

2021 US Labor & Employment Webinar Week
Insights and Compliance Strategies for a New World

February 1 – 4, 2021

The background of the slide features a close-up, shallow depth-of-field photograph of several stacks of silver coins. The stacks are arranged in a row, with the tallest stack in the center. The coins are resting on a dark, reflective surface, likely a scale, as indicated by the faint markings and a vertical beam of light. The lighting is dramatic, with bright highlights and deep shadows, creating a sense of value and precision. The overall color palette is dominated by the metallic tones of the coins and the teal overlay.

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Wage and Hour Developments – New Pay and Compensation Pitfalls

February 1, 2021

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A person wearing an orange long-sleeved shirt is standing at a wooden desk, writing on a document with a silver pen. The desk is cluttered with a laptop, a smartphone, and various papers. The scene is lit with warm, golden light from a window in the background, creating a soft glow. A green semi-transparent box is overlaid on the right side of the image, containing the text.

Independent
Contractors:
A Definition in Flux

Tests

- Common Law Agency or “Right to Control Test”
- Economic Reality Test (new DoL regulation suspended by Biden administration)
 - Two core factors
 - Nature and degree of control over work
 - Workers’ opportunity for profit or loss based on initiative and/or effort
 - Additional guideposts
 - Amount of skill required
 - Degree of permanence
 - Whether part of integrated unit of production

ABC Test

Test presumes employment of a worker unless:

The worker is free from the hiring party's control;

The work is done outside the hiring party's usual line of business; and

The worker is engaged in an independent trade.

Key Chronology

2004
Massachusetts adopted ABC test by legislation

2018
2018 California Supreme Court adopts it (Dynamex v. Superior Court).

September 2020
California Assembly Bill 2257 amends ABC Test adding more exemptions

January 6, 2021
new Federal Definition announced effective March 8, 2021

2015
New Jersey Supreme Court adopts the test

2019
California Assembly Bill 5 refines application of ABC Test

November 4, 2020
California Prop 22 passes exempting app-based gig workers from AB 5

January 20, 2021
Biden administration freezes regulations and withdrew an opinion letter on January 25.



Federal Contracting Developments: A Preview for Coming Requirements

2021 Minimum Wage for Federal Contract Workers

Effective January 1, 2021, the Executive Order 13658 minimum wage rate, which generally must be paid to **non-exempt employees** performing work on or in connection with covered federal contracts, is **\$10.95 per hour**.

Effective January 1, 2021, **tipped employees** performing work on or in connection with covered federal contracts generally must be paid a minimum cash wage of **\$7.65 per hour**.

Executive Order 13658 applies to new and replacement federal contracts for SCA-covered services, DBA-covered construction projects, concessions, federal lands management, and services to Federal employees.



Looking Ahead - Federal Contracting Wage Rules Under a Biden Administration

- **Fair Pay and Safe Workplaces - Executive Order 13673 (“Blacklisting Rule”)**
 - Mandated disclosure of labor law violations, including FLSA, SCA, and DBA
 - Rescinded by Trump; enjoined by Texas federal court on all but paycheck transparency provision
 - Any new Order must be narrower but could require stronger penalties for contractor noncompliance with federal labor laws
- **Federal Minimum Wage Hike to \$15**
 - Biden proposed requiring that federal contractors commit to \$15 min. wage, paid leave, and fair pay practices
 - Likely to promote indexing to the median wage
- **Pay Equity for Federal Contract Workers**
 - Restore Obama’s Equal Pay Rule
 - Strengthen enforcement of EO 12468 (nondiscrimination of women and minorities)



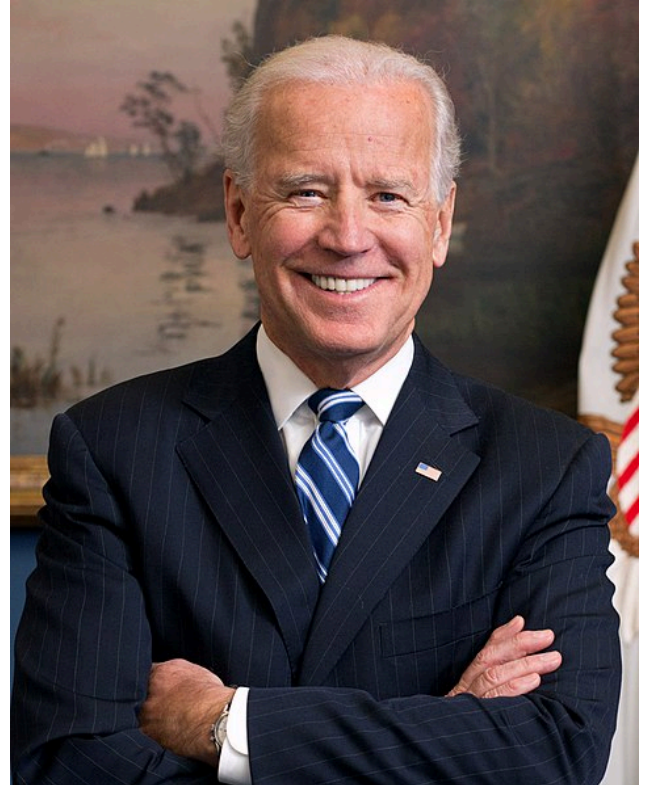


More Agency,
Legislative and
Court Developments

Federal Minimum Wage

What Can We Expect From the Biden Administration?

- Biden Administration endeavors to increase the federal minimum wage to \$15.00
 - Raise the Wage Act (2019)
 - Gradual increase to \$15.00 by 2025
 - No “subminimum” wage for tipped workers
- Pandemic Relief Plan (2021)
 - Part of \$1.9 trillion COVID relief plan
 - Immediate jump from \$7.25 to \$15.00



California Minimum Wage

May vary drastically by city and county

- 2021 California state increase
 - \$13.00 (25 or fewer employees)
 - \$14.00 (26 or more employees)
- State minimum wage inapplicable in 36 cities and counties
 - these local cities and counties minimum wages exceed the state minimum (or will exceed it by July 1, 2021)
- Limited exemptions from minimum wage requirements
 - Nonprofits may be exempt or subject to a lower minimum wage
 - Younger employees classified as “learners”



Significant DOL Opinions and Court Decisions

What's New and What's Ahead in 2021

- Wage & Hour Division, December 31, 2020, Opinion Letter, FLSA2020-19
 - “Continuous Work Day Rule”
 - All time between the first and last principal work activities of the workday is compensable (other than a *bona fide* meal period).
 - Compensability of time commuting to work or tending to personal matters for employees primarily working from home
- Non-compensable time = time employee is “completely relieved” of duties
- Reasonable, more flexible interpretation in the midst of COVID

Significant DOL Opinions and Court Decisions

What's New and What's Ahead in 2021

- Wage & Hour Division, January 8, 2021 Opinion Letter, FLSA2021-1
 - “Account Manger” duties
 - Consultations with potential clients to determine needs
 - Analysis of what products would meet those needs
 - Not closely supervised or scripted
 - Broad discretion to decide the manner of engaging with potential clients
- Administrative exemption applies, because primary duties:
 - (1) are non-manual or office work generally related to the management or general business operations of the employer; and
 - (2) include the exercise of discretion and independent judgment with respect to “matters of significance”

Significant DOL Opinions and Court Decisions

What's New and What's Ahead in 2021

Teamsters v. FMCSA (2021) (9th Circuit)

- Federal law preempts California meal and rest break rules
 - Applies to drivers of property-carrying commercial motor vehicles
 - Court recognized burden of compliance with different state requirements
- Decision could still be appealed
 - Likely focal point of Biden Administration
 - Pete Buttigieg, Secretary of Transportation (pro-Union labor)
 - Boston Mayor Marty Walsh, Secretary of Labor (pro-Union labor)

Significant DOL Opinions and Court Decisions

What's New and What's Ahead in 2021

- *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (2021) (Cal. Supreme Court)
 - Retroactive application of *Dynamex* ABC test



Employer Takeaways

- ABC test applies to independent contractor claims arising from the Wage Orders prior to original 2018 decision
- *Borello* test still applies to non-Wage Order misclassification claims
- Consider conducting worker classification audits going back beyond 2018

A top-down view of two people working at a wooden desk. On the left, a person with dark hair is writing in a calendar or notebook. In the center is an open laptop with a blue screen. To the left of the laptop is a tablet. In the bottom right corner is a smartphone with a red case. A purple semi-transparent box is overlaid on the right side of the image, containing the title text. A white coffee cup is visible in the top right corner.

Final Pandemic Considerations

Tracking Time for Remote Workers



- Beware of auto-deduct rules without exceptions
- Make sure employees are clocking in and out accurately
- Police off-the-clock work
- You may have constructive records of additional work through computer records

Changes to Exempt Status During Pandemic

- Do outside sales persons still qualify?
- While “helper rules” applicable to emergencies may preserve status during early days, we are now in “new normal”
 - Review duties of administrative personnel
 - Do exempt duties still predominate
 - Are supervisors still “supervising”
- Make sure reduced duty salaried exempt employees still meet applicable salary-basis test

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