February Legislative and Regulatory Report

LEGISLATIVE

Worker Classification Legislation Reintroduced in Congress

In February, lawmakers in both the House and Senate reintroduced legislation that would make it more difficult to classify workers as independent contractors. The Protecting the Right to Organize Act would amend several federal labor laws, including the National Labor Relations Act. Among other provisions, the legislation would establish the stringent ABC test for worker classification under the NLRA. Workers would automatically be considered employees unless they meet the following three criteria: (A) the individual is free from control and direction in connection with the performance of the service; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Under the PRO Act, employee misclassification would also constitute a standalone violation of the NLRA subject to civil penalties, thereby overturning a 2019 decision by the National Labor Relations Board which held that misclassification is not a separate violation of the NLRA.

The House bill is sponsored by Rep. Scott (D-VA) and was referred to the House Committee on Education and Labor. H.R. 842 has 209 cosponsors, 206 Democrats and three Republicans. The Senate bill is sponsored by Sen. Murray (D-WA), Chair of the Senate Committee on Health, Education, Labor, and Pensions, and was referred to the HELP Committee. S. 420 has 44 cosponsors, 43 Democrats – including Majority Leader Schumer (D-NY) – and one Independent.

The PRO Act previously passed the House in 2020 by a vote of 224 to 194. The legislation subsequently died in the then-Republican Senate. With both legislative chambers now narrowly controlled by Democrats, there could be increased support to advance the PRO Act in the 117th Congress. However, Republicans generally remain opposed to the legislation. Upon its introduction, House Education and Labor Committee Ranking Member Foxx (R-NC) called it “far-reaching, radical legislation that allows union bosses to consolidate power, coerce workers, line their own pockets, and bolster their own political agenda.”

REGULATORY

USDOT Solicits Applications for FY21 INFRA Grants

On February 17, the U.S. Department of Transportation issued its fiscal year 2021 notice of funding opportunity for the Infrastructure for Rebuilding America grant program. The NOFO makes available $889 million in FY21 funds for INFRA awards. Additionally, up to $150 million in prior year authorizations may also be used for this year's grant awards. Through the one-year FAST Act extension enacted in 2020, an aggregate of $600 million was set as the maximum amount of funds available for non-highway projects for fiscal years 2016-2021. Of this amount, approximately $146 million remains available for freight rail, port, and intermodal projects.

The Trump Administration published its own FY21 NOFO for the program to the USDOT website on January 19, however it never ran in the Federal Register. The Biden Administration subsequently withdrew the NOFO and updated it to reflect its own policy priorities, including two new merit criteria to evaluate project impacts on climate change and racial equity. The NOFO emphasizes consideration of project labor agreements and local hiring as important aspects of economic vitality and innovative project delivery. The innovation merit criterion has been expanded to include technology such as vehicle-to-infrastructure communications and electrification. Also new this year, during the evaluation process USDOT will assign projects a freight rating based on their share of quantifiable benefits to freight movement.

Applications are due by March 19, 2021.

Court Vacates FRA Order on Crew Size Requirements

In 2016, the Federal Railroad Administration issued a notice of proposed rulemaking to establish a minimum requirement of two crewmembers for all railroad operations. Upon conducting further research and stakeholder outreach, FRA determined in 2019 that it "cannot provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations." Accordingly, FRA issued an order withdrawing the NPRM, stating that no regulation of train crew staffing was necessary or appropriate, and further provided that all state laws attempting to regulate train crew staffing in any manner would be preempted by the order.

California, Washington, and Nevada subsequently filed petitions against the FRA's decision. The States contended that rather than simply withdrawing the NPRM and discontinuing the rulemaking proceeding, FRA's order instead authorized one-person crews nationwide and blocked any conflicting state regulations. Petitioners argued the 2019 order violated the minimum notice and comment provisions under the Administrative Procedures Act, stating stakeholders could not have reasonably anticipated the provisions outlined in the order as they were not a "logical outgrowth" of the NPRM and its subsequent comments.

On February 25, the U.S. Court of Appeals for the Ninth Circuit granted the petition and vacated the FRA's 2019 order. The court held that FRA failed to address safety concerns raised in response to the NPRM, did not adequately explain its reasoning for changing the scope of the proposed regulations, and sought to implement regulations without following its usual rulemaking procedures. The matter was remanded back to the FRA for review

DOL Reviews Trump Administration Independent Contractor Rule & Guidance

As a result of the White House's regulatory freeze memorandum, the Department of Labor proposed to delay the effective date, originally March 8, of its final rule on independent contractor status under the Fair Labor Standards Act until May 7, 2021. The final rule, issued during the final days of the Trump Administration, would adopt changes to the economic realities test used to determine worker classification. The revised multifactor test would rely on two core elements to determine an individual's economic dependence on an employer: 1) the nature and degree of the worker's control over the work; and 2) the worker's opportunity for profit or loss.

DOL stated the delay will allow time for new agency officials to review and consider the legal, policy, and enforcement implications of adopting the revised classification standard, including: "whether the rule effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly cover workers as employees; the costs and benefits attributed to the rule, including the assertion that workers as a whole will benefit from the rule; and/or whether the rule's explanation of the standard provides clarity for stakeholders and for the purposes of [Wage and Hour Division] enforcement, as was intended." DOL accepted comments on the proposed delay of the rule's effective date until late February but did not request additional public input on the provisions outlined in the final rule.

In another move to reverse Trump Administration labor policies, DOL's Wage and Hour Division withdrew a 2019 opinion letter which clarified that independent truck drivers did not need to be compensated for time spent off-duty in the sleeper berth, as long as they were completely relieved of all work duties. DOL's announcement stated the 2019 letter was inconsistent with "longstanding WHD interpretations regarding the compensability of time spent in a truck's sleeper berth." DOL noted that several courts had declined to follow the letter's guidance, determining it was unpersuasive and did not sufficiently explain WHD's change in position. The withdrawal reinstates previous opinion letters which determined that up to eight hours of sleeping time may be excluded from compensable time during a trip of 24 hours or longer and no sleeping time may be excluded for trips under 24 hours long.