when the need for leave is unforeseeable have been extended to 30 days after the leave has begun (previously listed as seven days.)
- While formal appeal rights have been limited to the claimant applying for benefits, additional provisions were added to allow employers to file a grievance with the Division if it has a good-faith belief, supported by evidence, that the Division has granted FAMLI benefits to a claimant in an amount, duration or frequency beyond what the claimant is entitled or in a way that unduly disrupts the employer's operations.
- Employers will now have an opportunity to request limited information regarding the amount and reason for leave where such information is strictly necessary for benefits coordination.

With the benefits rules now adopted, we anticipate filing our proposed private plan rules very soon. Once filed, our proposed rules will be published to our website, and the formal public comment period will open. We encourage you to submit your public comments by filling out this form or by participating in future public hearings. Notices of all public hearings will be posted on our rules page where you can also read all adopted rules, redlined versions and listen to past public hearings.”

Employers may request authorization to provide a private plan that meets or exceeds the state plan. The CDLE website states the following:

There will be a public hearing for [7CCR 1107-5](#) Regulations Concerning Private Plans at 5:00 pm, October 17, 2022. CDLE states, “the hearing will be held virtually over [Zoom](#).” They strongly encourage all that wish to participate register and notify the department if they wish to testify by completing this [form](#). Attendees can join the meeting at any time after 5 p.m.

Additionally, they state, “Anyone may submit comments to the FAML I Division regarding any proposed or adopted rules at any time. Please submit your comments by filling out our public comment form [here](#). Submitted comments will be considered formal comments and may be displayed publicly. All comments submitted either at the virtual rulemaking hearing or written and submitted to the Division online carry the same weight and will be considered by the Division for inclusion in subsequent rule changes. The comment period for the rules on Private Plans 7 CCR 1107-5, will close on **Tuesday, October 18, 2022** at 8 a.m.”

This is your chance to make your voice heard. Please take advantage of this opportunity.

Compliance Calendar

October

10/14 – Medicare Part D Creditable/Non-creditable Coverage Notice

10/30 – Form 941 Filing Deadline (third quarter)

November

Nothing to report...

December

Nothing to report...

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