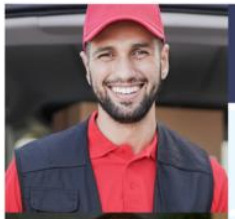
Misclassification of Employees as Independent Contractors



EMPLOYEE	OR	INDEPENDENT CONTRACTOR
Working for someone else's business		Running their own business
Paid hourly, salary, or by piece rate		Paid upon completion of project
Uses employer's materials, tools and equipment		Provides own materials, tools and equipment
Typically works for one employer		Works with multiple clients
Continuing relationship with the employer		Temporary relationship until project completed
Employer decides when and how the work will be performed		Decides when and how they will perform the work
Employer assigns the work to be performed		Decides what work they will do

A worker is entitled to minimum wage and overtime pay protections under the Fair Labor Standards Act (FLSA) when there is an employment relationship between the worker and an employer and there is coverage under the FLSA. The Wage and Hour Division is responsible for determining whether an employee has been misclassified as an independent contractor and has been denied critical benefits and labor standards protections.

https://www.dol.gov/agencies/whd/flsa/misclassification/myths

137 Nev., Advance Opinion 36

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFF MYERS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellant,
vs.
RENO CAB COMPANY, INC.,
Respondent.

No. 80448

FILED
JUL 29 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ARTHUR SHATZ AND RICHARD FRANTIS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellants,
vs.
ROY L. STREET, INDIVIDUALLY AND D/B/A CAPITAL CAB,
Respondent.

No. 80449

Consolidated appeals from a district court order granting summary judgment in minimum wage matters. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded.

Leon Greenberg Professional Corporation and Leon M. Greenberg, Las Vegas,
for Appellants.

Simons Hall Johnston PC and Mark G. Simons, Reno,
for Respondents.

BEFORE THE SUPREME COURT, EN BANC.

21-21961

OPINION

By the Court, STIGLICH, J.:

The central issue in these consolidated cases is a familiar one: are the appellants "employees" or "independent contractors," and how do we tell?[1] The answer will depend on the legal context. To say that a worker is an "employee" for the purpose of a particular law usually means that the worker falls within that law's scope of coverage. But different laws may have different scopes of coverage, and so the same worker may be an "independent contractor" as concerns one law and an "employee" as concerns another.

In this opinion, we clarify that employee status for purposes of the Minimum Wage Amendment to the Nevada Constitution (MWA) is determined only by the "economic realities" test, but employee status for purposes of statutory waiting time penalties for late-paid wages may be affected by the presumption set forth in NRS 608.0155. We reaffirm that a contractual recitation that a worker is not an employee is not conclusive under either test. Finally, employee status for the purposes of either the MWA or NRS Chapter 608 is *not* affected by the Nevada Transportation Authority's (NTA) approval of a taxi lease under NRS 706.473. Because the district court held that the NTA's approval of appellants' leases foreclosed further inquiry into their employee status, we reverse and remand.

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[1]*Cf.* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001).

BACKGROUND

The respondents are taxicab companies that lease taxicabs to the appellant drivers under agreements approved by the NTA, pursuant to NRS 706.473.[2] Each agreement contains the following language:

> RELATIONSHIP. Neither Party is the partner, joint venture, agent, or representatives of the other Party. LESSEE is an independent contractor. LEASING COMPANY and LESSEE acknowledge and agree that there does not exist between them the relationship of employer and employee, principal and agent, or master and servant, either express or implied, but that the relationship of the parties is strictly that of lessor and lessee, the LESSEE being free from interference or control on the part of LEASING COMPANY.

Each lease agreement requires the driver to operate the taxicab for at least three days per week, unless the driver obtains approval for an alternate schedule. On any day that the driver operates the taxicab, the driver must pay to the leasing company a nominal fee of 5 or 10 dollars, plus one-half of the driver's "total book" (i.e., gross receipts) for the day, plus gas and administrative fees. The lease agreement states that drivers have the option, but are not required, to use the companies' dispatch service to acquire passengers.

The drivers sued in 2015, alleging that their take-home pay was often less than the minimum hourly wage required by the MWA. The MWA only applies to "employees." Nev. Const. art. 15, § 16. The drivers alleged

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[2]NRS 706.473(1) provides in relevant part that "a person who holds a certificate of public convenience and necessity which was issued for the operation of a taxicab business may, upon approval from the Authority, lease a taxicab to an independent contractor who does not hold a certificate of public convenience and necessity."

that, notwithstanding the recital in the lease agreement that they were independent contractors, they were in fact employees under the "economic realities" test we elucidated the previous year in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 336 P.3d 951 (2014). Although *Terry* involved the *statutory* right to a minimum wage, *see id.* at 881, 336 P.3d at 953; *see also* NRS 608.250, the drivers argued that the same test should apply to their MWA claims. In addition, the drivers alleged that they were not paid all the wages they were owed at the time of separation, entitling them to waiting time penalties under NRS 608.040.

The cab companies moved for summary judgment, arguing that the drivers were independent contractors, not employees, for the purposes of the minimum wage laws. The district court initially denied the motion, finding that disputed issues of material fact prevented summary judgment. But it later granted the cab companies' renewed motion. It relied solely on the fact that the drivers held NTA-approved taxicab leases, reasoning that when the NTA approves a lease pursuant to NRS 706.473, it confirms that the parties to the lease have entered a "statutorily created independent contractor relationship." *See Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 592, 262 P.3d 699, 704 (2011). In the district court's view, a worker who is an independent contractor under NRS 706.473 is not an employee for any purpose, and thus the protections afforded to "employees" by the MWA and by NRS Chapter 608 did not apply. The drivers appealed, and this court has consolidated these appeals.

DISCUSSION

The drivers stated two claims: one claim for unpaid minimum wages under the MWA, and one claim for waiting time penalties under NRS 608.040. The drivers are entitled to assert each claim only if they are "employees" under the relevant law. We first consider whether the

statement in the drivers' leases that they are independent contractors is conclusive as to employee status under these laws. Second, we consider whether the NTA's approval of the drivers' leases under NRS 706.473 is conclusive as to employee status under these laws. Finally, having held in *Doe Dancer I v. La Fuente, Inc.*, 137 Nev., Adv. Op. 3, 481 P.3d 860 (2021), that NRS 608.0155 does not govern employment status with respect to constitutional MWA claims, we consider whether that statute applies to NRS Chapter 608 claims that are derivative of an underlying constitutional violation.

Standard of review

"This court reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The proper legal test for employee status under the MWA and NRS Chapter 608 is a question of law, which we also review de novo. *See Doe Dancer*, 137 Nev., Adv. Op. 3, 481 P.3d at 866. When the facts are undisputed, the existence of an employment relationship under a given test is a question of law that can be resolved at summary judgment. *See Terry*, 130 Nev. at 889, 336 P.3d at 958. But where material facts are genuinely disputed, summary judgment should be denied. *See Jaramillo v. Ramos*, 136 Nev. 134, 139, 460 P.3d 460, 465 (2020) (reversing summary judgment where genuine issue of material fact existed).

A contractual disavowal of an employment relationship is not conclusive

We dispose of the cab companies' simplest argument first. They contend that the recitation in the lease agreement that "LESSEE is an independent contractor" is conclusive evidence that the drivers are in fact independent contractors for MWA and NRS Chapter 608 purposes, and thus no application of any other test is necessary. As the district court correctly

recognized, that argument is squarely foreclosed by our caselaw. *Terry*, 130 Nev. at 882, 336 P.3d at 954 ("Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship."); *see also Doe Dancer*, 137 Nev., Adv. Op. 3, 481 P.3d at 865, 868-70 (concluding that dancers were employees under the MWA despite contract specifically disavowing any employment relationship—in all capitals, no less).

We note that employment relationships are by no means unique in their dependence on facts beyond the original contract. *Cf. Shaw v. Delta Airlines, Inc.*, 798 F. Supp. 1453, 1455 (D. Nev. 1992) (noting that whether the parties call their relationship a partnership, or believe it to be so, is "immaterial" in determining whether they are in fact partners). A dispute over whether a worker is an employee covered by remedial legislation cannot be resolved by the contract's statement to the contrary, any more than a dispute over whether a worker was paid can be resolved by the contract's statement that the worker will be paid every Friday. Just as a business may fail to *in fact* pay its workers on time, a business may fail to *in fact* treat its workers as independent contractors. The facts as proven in court control a worker's actual status.[3]

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[3]Our continued refusal to treat a written disavowal of an employment relationship as conclusive, or even particularly persuasive, is supported by the overwhelming weight of authority. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403 (Cal. 1989) ("The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced."). Ultimately, "if it looks like a duck, walks like a duck and

In the face of this authority, the cab companies point only to *Kaldi v. Farmers Insurance Exchange*, 117 Nev. 273, 21 P.3d 16 (2001). There, we relied on a contract provision to find that no employment relationship existed. *Id.* at 278-79, 21 P.3d at 19-20. However, *Kaldi* was not concerned with any "remedial statute" or constitutional provision, *cf. Terry*, 130 Nev. at 882, 336 P.3d at 954, but only with an alleged *contractual* right to be free from termination except for good cause. *See Kaldi*, 117 Nev. at 279 & n.4, 21 P.3d at 20 & n.4 (citing *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 211-12 (1991), which discussed "contractual rights of continued employment" in context of tortious bad-faith discharge). Of course, if a plaintiff seeks to enforce a right given by the contract, then the contract's language will be highly relevant. If the drivers' claims here were similar to those in *Kaldi*, then *Kaldi* might well be controlling. But the claims are dissimilar. The drivers here seek to enforce a right that—if they are employees under the appropriate tests—is guaranteed to them by law, not by the contract. To the extent *Kaldi* might be misread as suggesting that a contractual recitation is dispositive of a worker's status under remedial employment laws, it serves as an example of the risk of confusion caused by using the terms "employee" or "employment relationship" without specifying the legal context.

Thus, we reaffirm that a worker is not necessarily an independent contractor solely because a contract says so. Instead, the court must determine employee status under the applicable legal test, based on

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quacks like a duck, it must be a duck . . . even if it is holding a piece of paper that says it is a chicken." *Wild v. Fregein Constr.*, 68 P.3d 855, 861 (Mont. 2003); *see also Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007).

all the relevant facts. Courts must not allow contractual recitations to be used as "subterfuges" to avoid mandatory legal obligations. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403 (Cal. 1989). Otherwise, our constitutional and statutory protections for workers could (and almost certainly would) be eviscerated by contracts of adhesion disavowing an employment relationship.[4]

NRS 706.473 does not affect the test for employment status under either the MWA or NRS Chapter 608

We now turn to the grounds on which the district court actually granted summary judgment. The drivers' leases were approved by the NTA pursuant to NRS 706.473, which permits a company to lease a taxicab to an independent contractor. We have held that when "all of the statutory and administrative requirements for creating . . . an independent contractor relationship [under NRS 706.473] have been satisfied," then a "statutorily created independent contractor relationship" exists as a matter of law. *See Yellow Cab*, 127 Nev. at 592, 262 P.3d at 704. The district court reasoned that because the NTA approved the drivers' leases and all other administrative requirements were satisfied, the relationship between the drivers and the companies is a "statutorily created independent contractor relationship."

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[4]In their supplemental briefing, respondents urged for the first time that treating these plaintiffs as employees would impair the obligation of contracts, in violation of U.S. Constitution Article I, Section 10, and Nevada Constitution article 1, section 15. This belated argument is not properly before us, and so we decline to address it in detail, but we do note that a federal court recently rejected a similar challenge to California's employee misclassification statute. *Crossley v. California*, 479 F. Supp. 3d 901, 919-20 (S.D. Cal. 2020).

Next, the district court reasoned that because the drivers were independent contractors under NRS Chapter 706, they were not entitled to the protections of either the MWA or NRS Chapter 608. The district court erred at this step. Its analysis assumed that an independent contractor under NRS Chapter 706 is necessarily an independent contractor *for all purposes*. That assumption was unfounded. The phrase "independent contractor" does not have a single, universal meaning that is the same in all contexts and for all purposes. Rather, because different statutes have different scopes, it is not at all unusual for a worker to be classified as an independent contractor for some purposes and as an employee for others. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 29 (Cal. 2018) ("[W]hen different statutory schemes have been enacted for different purposes, it is possible . . . that a worker may properly be considered an employee with reference to one statute but not another."); *cf. Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning that "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against"). For example, workers who would otherwise be considered "independent contractors may be deemed 'employees'" for the limited purposes of the Nevada Industrial Insurance Act. *Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev.*, 117 Nev. 678, 682, 31 P.3d 367, 369 (2001); *see* NRS 616A.210(1). Naturally, their status as employees for those limited purposes does not spill over and make them employees for other purposes. *See* NRS 616A.210(3); *see also, e.g., Alberty-Vélez v. Corporación de P.R. para la Difusión Pública*, 361 F.3d 1, 10 (1st Cir. 2004) (holding that a worker's status for purposes of Puerto Rican

unemployment insurance law was irrelevant to the same worker's status for purposes of federal antidiscrimination law).

We recognized in *Yellow Cab* itself that NRS Chapter 706's "statutorily created independent contractor relationship" did not necessarily have all of the same consequences as a "traditional independent contractor relationship[ ]." 127 Nev. at 592 & n.6, 262 P.3d at 704 & n.6. There, we explained that even though it is settled law that a *traditional* independent contractor relationship forecloses finding the principal liable in respondeat superior for the contractor's torts, the effect of the *statutory* relationship on such liability was a completely different question.[5] *Id.* Likewise, even if the existence of a traditional independent contractor relationship would take the worker outside the protection of the MWA and NRS Chapter 608, the existence of the statutory relationship might not. The district court's reliance on *Yellow Cab* was therefore misplaced. We must determine in the first instance whether NRS Chapter 706's "statutorily created independent contractor relationship" precludes coverage under either the MWA or NRS Chapter 608.

NRS 706.473 cannot override the constitutional minimum wage guarantee

NRS 706.473 plainly cannot preclude coverage under the MWA. We held in *Doe Dancer* that Nevada's Constitution guarantees a minimum wage to workers who satisfy the economic realities test. *See* 137 Nev., Adv. Op. 3, 481 P.3d at 867. Under the economic realities test, the court "examines the totality of the circumstances and determines whether, as a

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[5]Because the district court in *Yellow Cab* had not addressed the effect of the statutory relationship on respondeat superior liability, we declined to answer this question in the first instance. 127 Nev. at 592-93, 262 P.3d at 704-05.

matter of economic reality, workers depend upon the business to which they render service for the opportunity to work." *Terry*, 130 Nev. at 886, 336 P.3d at 956 (emphasis omitted). Under this test, an independent contractor is one who, "as a matter of economic fact, [is] in business for himself." *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994). The inquiry is "not limited by any contractual terminology or by traditional common law concepts." *Id.* Rather, the economic realities test is "wide-reaching," *Terry*, 130 Nev. at 886, 336 P.3d at 956, in order to effectuate the "remedial purpose underlying the legislation." *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993); *cf. Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552-53 (2d Cir. 1914) (Hand, J.) ("[W]here all the conditions of the relation require protection, protection ought to be given."). There are six main factors courts should consider, though these factors are not exhaustive. *Terry*, 130 Nev. at 888-89, 336 P.3d at 958.

When a person is entitled to a right under the constitution, we do not look to a statute to second-guess that entitlement, because "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014); *see Doe Dancer*, 137 Nev., Adv. Op. 3, 481 P.3d at 872-73. Thus, if as a matter of economic reality a worker is dependent on the business to which she or he renders service, and is not in business for herself or himself, and is not subject to the MWA's express exceptions, then the worker is constitutionally entitled to be paid a minimum hourly wage for that service. This is true no matter the worker's status under NRS 706.473 or any other statute. To dispel any lingering uncertainty, we clarify that

only the economic realities test determines whether a worker is an employee for the purposes of the MWA.

The NTA's sweeping definition of "independent contractor" does not apply to NRS Chapter 608 waiting time penalty claims

We now turn to the next question: does the NTA's approval of a driver's lease preclude the driver from employee status under NRS Chapter 608? The answer is somewhat less plain, because while the Legislature cannot take away a constitutional entitlement, the Legislature can presumably limit the scope of statutory entitlements. Here, it has chosen to exclude "[t]he relationship between a principal and an independent contractor" from the statutory protections of NRS Chapter 608. NRS 608.255. But as we recognized in *Yellow Cab*, "independent contractor" may have different meanings depending on context. 127 Nev. at 592, 262 P.3d at 704; *cf. Dynamex*, 416 P.3d at 29. The issue is therefore whether a driver whose lease is approved by the NTA, after satisfying all relevant requirements, is necessarily an independent contractor *for purposes of NRS Chapter 608* and NRS 608.255 in particular.

We conclude that the answer, again, is no. NRS 706.473 permits a taxicab company to lease cars to independent contractors. But the NTA's own regulations define an "independent contractor," for the purposes of NRS Chapter 706, as "a person who leases a taxicab from a certificate holder pursuant to NRS 706.473." NAC 706.069; *see also* NAC 706.450(5). That circular definition is strikingly different from any definition familiar to employment law. The NTA's regulations set forth certain requirements for the lease, none of which appear to distinguish independent contractors from employees in a meaningful way. *See, e.g.*, NAC 706.5551, .5557. The NTA "shall approve" a lease agreement that meets those requirements. NAC 706.5555(2).

Thus, according to the plain language of NAC 706.069, *no* lease can ever be disapproved on the grounds that the lessee is in fact an employee rather than an independent contractor, because any lessee is necessarily an independent contractor for purposes of NRS Chapter 706. That is powerful evidence that the "statutorily created independent contractor relationship" referred to in *Yellow Cab* is of a fundamentally different type than the independent contractor relationships relevant to the MWA or NRS Chapter 608. And this makes sense: the NTA is concerned with the regulation of motor vehicles, not with the financial protection of workers.[6]

Therefore, consistent with the principle that a worker's status as an employee or independent contractor depends on the legal context, *cf. Hays Home Delivery*, 117 Nev. at 682, 31 P.3d at 369, we hold that the "statutorily created independent contractor relationship" recognized in *Yellow Cab* is distinct from independent contractor status for MWA or NRS Chapter 608 purposes. For the purposes of NRS Chapter 706, "independent contractor" means nothing more or less than a person who leases a taxicab

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[6]Respondents urge that the NTA is tasked with ensuring drivers receive "reasonable compensation," citing NRS 706.151(1)(b). This seriously misrepresents that statute, which is a legislative declaration that *the State* should be compensated, through license fees, by private parties who use publicly maintained highways for profit. Respondents also appear to argue that the Legislature's choice to regulate certain aspects of an industry shows an intent to exclude that industry's workers from employment laws, citing *Nevada Employment Security Department v. Capri Resorts, Inc.*, 104 Nev. 527, 528, 763 P.2d 50, 52 (1988). But in *Capri Resorts*, a statute expressly excluded "licensed real estate salesperson[s]" from the protections of the Unemployment Compensation Law. NRS 612.133. The issue was whether timeshare salespersons were "licensed real estate salespersons" within that statute. A comparable statement about cab drivers is conspicuously absent from NRS Chapter 608.

from a certificate holder under an approved lease. NAC 706.069. When a cab company and a driver enter into that relationship, they submit to the jurisdiction of the NTA and acknowledge that they are subject to the regulations that govern independent contractors who lease taxicabs. But to determine whether such a person is an independent contractor for MWA or NRS Chapter 608 purposes, the court must separately engage with the facts under the appropriate test. The district court therefore erred in granting summary judgment on the ground that the NTA's approval of the drivers' leases rendered them independent contractors, and not employees, for all purposes.

NRS 608.0155 may affect a worker's entitlement to waiting time penalties

Because we have concluded that NRS 706.473 does not distinguish this case from *Doe Dancer*, the MWA claims are clearly governed by the economic realities test. 137 Nev., Adv. Op. 3, 481 P.3d at 867. But what about the waiting time penalties claim? Following our decision in *Terry*, the Legislature sought to clarify the scope of NRS Chapter 608 by setting forth a more structured test for independent contractor status under that chapter. NRS 608.0155; *see* 2015 Nev. Stat., ch. 325, § 1, at 1742-44. This test does not entirely supplant the economic realities test we announced in *Terry*: the defendant's failure to establish independent contractor status under NRS 608.0155 does not automatically mean the plaintiff is an employee, *see* NRS 608.0155(3), and thus a plaintiff must still *at least* satisfy the economic realities test in order to prevail. But, if NRS 608.0155 applies, then the plaintiff now must *also* defeat an attempt by the defendant to establish independent contractor status under the statutory test. Even if it is likely that many workers' employment status will be the same under both tests, there are sure to be cases at the margins where NRS 608.0155 excludes workers who are employees under the economic realities

test. Thus, we must decide whether NRS 608.0155 applies to the waiting time penalties claim.

In *Doe Dancer*, we held that "the definition of independent contractor in NRS 608.0155 (or Section 1 of S.B. 224) applies only to NRS Chapter 608 claims." 137 Nev., Adv. Op. 3, 481 P.3d at 871. While NRS 608.0155 does not apply to MWA claims, it must apply at least "to the statutory chapter in which it sits" if it is to apply to anything at all. *See id.* Waiting time penalties are an NRS Chapter 608 claim, and thus NRS 608.0155 would seem to apply, prima facie. Nevertheless, the drivers contend that they are entitled to seek waiting time penalties under subsection (B) of the MWA, which states that an aggrieved employee "shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section." Nev. Const. art. 15, § 16(B). In the drivers' view, waiting time penalties under NRS 608.040 can be used to remedy a violation of the MWA; thus, if they are employees for constitutional purposes, they may seek statutory waiting time penalties regardless of their status under NRS 608.0155.

We disagree. The plaintiffs each pleaded two separate claims for relief. First, as relief for their MWA claim, the plaintiffs sought "a judgment against the defendant for minimum wages owed . . . , a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs . . . ." Separately, as relief for their NRS 608.040 claim, they sought "a judgment against the defendant for the wages owed to [the plaintiffs] as prescribed by [NRS] 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees." The separateness of the claims for relief is clear. The

MWA's "all remedies available" provision allows an aggrieved employee to pursue appropriate remedies under the cause of action the MWA itself provides. Under that cause of action, the plaintiffs are in fact seeking back pay, injunctive relief, punitive damages, and attorney fees and costs.[7] But nothing in the MWA appears to enlarge the availability of a separate, statutory cause of action. A claim for waiting time penalties under NRS 608.040 requires the plaintiff to prove certain elements, and we do not read the MWA as abrogating those requirements. The worker must have resigned, quit, or been discharged; the employer must have failed to pay the wages when due, if the worker resigned or quit, or within 3 days of when due, if the worker was discharged; and the worker must be an "employee" within the meaning of NRS Chapter 608. Just as the MWA clearly does not make statutory waiting time penalties available to a worker who has not separated from employment, or to a worker who was promptly paid upon separation, we do not read it as making such penalties available to a worker who does not satisfy the statutory definition of "employee."

In sum, a defendant can show that a plaintiff is an independent contractor not subject to NRS Chapter 608 by showing either (1) that the plaintiff is an independent contractor under the economic realities test, *or* (2) that the plaintiff is an independent contractor under NRS 608.0155. If a plaintiff asserts only statutory claims, then a showing of independent contractor status under either test will justify summary judgment for the defendant. In contrast, when a plaintiff alleges *both* an MWA claim and an

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[7]In this section, we hold that a plaintiff who pleads and pursues a claim under NRS 608.040 must be an employee within the statutory definition. We have no occasion here to consider the precise scope of remedies available under the MWA itself.

NRS Chapter 608 claim, as here, the court will necessarily analyze the economic realities test at some point. Neither a contractual statement that the worker is an independent contractor, nor the NTA's approval of a taxicab lease, is conclusive under either test.

Remand is necessary to resolve disputed factual issues

Because both the economic realities test and the NRS 608.0155 test may be fact-intensive, it may not always be possible to resolve those questions at summary judgment. To be sure, the existence of an employment relationship is a question of law when no material facts are disputed, and we have in the past determined workers' status on appeal despite the district court's failure to apply the correct test. *See Doe Dancer*, 137 Nev., Adv. Op. 3, 481 P.3d at 868-70; *Terry*, 130 Nev. at 889-92, 336 P.3d at 958-60. Here, however, the district court expressly found that certain material facts were disputed. Among these were the extent of the drivers' control over their own work schedules; the extent of their control over which fares to pick up; whether they were in fact free to hire substitute drivers; and whether they were in fact free to work elsewhere. We agree that these facts are potentially material to the drivers' status under the MWA and NRS Chapter 608. Thus, we cannot decide as a matter of law whether the drivers are employees under either law. We therefore reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

CONCLUSION

A taxi driver is covered by the Minimum Wage Amendment if he or she satisfies the economic realities test. But that same taxi driver is *not* covered by NRS Chapter 608 if he or she is an independent contractor under NRS 608.0155. Both these inquiries can be fact-intensive, and in this case they cannot be resolved on the existing record. Finally, the NTA's

approval of a driver's lease pursuant to NRS 706.473 does not render the driver an independent contractor for purposes beyond NRS Chapter 706. Because the district court erroneously granted summary judgment on the basis of the NTA's approval of the drivers' leases, we reverse and remand for further proceedings consistent with this opinion.

Stiglich, J.

Stiglich

We concur:

Hardesty, C. J.

Hardesty

Parraguirre, J.

Parraguirre

Cadish, J.

Cadish

Silver, J.

Silver

Herndon, J.

Herndon

PICKERING, J., concurring:

I concur with much of the majority's analysis—as we have repeatedly and consistently held, the contractual disavowal of an employment relationship does not control whether a working relationship is that of an employer and employee within the meaning of the Minimum Wage Amendment (MWA) to the Nevada Constitution; instead, resolution of the question turns on the fact-intensive application of the economic realities test, which the majority correctly reiterates is the only applicable test for employment under the MWA. And I likewise agree that the Nevada Transportation Authority's approval of a driver's lease does not, in and of itself, demonstrate that the driver is an independent contractor for the purposes of Nevada's minimum wage laws. I write separately to make plain that, with regard to the majority's holding that "NRS 608.0155 may affect a worker's entitlement to waiting time penalties," I join on the understanding that this outcome results from the way the drivers pleaded their waiting time penalty claims in this particular case—as a distinct claim for relief, based in statute, NRS 608.040, separate and apart from their MWA claims.

Subsection (B) of the MWA inarguably endows a district court with broad remedial powers to rectify an MWA violation—"An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and *shall be entitled to all remedies available under the law or in equity* appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief." Nev. Const. art. 15, § 16(B) (emphasis added). A remedy is "anything a court can do for a litigant who has been wronged or is about to be wronged." *Remedy*, *Black's*

Law Dictionary (11th ed. 2019) (quoting Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010)). And, at the time the MWA was proposed and ratified, waiting time penalties had long been statutorily available, as needed, to make an improperly compensated employee whole. *See Doolittle v. Eighth Judicial Dist. Court*, 54 Nev. 319, 322, 15 P.2d 684, 685 (1932) (awarding waiting time penalties under Comp. Laws 1925, § 2785, the predecessor to NRS 608.040, and noting the general principle that "[w]hen a person employs another, if he is honest, he expects to pay for the service, and should be ready to do so upon the completion of the work"). They were therefore also constitutionally incorporated, where appropriate to rectify an MWA violation, according to the plain meaning of the MWA's provision for "all remedies available." *See Strickland v. Waymire*, 126 Nev. 230, 234-35, 235 P.3d 605, 608-09 (2010) (holding that "[t]he goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification'" and that a later-enacted statute "cannot furnish a construction that the Constitution does not warrant") (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)). And it follows that the Legislature's subsequent enactment of NRS 608.0155 could not extinguish the constitutional remedy as it then existed. *Doe Dancer I v. La Fuente, Inc.*, 137 Nev., Adv. Op. 3, 481 P.3d 860, 874 (2021) (Stiglich, J., concurring) (concluding that by enacting NRS 608.0155 "the Legislature intended to limit the scope of the MWA, [but] that it lacked the power to do so"); *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014) (stating that "the Constitution [is] superior paramount law, unchangeable by ordinary means") (internal quotation marks omitted).

Simply put, I join based on the understanding that the majority opinion does not foreclose the availability of waiting time penalties, among myriad other remedies, under the MWA's subsection (B) "all remedies" clause, where they are "available," "appropriate," and sought as part of the constitutional violation itself.

Pickering, J.

Pickering

A Wage & Hour Annual Report

DOL Developments in 2021 and Looking Forward to 2022

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ComplianceHR

Michael Worth
Vice President of Sales
ComplianceHR
worth@compliancehr.com

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Track Results

COVID-19 Resource Center

COVID-19 Resource Center

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View Resource Documents

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Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

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▶ IC Agreement

Navigator OT

Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

+ Create New Review
View Reviews
View Evaluations

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View Forms
▶ Use PSL Rapid Reference
▶ Use Rapid Reference

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Tammy McCutchen

Strategic Adviser,
ComplianceHR
tammy@compliancehr.com

- Former Administrator, US-DOL, Wage & Hour Division
- A leading authority of federal and state wage and hours law
- Primary architect of DOL's overtime exemptions regulations & ComplianceHR's Navigator IC and Navigator OT applications

Agenda

- WHD Leadership
- Joint Employment
- Independent Contracting
- Overtime
- Enforcement
- Wage & Hour ABCs

WHD Leadership

Acting Administrator Jessica Looman

- Executive Director, Minnesota State Building and Construction Trades Council
- Commissioner, Minnesota Dept. of Commerce
- Deputy Commissioner, Minnesota Dept. of Labor & Industry
- General Counsel, Laborers District Council of Minnesota and North Dakota

WHD Leadership

Administrator Nominee David Weil

- Served as Administrator from 2014 to 2017
- Initially nominated by President Biden in June 2021, but confirmation deadlocked in the Senate HELP committee
- Renominated on Jan. 4
- Voted out of committee, 11-10, on Jan. 13 – Senator Rand (R – KY) was absent
- Fate before full Senate unsure

Weil in West Virginia

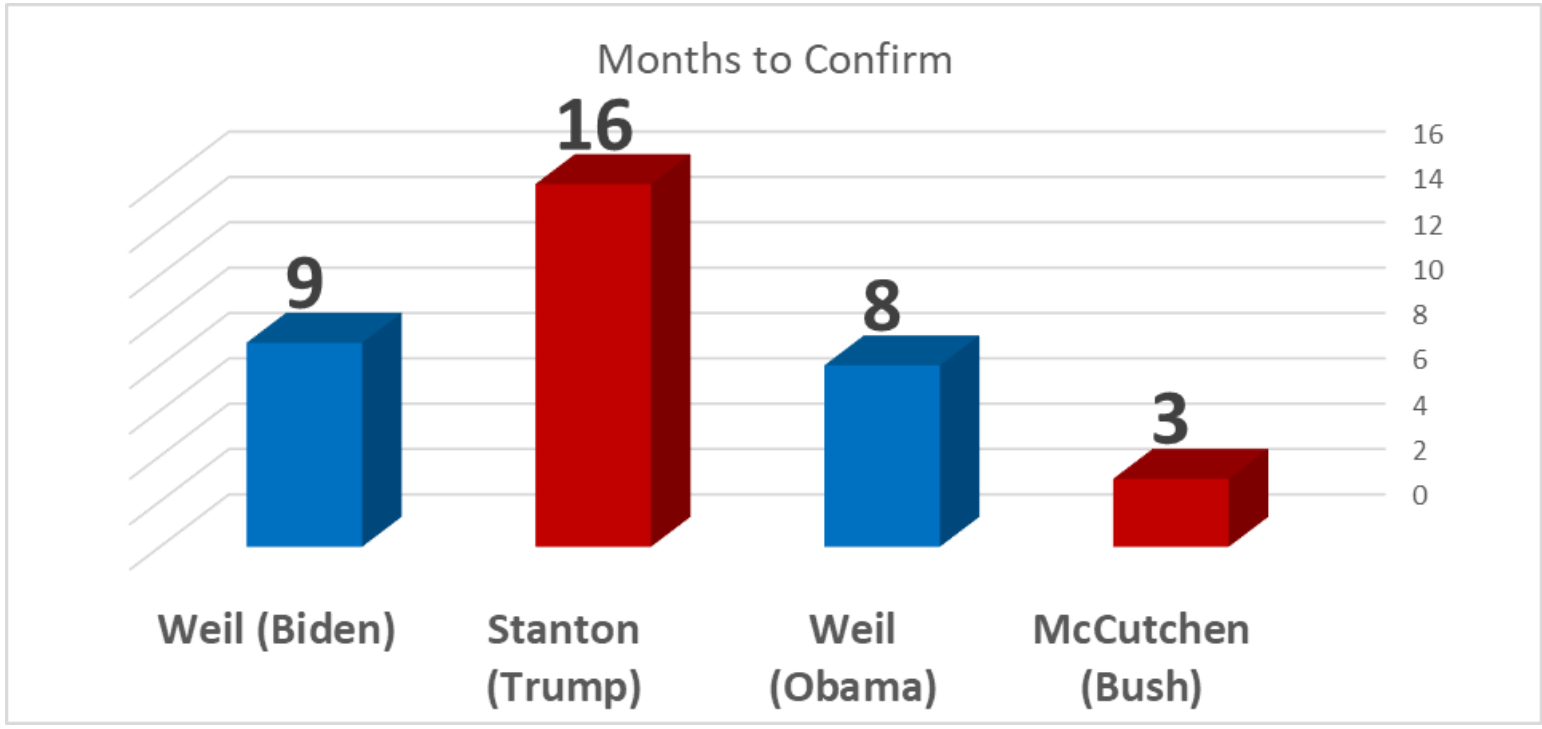
News Release

US LABOR DEPARTMENT HELPS MORE THAN 5,300 PENNSYLVANIA AND WEST VIRGINIA OIL AND GAS WORKERS RECOVER $4.5M IN BACK WAGES FOR UNPAID OVERTIME

Multi-year initiative finds widespread and significant violations

"The oil and gas industry is one of the most fissured industries. Job sites that used to be run by a single company can now have dozens of smaller contractors performing work, which can create downward economic pressure on lower level subcontractors," said Dr. David Weil, administrator of the Wage and Hour Division. "Given the fissured landscape, this is an industry ripe for noncompliance."

How Long Does It Take To Confirm an Administrator?



Regulations

Compliance HR

Joint Employment

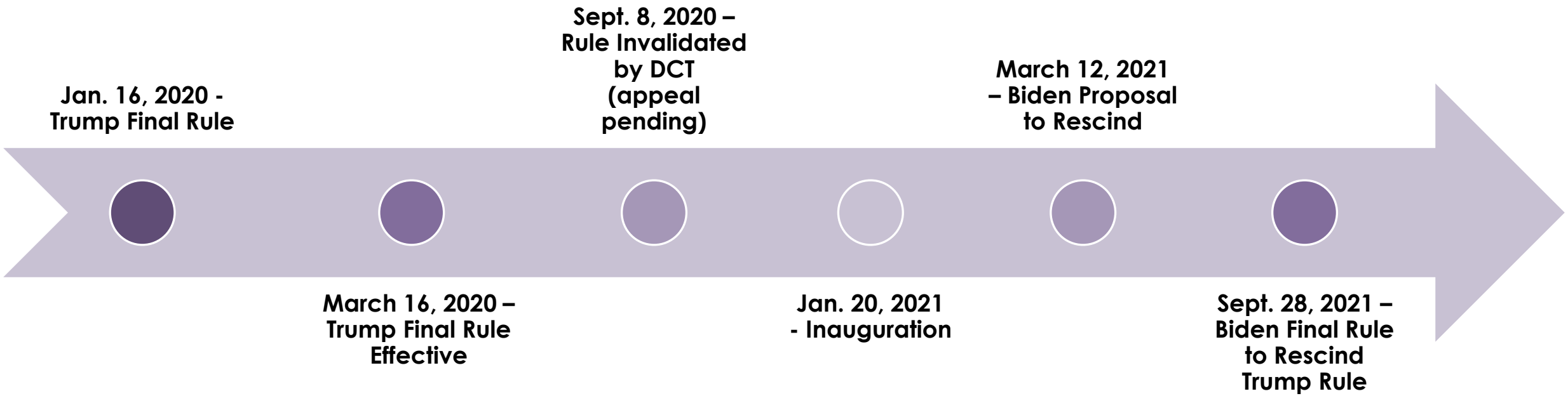
Trump Regulation:

Four-factor balancing test, no single factor is dispositive

Does the alleged employer:

1. Hire or fire the employee;
2. Supervise and control the employee's work schedule or conditions of employment to a substantial degree;
3. Determine the employee's rate and method of payment; and
4. Maintain the employee's employment records.

Death of the Joint Employer Regulation



What's Next for Joint Employment?

Administrator's Interpretation FLSA2016-1 (Jan. 20, 2016)

https://www.hallrender.com/wp-content/uploads/2016/01/DOL_Joint_Employment_1_20_16.pdf

Administrator's Interpretation No. 2016-1: Joint Employment Under the FLSA and MSPA - U.S. Department of Labor Ã¢â‚¬â€ Wage and Hour Division (WHD)

UNITED STATES DEPARTMENT OF LABOR

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Wage and Hour Division SHARE Was this page helpful?

DOL Home > WHD > FLSA > Joint Employment AI > Administrator's Interpretation No. 2016-1

U.S. Department of Labor
Wage and Hour Division
Washington, D.C. 20210

Administrator's Interpretation No. 2016-1 (PDF)

January 20, 2016

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.

Through its enforcement efforts, the Department of Labor's Wage and Hour Division (WHD) regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. As a result, the traditional employment relationship of one employer employing one employee is less prevalent.[1] WHD encounters these employment scenarios in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

The growing variety and number of business models and labor arrangements have made joint employment more common.[2] In view of these evolving employment scenarios, the Administrator believes that additional guidance will be helpful concerning joint employment under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.*, and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801, *et seq.*[3]

Whether an employee has more than one employer is important in determining employees' rights and employers' obligations under the FLSA and MSPA. It is a longstanding principle under both statutes that an employee can have two or more employers for the work that he or she is performing. When two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA.[4] Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.

Certainly, not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment. This Administrator's Interpretation (AI) provides guidance on identifying those scenarios in which two or more employers jointly employ an employee and are thus jointly liable for compliance under the FLSA or MSPA.[5] This AI first discusses the broad scope of the employment relationship under the FLSA and MSPA. It then discusses the concepts of horizontal and vertical joint employment and relevant joint employment regulations.

Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. This AI explains that guidance provided in the FLSA joint employment regulation – which focuses on the relationship between potential joint employers – is useful when analyzing potential horizontal joint employment cases.

Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. This AI explains that guidance provided in the MSPA joint employment regulation is useful when analyzing potential vertical joint employment. The structure and nature of the relationship(s) at issue in the

Independent Contracting

Trump Regulation:

Adopting an "economic reality" test with two core factors

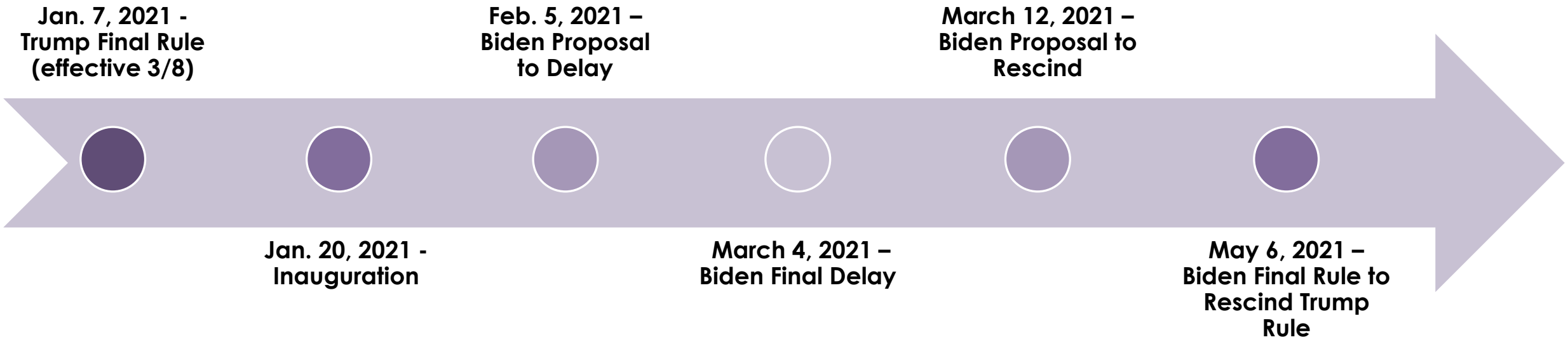
Economic Reality Test

- An individual is an employee "if as a matter of economic reality, the individual is economically dependent on that employer for work"

Two Core Factors:

- The nature and degree of control over the work
- The worker's opportunity for profit or loss

Death of the Independent Contractor Regulation

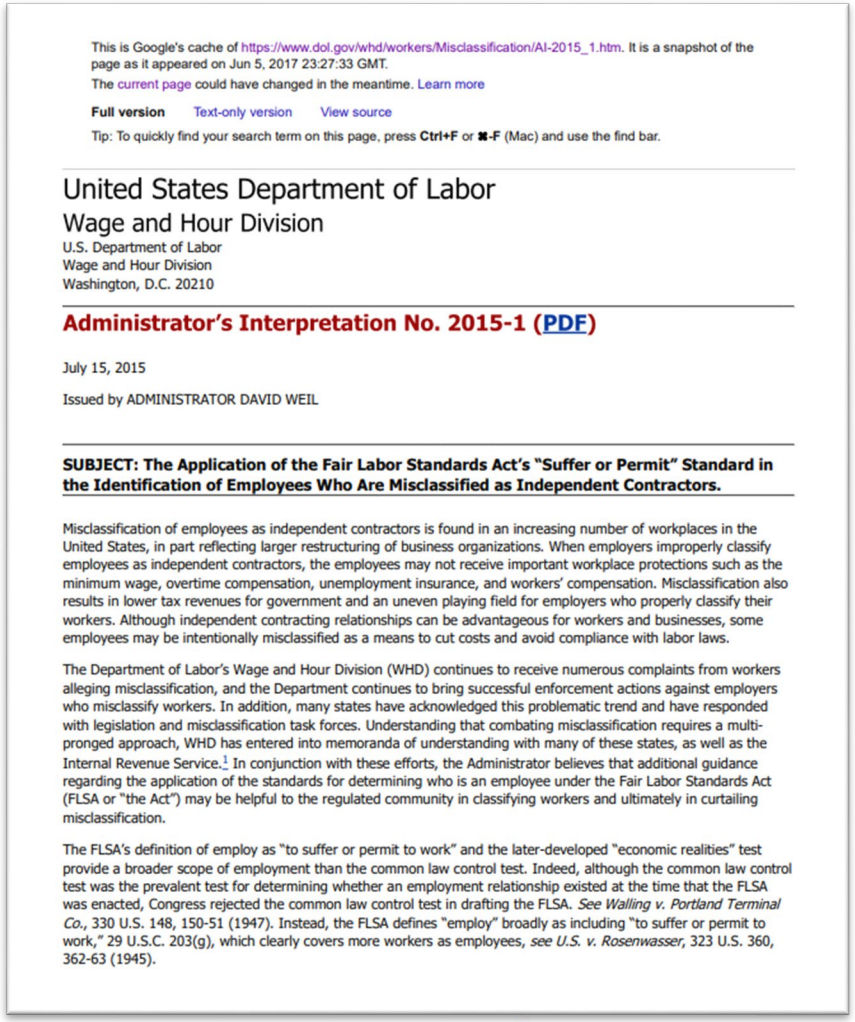


What's Next for Independent Contracting?

Administrator's Interpretation 2015-1 (July 15, 2015)

"In sum, most workers are employees under the FLSA's broad definitions."

https://www.blr.com/html_email/ai2015-1.pdf



This is Google's cache of https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm. It is a snapshot of the page as it appeared on Jun 5, 2017 23:27:33 GMT.
The current page could have changed in the meantime. Learn more

Full version Text-only version View source

Tip: To quickly find your search term on this page, press **Ctrl+F** or **⌘-F** (Mac) and use the find bar.

United States Department of Labor
Wage and Hour Division
U.S. Department of Labor
Wage and Hour Division
Washington, D.C. 20210

Administrator's Interpretation No. 2015-1 (PDF)

July 15, 2015

Issued by ADMINISTRATOR DAVID WEIL

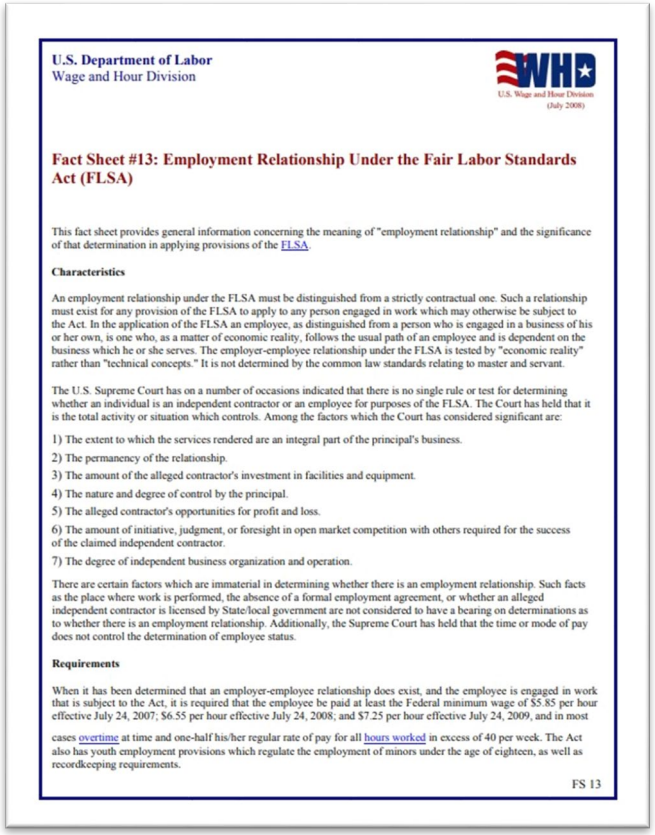
SUBJECT: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.

Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations. When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.

The Department of Labor's Wage and Hour Division (WHD) continues to receive numerous complaints from workers alleging misclassification, and the Department continues to bring successful enforcement actions against employers who misclassify workers. In addition, many states have acknowledged this problematic trend and have responded with legislation and misclassification task forces. Understanding that combating misclassification requires a multi-pronged approach, WHD has entered into memoranda of understanding with many of these states, as well as the Internal Revenue Service.[1] In conjunction with these efforts, the Administrator believes that additional guidance regarding the application of the standards for determining who is an employee under the Fair Labor Standards Act (FLSA or "the Act") may be helpful to the regulated community in classifying workers and ultimately in curtailing misclassification.

The FLSA's definition of employ as "to suffer or permit to work" and the later-developed "economic realities" test provide a broader scope of employment than the common law control test. Indeed, although the common law control test was the prevalent test for determining whether an employment relationship existed at the time that the FLSA was enacted, Congress rejected the common law control test in drafting the FLSA. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947). Instead, the FLSA defines "employ" broadly as including "to suffer or permit to work," 29 U.S.C. 203(g), which clearly covers more workers as employees, *see U.S. v. Rosenwasser*, 323 U.S. 360, 362-63 (1945).

Other IC Developments: Fact Sheet #13



U.S. Department of Labor
Wage and Hour Division

WHD
U.S. Wage and Hour Division
(July 2008)

Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the FLSA.

Characteristics

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.
2) The permanency of the relationship.
3) The amount of the alleged contractor's investment in facilities and equipment.
4) The nature and degree of control by the principal.
5) The alleged contractor's opportunities for profit and loss.
6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7) The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Requirements

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the Act, it is required that the employee be paid at least the Federal minimum wage of $5.85 per hour effective July 24, 2007; $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The Act also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

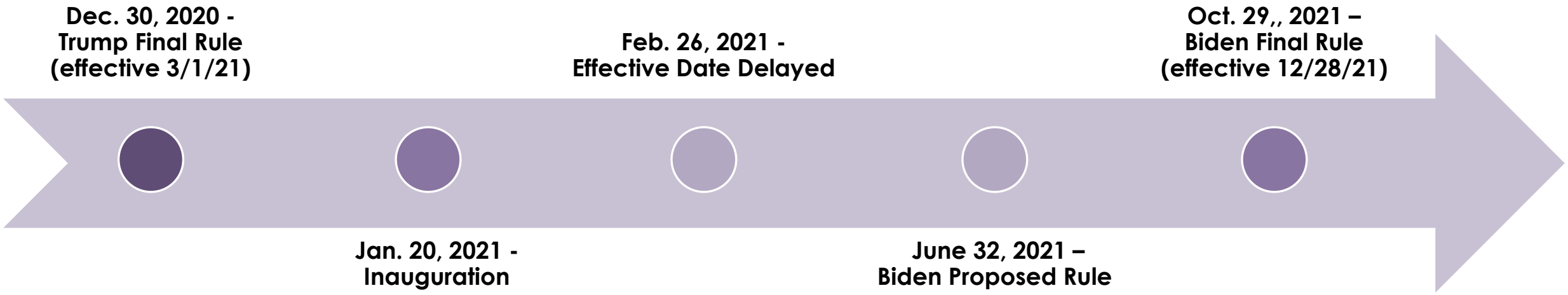
FS 13

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Other IC Developments: The New Website

dol.gov/agencies/whd/flsa/misclassification

Tip Credit Regulations



Limits on Non-Tipped Work

- Employers can only take a tip credit when employees engaged in tip-producing work or tasks that directly support such work
- Tip-supporting work limited to 20% of hours worked in a workweek and no more than 30 continuous minutes
- Tip-supporting work is “work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work”

- Refilling salt and pepper shakers and ketchup bottles
- Rolling silverware
- Folding napkins
- Sweeping or vacuuming under tables in the dining area
- Busing, wiping down and setting tables

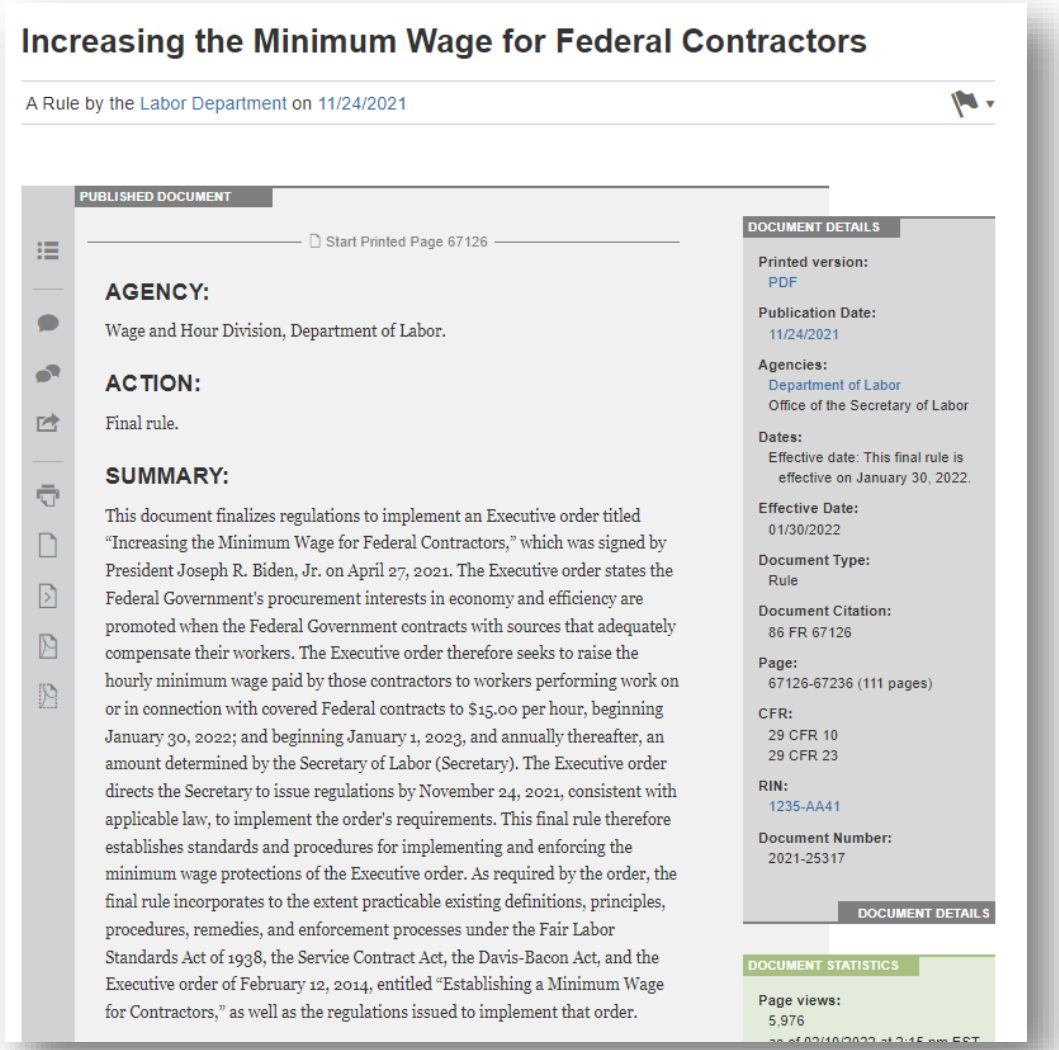
Civil Money Penalties

- Final rule published Sept. 24, 2021, and effective Nov. 23, 2021
- Civil money penalties available against employers, managers or supervisors who take tips earned by their employers
- Violations need not be repeat or willful

Willfulness defined

- The employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA
  - Advice from WHD that conduct was not lawful
  - Failure to adequately inquire into whether the conduct was in compliance with the FLSA

Government Contracting



Increasing the Minimum Wage for Federal Contractors

A Rule by the Labor Department on 11/24/2021

PUBLISHED DOCUMENT

Start Printed Page 67126

AGENCY:

Wage and Hour Division, Department of Labor.

ACTION:

Final rule.

SUMMARY:

This document finalizes regulations to implement an Executive order titled "Increasing the Minimum Wage for Federal Contractors," which was signed by President Joseph R. Biden, Jr. on April 27, 2021. The Executive order states the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The Executive order therefore seeks to raise the hourly minimum wage paid by those contractors to workers performing work on or in connection with covered Federal contracts to $15.00 per hour, beginning January 30, 2022; and beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The Executive order directs the Secretary to issue regulations by November 24, 2021, consistent with applicable law, to implement the order's requirements. This final rule therefore establishes standards and procedures for implementing and enforcing the minimum wage protections of the Executive order. As required by the order, the final rule incorporates to the extent practicable existing definitions, principles, procedures, remedies, and enforcement processes under the Fair Labor Standards Act of 1938, the Service Contract Act, the Davis-Bacon Act, and the Executive order of February 12, 2014, entitled "Establishing a Minimum Wage for Contractors," as well as the regulations issued to implement that order.

DOCUMENT DETAILS

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PDF

Publication Date:
11/24/2021

Agencies:
Department of Labor
Office of the Secretary of Labor

Dates:
Effective date: This final rule is effective on January 30, 2022.

Effective Date:
01/30/2022

Document Type:
Rule

Document Citation:
86 FR 67126

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67126-67236 (111 pages)

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29 CFR 10
29 CFR 23

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1235-AA41

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2021-25317

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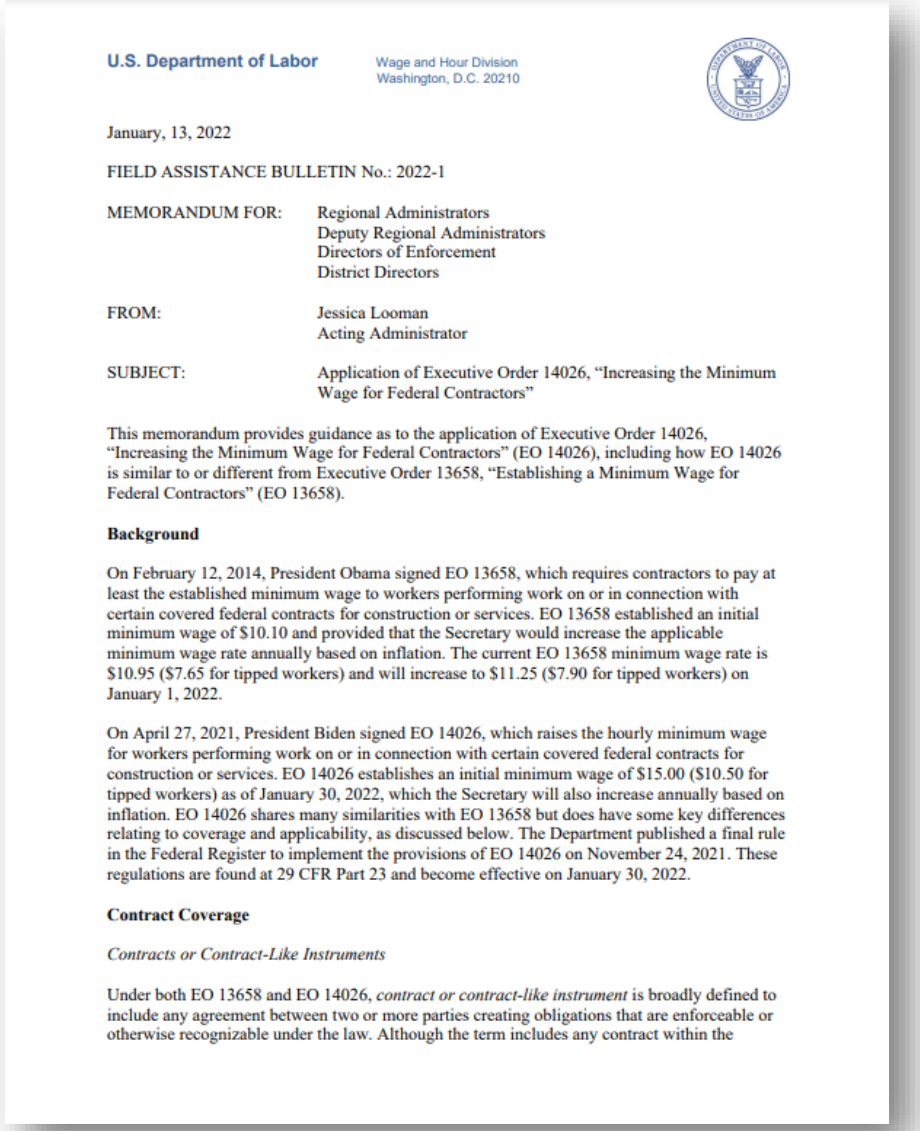


U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

January, 13, 2022

FIELD ASSISTANCE BULLETIN No.: 2022-1

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Jessica Looman
Acting Administrator

SUBJECT: Application of Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors"

This memorandum provides guidance as to the application of Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors" (EO 14026), including how EO 14026 is similar to or different from Executive Order 13658, "Establishing a Minimum Wage for Federal Contractors" (EO 13658).

Background

On February 12, 2014, President Obama signed EO 13658, which requires contractors to pay at least the established minimum wage to workers performing work on or in connection with certain covered federal contracts for construction or services. EO 13658 established an initial minimum wage of $10.10 and provided that the Secretary would increase the applicable minimum wage rate annually based on inflation. The current EO 13658 minimum wage rate is $10.95 ($7.65 for tipped workers) and will increase to $11.25 ($7.90 for tipped workers) on January 1, 2022.

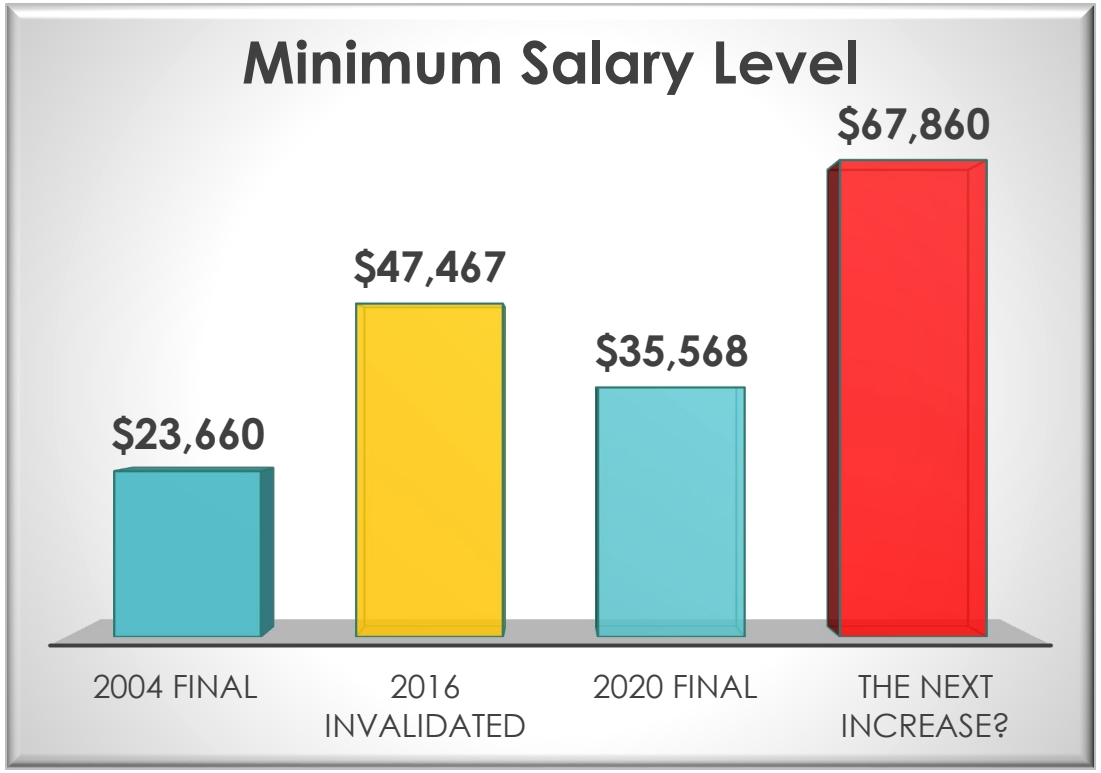
On April 27, 2021, President Biden signed EO 14026, which raises the hourly minimum wage for workers performing work on or in connection with certain covered federal contracts for construction or services. EO 14026 establishes an initial minimum wage of $15.00 ($10.50 for tipped workers) as of January 30, 2022, which the Secretary will also increase annually based on inflation. EO 14026 shares many similarities with EO 13658 but does have some key differences relating to coverage and applicability, as discussed below. The Department published a final rule in the Federal Register to implement the provisions of EO 14026 on November 24, 2021. These regulations are found at 29 CFR Part 23 and become effective on January 30, 2022.

Contract Coverage

Contracts or Contract-Like Instruments

Under both EO 13658 and EO 14026, *contract or contract-like instrument* is broadly defined to include any agreement between two or more parties creating obligations that are enforceable or otherwise recognizable under the law. Although the term includes any contract within the

Overtime



Projected Minimum Salary Under the Obama Standard	
2021	$51,053
2022	$51,053
2023	$55,055
2024	$55,055

Quick Survey

What wage-hour compliance issue is most likely to keep you up at night?

A. Joint Employment
B. Independent Contracting
C. Tipped Employees
D. Civil Money Penalties
E. Government Contracting/Davis-Bacon
F. Overtime

Informal Guidance

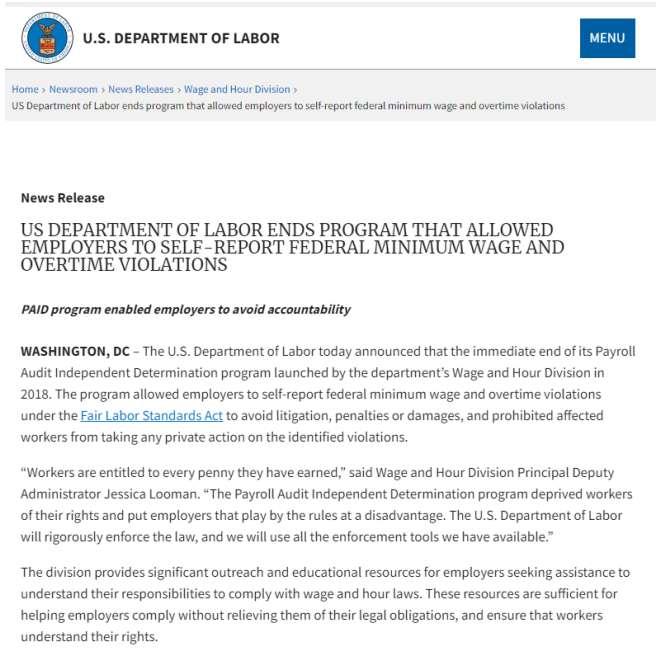
Compliance HR

2021 Policy Changes & Informal Guidance

Opinion Letters - Gone

- Three opinion letters issued in the last week of the Trump administration withdrawn
- No formal statement that DOL will no longer issue opinions letters, but no new opinion letters issued

The PAID Program - Gone



U.S. DEPARTMENT OF LABOR

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US Department of Labor ends program that allowed employers to self-report federal minimum wage and overtime violations

News Release

US DEPARTMENT OF LABOR ENDS PROGRAM THAT ALLOWED EMPLOYERS TO SELF-REPORT FEDERAL MINIMUM WAGE AND OVERTIME VIOLATIONS

PAID program enabled employers to avoid accountability

WASHINGTON, DC – The U.S. Department of Labor today announced that the immediate end of its Payroll Audit Independent Determination program launched by the department's Wage and Hour Division in 2018. The program allowed employers to self-report federal minimum wage and overtime violations under the Fair Labor Standards Act to avoid litigation, penalties or damages, and prohibited affected workers from taking any private action on the identified violations.

"Workers are entitled to every penny they have earned," said Wage and Hour Division Principal Deputy Administrator Jessica Looman. "The Payroll Audit Independent Determination program deprived workers of their rights and put employers that play by the rules at a disadvantage. The U.S. Department of Labor will rigorously enforce the law, and we will use all the enforcement tools we have available."

The division provides significant outreach and educational resources for employers seeking assistance to understand their responsibilities to comply with wage and hour laws. These resources are sufficient for helping employers comply without relieving them of their legal obligations, and ensure that workers understand their rights.

2021 Policy Changes & Informal Guidance

We Hear You: How We're Addressing Feedback

Filed in Wage and Hour Issues • By: Jessica Looman • January 19, 2022

In the past year, the Wage and Hour Division has held more than 70 listening sessions and met with people representing workers and employers in many industries to identify ways we can improve access to the worker protections and services we provide. Learn more about our plans to address these priorities in 2022.

Here are some of the things we've learned:

Compliance Assistance – Gone?

- Workers need to know they can come to us for help
- We need to do more to let workers know they are protected from retaliation
- Reach workers to dispel the myths about IC misclass cation
- Identify more opportunities to collaborate and connect to workers and influential community members

www.dol.gov/agencies/whd/contact/local-offices

2021 Policy Changes & Informal Guidance

Arbitration Agreements are Out

News Release

COURT AFFIRMS US DEPARTMENT OF LABOR'S INDEPENDENT AUTHORITY TO RECOVER UNPAID WAGES, DAMAGES IN COURT FOR EMPLOYEES WHO SIGNED PRIVATE ARBITRATION AGREEMENTS

Judge rules that US Secretary of Labor not bound by third-party agreements

NEW YORK – A federal judge in New York has ruled private arbitration agreements do not bind the Secretary when the U.S. Secretary of Labor is not a party. The decision now allows the U.S. Department of Labor to move forward with its lawsuit alleging that three defendants misclassified their employees as independent contractors to evade the overtime and recordkeeping requirements of the Fair Labor Standards Act.

Liquidated Damages are In

Liquidated Damages in Settlements in Lieu of Litigation

Filed in Wage and Hour Issues • By: Jessica Looman • April 9, 2021

The Wage and Hour Division of the U.S. Department of Labor is responsible for ensuring that over 148 million workers across the country are getting paid for the work they do every day to keep our economy moving forward. Enforcing the minimum wage and making sure workers get time and a half after 40 hours a week are fundamental protections provided under the Fair Labor Standards Act. When a worker doesn't get paid, it hurts them, their families, and the community. That's not fair and that's not right.

That's why, under the Fair Labor Standards Act, employers who violate minimum wage, overtime and protections for employees who receive tips are liable for the unpaid wages or unlawfully kept tips and for an additional equal amount in liquidated damages.

Prior to June 2020, the U.S. Department of Labor's Wage and Hour Division, working with the department's Solicitor's Office, had successfully leveraged pre-litigation liquidated damages in the settlement of cases in lieu of litigation, with impactful results. From fiscal year 2016 through fiscal year 2020, the division assessed more than $200 million dollars in liquidated damages for approximately 250,000 affected workers. However, in June 2020, the department paused the use of this enforcement tool.

Effective April 9, 2021, the Wage and Hour Division will return to pursuing pre-litigation liquidated damages and leveraging this enforcement tool where appropriate.

Enforcement

Compliance HR

Enforcement 2021

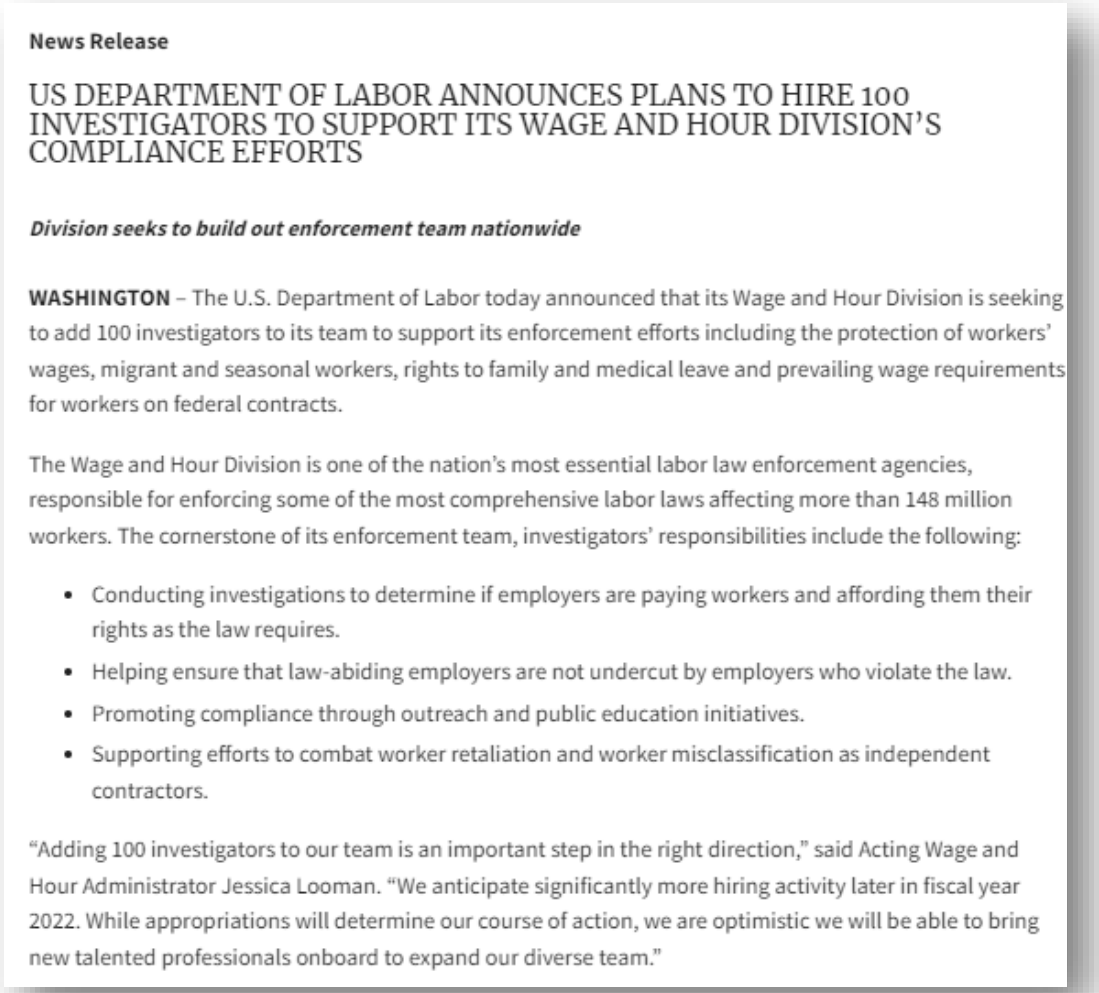
$234.2 million in back wages collected for 193,349 employees in FY 2021

- FY 2020: $257.8 million for 229,934 employees
- FY 2019: $322.4 million for 313,941 employees
- FY 2018: $304.9 million for 265,027 employees
- FY 2017 $270.4 million for 240,608 employees

Administrator Weil's best year: $265.5 million in 2016.

Enforcement 2022
So Why Should I Care?

- More investigators
- More double liquidated damages
- More civil money penalties
- More litigation
- More difficult to settle



News Release

US DEPARTMENT OF LABOR ANNOUNCES PLANS TO HIRE 100 INVESTIGATORS TO SUPPORT ITS WAGE AND HOUR DIVISION'S COMPLIANCE EFFORTS

Division seeks to build out enforcement team nationwide

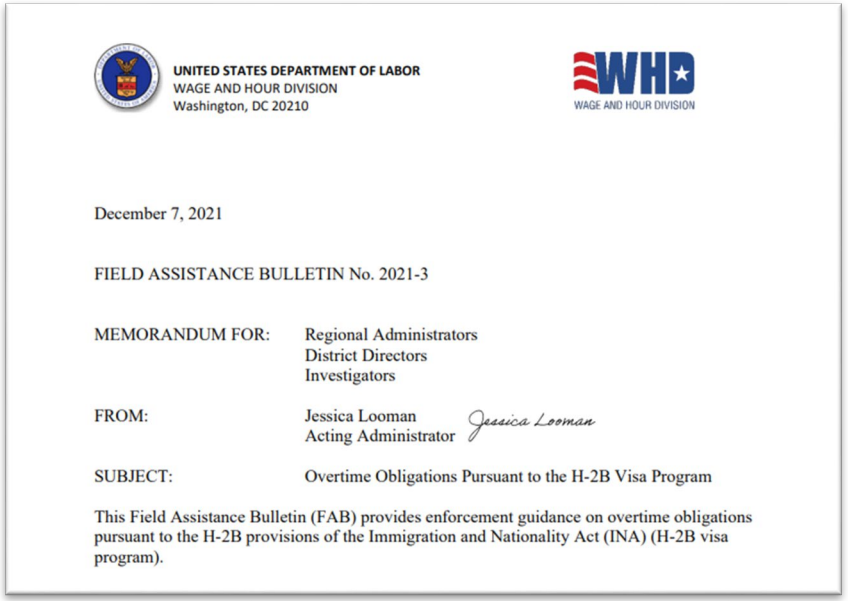
WASHINGTON – The U.S. Department of Labor today announced that its Wage and Hour Division is seeking to add 100 investigators to its team to support its enforcement efforts including the protection of workers' wages, migrant and seasonal workers, rights to family and medical leave and prevailing wage requirements for workers on federal contracts.

The Wage and Hour Division is one of the nation's most essential labor law enforcement agencies, responsible for enforcing some of the most comprehensive labor laws affecting more than 148 million workers. The cornerstone of its enforcement team, investigators' responsibilities include the following:

- Conducting investigations to determine if employers are paying workers and affording them their rights as the law requires.
- Helping ensure that law-abiding employers are not undercut by employers who violate the law.
- Promoting compliance through outreach and public education initiatives.
- Supporting efforts to combat worker retaliation and worker misclassification as independent contractors.

"Adding 100 investigators to our team is an important step in the right direction," said Acting Wage and Hour Administrator Jessica Looman. "We anticipate significantly more hiring activity later in fiscal year 2022. While appropriations will determine our course of action, we are optimistic we will be able to bring new talented professionals onboard to expand our diverse team."

H-2B Enforcement
FAB 2021-3 (Dec. 7, 2021)



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

WHD
WAGE AND HOUR DIVISION

December 7, 2021

FIELD ASSISTANCE BULLETIN No. 2021-3

MEMORANDUM FOR: Regional Administrators
District Directors
Investigators

FROM: Jessica Looman
Acting Administrator

SUBJECT: Overtime Obligations Pursuant to the H-2B Visa Program

This Field Assistance Bulletin (FAB) provides enforcement guidance on overtime obligations pursuant to the H-2B provisions of the Immigration and Nationality Act (INA) (H-2B visa program).

- H2-B job order must indicate expected OT hours
- Because OT is on the job order, any FLSA violation is also an H2-B violation
- Failing to offer OT to citizens first is an H2-B violation
- Violation penalties
  - FLSA max = $2,074
  - H2-B max = $13,072

Investigation of the Year: 91,500 Oily Pennies

A Georgia man waiting on a final paycheck from his old job says his money arrived in the form of 90,000 greasy pennies dumped in his driveway. *SCREENSHOT FROM WGCL-TV*

News Release

US DEPARTMENT OF LABOR SUES GEORGIA AUTO REPAIR SHOP OWNER WHO PAID FORMER WORKER FINAL WAGES IN OILY PENNIES

A OK Walker Autoworks violated retaliation prohibition, overtime laws

ATLANTA – The U.S. Department of Labor has filed a complaint in the U.S. District Court for the Northern District of Georgia, against a Peachtree City auto repair shop and its owner seeking $36,971 in back wages and liquidated damages after investigators found they violated the retaliation, overtime and recordkeeping prohibitions of the Fair Labor Standards Act.

The department's Wage and Hour Division determined that Miles Walker, the owner of 811 Autoworks LLC – operating as A OK Walker Autoworks – retaliated against one employee who contacted the agency after he resigned and the employer failed to pay his final wages.

The department's complaint alleges that Walker paid the former employee's final wages of $915 by delivering about 91,500 oil-covered pennies and a pay stub marked with an expletive to the worker's home – blocking and staining his driveway and requiring nearly seven hours for him to remove – as well as publishing defamatory statements about the former employee on the company's website.

The division also determined that Walker violated the FLSA's overtime provisions by paying other employees straight time for all hours worked, failing to pay legally required overtime rate when they worked over 40 hours in a workweek. In addition, the defendant also failed to keep adequate and accurate records of employees' pay rates and work hours. The department seeks to enjoin the defendant permanently from future FLSA retaliation, overtime and recordkeeping violations.

Wage & Hour ABCs

Always Be Complying

Compliance Issues

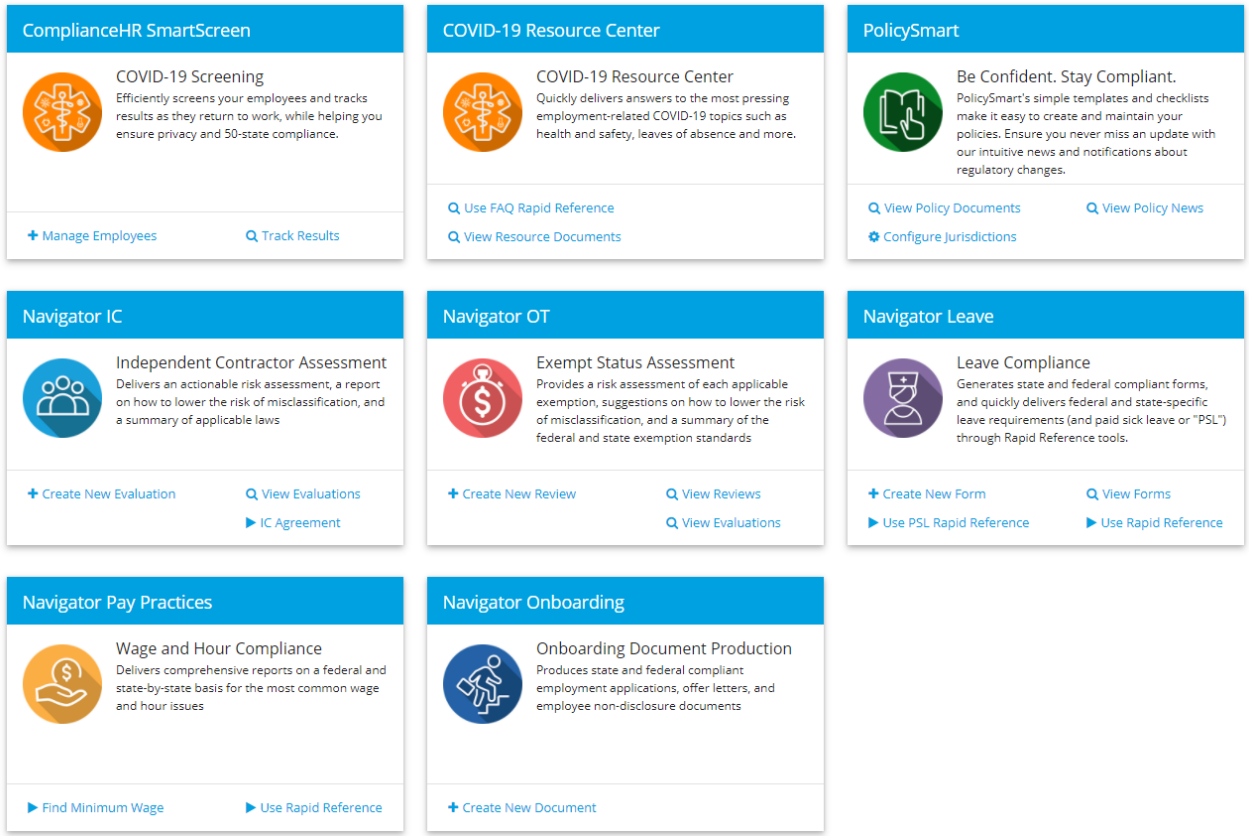
- Are your workers correctly classified as employees?
- What are the risks of joint employment?
- Are your employees correctly classified as exempt from overtime requirements?
- Do you pay your workers for all hours they work?
- Are you included all wages in the overtime calculation?

A Compliance Program

- Wage and hour policies
- Regular audits
- Training for employees and managers
- Employee complaint process

How Can ComplianceHR Help?

- PolicySmart
- Rapid Reference Apps
- Independent Contractor
- Overtime
- COVID-19 apps



What's your biggest compliance challenge?

- Creating and maintain an up-to-date and legally compliant employee handbook
- Mitigating your risk of independent contractor misclassification
- Quickly and compliantly determining whether an employee is exempt or non-exempt
- Easily screening employees for COVID-19-related symptoms and track recent testing outcome and vaccination status.

Questions?

Compliancehr.com/webinar-demo

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Thank you!

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