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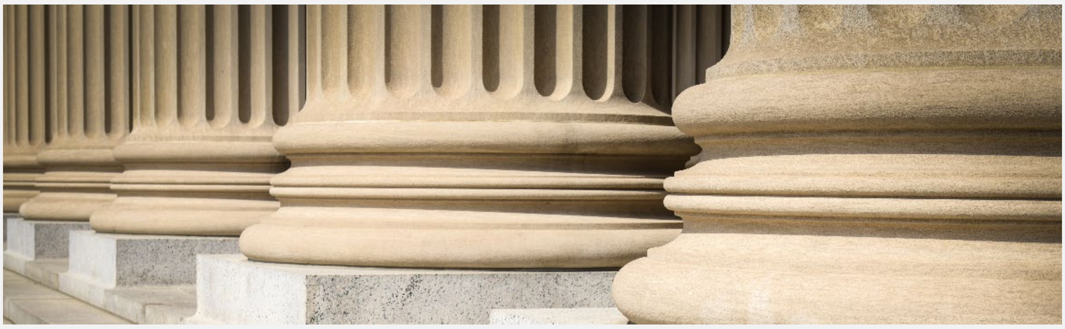

Rewards Policy Insider
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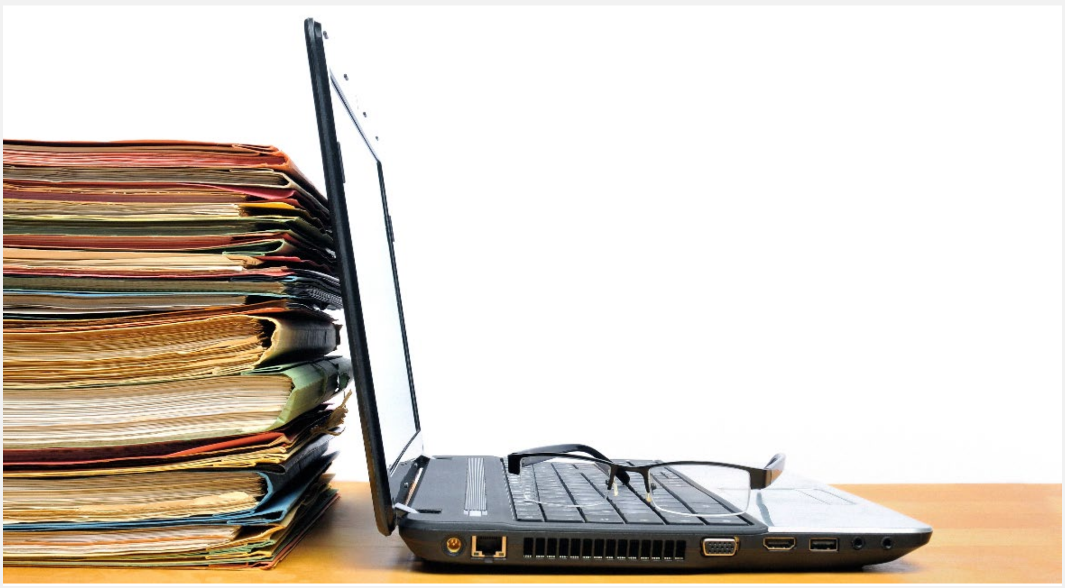

In this Issue:

Department of Labor Withdraws Independent Contractor Rule

The Department of Labor (DOL) has formally withdrawn a final rule issued during the last days of the Trump Administration that would have established new standards for determining if an individual is an employee or an independent contractor for purposes of the Fair Labor Standards Act (FLSA). The now withdrawn independent contractor rule—originally scheduled to take effect on May 8, 2021—was embraced by some employers that leverage independent contractors as a key part of their business models, but was criticized by other stakeholders for potentially making it too difficult for workers to access the FLSA's overtime and minimum wage protections as well as health and other benefits provided to employees.

According to a DOL press release, reasons for withdrawing the independent contractor rule include:

- The DOL believes the rule was inconsistent with the FLSA's text and purpose, as well as relevant judicial precedent relating to standards for classifying workers under the FLSA.
- The rule's prioritization of two "core factors" for determining employee status under the FLSA would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring a review of the totality of the circumstances related to the employment relationship.
- The rule would have narrowed the facts and considerations comprising the analysis of whether a worker is an employee or an independent contractor, resulting in workers losing FLSA protections.

Employers that were preparing to re-classify workers or otherwise rely on the independent contractor rule should be aware that the rule never took effect, is not consistent with the current DOL's interpretation of the FLSA, and would not be entitled to deference in court.

That raises the question, of course, of what rule or standard the DOL will apply going forward. Although it is not clear at this point, a good starting point may be the Administrator's Interpretation No. 2015–1 (AI 2015-1), which the DOL's Wage and Hour Division issued in 2015 and then withdrew in the first year of the Trump Administration. AI 2015-1 reiterated that the "economic realities" of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified the following six economic realities factors:

1) The extent to which the work performed is an integral part of the employer's business;
2) the worker's opportunity for profit or loss depending on his or her managerial skill;

3) the extent of the relative investments of the employer and the worker;
4) whether the work performed requires special skills and initiative;
5) the permanency of the relationship; and
6) the degree of control exercised or retained by the employer.

However, the DOL may issue more guidance on this issue.

Keep an eye out for future issues of the Rewards Policy Insider for additional updates.

Ways and Means Committee Chairman Neal Unveils Universal Paid Leave Proposal

During his recent address to a joint session of Congress, President Biden outlined a series of family-focused legislative proposals including one to provide universal paid family and medical leave. The starting point for that proposal was announced on April 27 by House Ways and Means Committee Chairman Richard Neal. His Committee is expected to take up the Building an Economy for Families Act (BEFA) – which also includes President Biden's proposals related to guaranteed access to childcare and enhanced child and dependent care tax credits, among others – in the near future.

The following summary focuses only on the universal paid leave proposal and does not address other provisions of the BEFA or President Biden's proposed American Families Plan.

Summary

BEFA would create a universal paid family and medical leave program, effective beginning in 2023, that would be provided through three channels:

- A new federal benefits program;
- A "legacy state" program; and/or
- An employer's program that has been approved by the Secretary of the Treasury and that satisfies certain minimum requirements.

Significantly, the proposal would provide for the federal government to reimburse "legacy states" and employers with approved programs up to certain amounts consistent with the cost of providing the benefits through the federal program.

Only "legacy states" – defined as those that enacted a paid family and medical leave benefit program before BEFA is enacted – would be eligible for federal grants. However, BEFA would not appear to specifically preempt any state from enacting a more generous paid family and medical leave program in the future.

Employers that choose to set up their own paid leave programs would also be eligible for federal grants. These employers would not have to offer paid leave programs that are as generous or comprehensive as the federal program, but the grant structure would be designed to set minimum standards and to encourage employers to be as generous as possible. However, employers with employees in legacy states would still be required to follow those states' programs for those employees.

Summary of Proposed Federal Leave Program

The new federal program would provide for paid leave for up to 20 caregiving days per month, up to a maximum of 60 caregiving days in a 12-month benefit period.

A "caregiving day" would be defined as a single calendar day in which an individual, in lieu of working for compensation (including wages, paid time off, or paid sick leave), engages in at least 8 hours of "qualified caregiving", or 2 calendar days in which an individual engages in at least 4 hours of "qualified caregiving" per day. Also, in order to be a "caregiving day" the reason for the leave would have to be a reason that would qualify the employee for unpaid leave under the Family and Medical Leave Act (FMLA) – i.e., to address a serious personal or family health issue; to care for a newborn, newly adopted child, or new foster child; or for circumstances arising from a loved one's military deployment or serious injury. However:

- With respect to family members, FMLA leave is available only to care for a spouse, son, daughter, or parent with a serious health condition, or for circumstances arising from a spouse's, son's, daughter's, or parent's military deployment or serious injury. For purposes of the new paid leave mandate only, these relationships would be expanded to include siblings, grandparents, and grandchildren; the spouses of family members; and any other association by blood or affinity that is equivalent to a family relationship, as defined in Treasury regulations.
- An individual would not need to be eligible for FMLA leave to qualify for the new paid leave mandate.

Benefits would be based on the individual's average monthly earnings, with replacement rates ranging from 85% to 5% applied to specified wage bands, with higher replacement rates applied to lower wage bands. The proposed formula is designed to replace approximately two-thirds of average wages for most workers, although the replacement rate would be greater for lower paid workers, and less for those who are more highly paid. Benefits would not begin until a worker completes a 5-day waiting period.

Employer Requirements and Grant Details

Employers that want to offer their own paid leave programs would still be allowed to do so and recover part of the cost in the form of federal grants. These employer programs would have to be in writing, be approved by the Treasury Secretary, and meet certain minimum requirements. In general, these programs would need to:

- Provide at least 15 days of paid leave at a rate of at least 50% of each individual's regular rate of pay;
- Provide paid leave to all employees (other than those in a legacy state) with at least 1 year of cumulative service with the employer, regardless of job type, union membership, seniority, or any other classification; and

- Provide paid leave for one or more of the caregiving reasons discussed above, regardless of any preexisting medical conditions.

As with the federal program, employers could impose a waiting period of up to one week before benefits begin – but would not be required to do so.

Grant amounts would be determined in part by how extensive the employer's paid leave program is. Those employers that offer paid leave for all the same reasons as would be provided under the federal program would be eligible for grants equal to the lesser of 40% of the employer's "reimbursable benefits," or 40% of the total amount of federal benefits that otherwise would have been paid to the relevant employees. In the case of employers that offer paid leave benefits for less than all the reasons as would be provided under the federal program, the same formula would apply except 40% would be replaced with 28%.

Significantly, "reimbursable benefits" would not include paid sick leave or other paid time off offered by the employer. It also would not include paid leave benefits for employees in legacy states. However, it would include paid leave benefits that are more generous than the minimum required for grant eligibility.

More on Legacy States

As noted, legacy states would also be entitled to federal grants to help pay for the cost of their paid family and medical leave programs. BEFA would define a legacy state as a state that:

1) had enacted a law providing paid family and medical leave benefits as of the date of the BEFA's enactment, and
2) beginning with the first calendar year that starts two years after the BEFA's enactment, provides a comprehensive paid leave program that covers all workers in the state who would be covered under the federal program, and provides at least 60 days of paid family and medical leave benefits per year in amounts that are actuarially equivalent to the federal program's benefits.

Observations

This summary is based on the discussion draft issued by Chairman Neal, and the proposal undoubtedly will change and evolve over the course of the legislative process. However, that process may be on a fast track because President Biden and Congressional Democrats have made universal paid leave a priority. Current indications are that Chairman Neal's proposal is designed to be included in a second reconciliation bill that Democrats expect to move sometime this year. That would enable them to pass it without Republican support, but only if all 50 Senate Democrats are in support.

Additional details to be provided in future issues of the Rewards Policy Insider.

IRS Issues Frequently Asked Questions (FAQs) on Temporary Partial Termination Relief

The Consolidated Appropriations Act (CAA), 2021 included a provision to provide temporary relief from the partial termination provisions of IRC § 411(d)(3) for tax-qualified retirement plans. A recent set of "frequently asked questions" issued by the IRS provides helpful guidance on applying the temporary rule.

Background

Whether a partial termination of a retirement plan has occurred is typically a facts and circumstances inquiry. However, the IRS's position is that there is a rebuttable presumption of a partial termination during any "applicable period" if the plan's "turnover rate" was 20% or more. For this purpose, the "applicable period" generally is a single plan year although it could be more if a series of employer-initiated terminations crosses multiple plan years.

A plan's 'turnover rate" for an applicable period is calculated by dividing the number of participating employees who had an employer-initiated severance from employment during the applicable period by the sum of all of the participating employees at the start of the applicable period and the employees who became participants during the applicable period.

For example, assume a calendar year plan in which 100 plan participants were terminated by the employer during the 2020 plan year. If, at the beginning of the plan year there were 400 participants, and 80 new participants were added during the plan year, the turnover rate for the year would be [100/(400 + 80) =] .208, or 20.8%. This would, under the normal rule, result in a rebuttable presumption of a partial termination.

When a partial termination occurs, each affected employee becomes fully vested in all benefits accrued as of the date of the partial termination. In the case of a defined contribution plan, this means affected employees' rights to employer contributions become immediately vested. Employee salary deferrals are always 100% vested.

Temporary Relief

In general, the temporary relief provides that a plan is not treated as having a partial termination (within the meaning of IRC § 411(d)(3)) during any plan year which includes the period beginning on March 13, 2020, and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80% of the number of active participants covered by the plan on March 13, 2020.

The FAQs clarify some important points about the temporary relief:

- The 80% test is a comparison of the number of active participants in a plan on March 13, 2020 and March 31, 2021. There is no requirement to look only at the number of active participants on March 13, 2020 and who were still active on March 31, 2021. Participants who joined the plan after March 13, 2020 are included in the March 31, 2021 active participant count as long as they are still active as of that date.
- The relief applies to any partial termination determination for the entire plan year of any plan year that includes the period from March 13, 2020 through March 31, 2021. In other words, in the case of a calendar year plan the temporary relief fully applies to both the 2020 and 2021 plan years.

- The temporary rule is not limited to reductions related to the COVID-19 national emergency.

To understand the impact of the temporary relief, let's continue with the previous example. Assume the active participant count on March 13, 2020 was 400, but due to additional layoffs in early 2021 there were only 350 active participants in the plan as of March 31, 2021. Because part of the 2020 plan year includes the period from March 13, 2020 through March 31, 2021, the temporary relief applies for purposes of determining if a partial termination occurred during the 2020 plan year.

As noted above, under normal rules there would be a rebuttable presumption of a partial termination in 2020 because the turnover rate was greater than 20%. However, under the temporary relief the number of active participants on March 31, 2021 (350) is 87.5% of the number of active participants on March 13, 2020 (400), so there would be no partial termination for the 2020 or 2021 plan year.

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