

Mid-Year 2024: Labor + Wage/Hour

July 24, 2024

The Department of Labor and the National Labor Relations Board have each sought to reshape the contours of the employment relationship through rulemaking, redefining who is an “employer” under the National Labor Relations Act (NLRA) and who is an “employee” under the Fair Labor Standards Act (FLSA). The NLRB issued a rule defining when an entity is a “joint employer” of a group of employees under the NLRA. The DOL enacted a rule defining “employee” vs. “independent contractor” under the FLSA. Both rules can mean greater liability for employers under the respective statutes.

Meanwhile, the DOL revised the salary criteria for defining who is “exempt” under the executive, administrative, and professional (EAP) exemptions from the FLSA’s minimum wage and overtime requirements. A sharp, two-step increase in the salary threshold leaves employers to grapple with the difficult choice of raising the salaries of exempt employees who fall below the new thresholds or reclassifying them as non-exempt.

These agency actions have faced a flurry of legal challenges. Although the DOL rules are currently in effect, numerous ongoing lawsuits seek to invalidate them. And a federal court blocked the NLRB rule before it got out of the gate. The NLRB has filed an appeal, however, hoping to resurrect its rule.

The takeaways below can help employers comply with the regulatory changes and manage the legal risks.



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MYR 2024: DOL Final Rule Governing the White-Collar Exemptions to Overtime

Podcast

“It’s an interesting point in the sense that the FLSA does not specify a particular salary requirement at all. It is a requirement that the Department of Labor imposed early on when the FLSA was passed in 1938. But the statute itself doesn’t say anything specifically about any salary requirement or salary level requirement.”

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EAP exemptions

Effective 07.01.24

The DOL final rule raises the minimum salary requirements for the EAP exemptions.

Phased increases to minimum salary level.

EAP Exemption	Previous	Phase 1 Effective 07.01.24	Phase 2 Effective 01.01.25
Standard	\$35,568/year (\$684/week)	\$43,888/year (\$844/week)	\$58,656/year (\$1,128/week)
Highly Compensated Employees	\$107,432/year	\$132,964/year	\$151,164/year

- No changes to “duties” test or “salary basis” test.

- Automatic increases every three years (starting July 1, 2027).
- Legal challenges are pending.
- The issue: Does the DOL even have authority to impose a “salary minimum” test? One court already has signaled an emphatic “No.”

Key employer takeaways

- Plan for January 1, 2025 increase — but be prepared to pivot if the final rule is stricken.
- Manage the hurdles (employee morale; manager training; overtime policies; timekeeping).
- Consider the downstream effect (higher salaries, upward wage pressures across the board).
- Keep state laws in mind (some have higher minimum salaries; some don’t recognize a highly compensated exemption).
- Embrace the opportunity: This is a good time to review (and correct, if necessary) employees’ exempt classifications.

Independent contractors

Effective 03.01.24

The DOL final rule independent contractor rule:

- Formally rescinds the previous administration’s independent contractor rule, which focused on two “core” factors:
 1. Nature/degree of control over the work.
 2. The worker’s opportunity for profit/loss.
- Applies six “economic reality” factors, to be applied equally:
 1. Opportunity for profit or loss depending on skill.
 2. Investments by worker and employer.
 3. Degree of permanence of working relationship.
 4. Nature and degree of control.
 5. Is the work performed an “integral part” of the business?
 6. Skill and initiative.
- Applies only to how “independent contractor” is defined under the FLSA.
- Reflects DOL prioritization of independent contractor enforcement.
- Legal challenges pending.

Key employer takeaways

- Evaluate risk based on industry, locations, etc. State law may control if it is more favorable to workers (that is, the state test is more likely to find “employee”

status).

- Assess potential business impact: Is the organization reliant on an independent contractor model? How many contractors, and for what functions?
- Review independent contractor agreements; revise where necessary, including to eliminate provisions indicative of control over their work.
- Review independent contractor policies; consider eliminating independent contractors' expense reimbursement. (They are in business for themselves!)
- Not just HR — Consult with purchasing/procurement, as these departments may also bring in outside labor, consultants.
- Consider reclassification or staffing agency model.
- Evaluate in tandem with joint employment issues (see below for more detail).

NLRB joint employer

Effective date pending as of 07.01.24

The NLRB issued its final rule for determining joint employer status under the National Labor Relations Act in October 2023. The rule, which was originally scheduled to go into effect 12.26.23, then 03.11.24, after two additional delays: The NLRB issued its final rule for determining joint employer status under the National Labor Relations Act in October 2023.

The rule, which was originally scheduled to go into effect 12.26.23, then 03.11.24 after two additional delays:

- Centers on the degree to which one employer must retain the right to control another company's employees' essential terms and conditions of employment.
- Has significant impact on franchisors-franchisees, contractors-subcontractors and staffing agencies-user employers.
- Also holds that indirect or reserved, unexercised control could establish joint employment.

Rule's definition of terms and conditions of employment

An entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment, which are defined exclusively as:

- Wages, benefits, and other compensation.
- Hours of work and scheduling.
- Assignment of duties to be performed.
- Supervision of the performance of duties.
- Work rules and directions governing the manner, means and methods of the

performance of duties and the grounds for discipline.

- Tenure of employment, including hiring and discharge.
- Working conditions related to the safety and health of employees.

Rule's status as of 07.01.24

- A Texas federal judge vacated the rule in March 2024, finding it too expansive.
- Court issued its order following oral arguments between the NLRB and a coalition of business groups led by the U.S. Chamber of Commerce.
- The NLRB appealed the court's decision, teeing up potential U.S. Supreme Court review, then dropped its appeal on 07.19.24.

Key employer takeaways

- The NLRB's 2020 rule requiring "direct and immediate control" over the essential terms and conditions of employment of another entity remains in effect.
- Employers should review existing and future contracts containing terms or rights over another employers' employees in case the NLRB is successful on appeal.
- Avoid providing a basis for the NLRB to claim the entity is a joint employer.
- Ensure company boundaries are sufficiently defined by contract and in practice.

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