

Employers Beware: Your Troubles Might Multiply

January 28, 2022

We are fond of saying, “When one agency finds an issue, it’s likely that other agencies will not be far behind.” On January 6, 2022, the US Department of Labor, Wage and Hour Division (“DOL”) and the National Labor Relations Board (“NLRB”) proved us right, announcing their formal agreement to coordinate information sharing, conduct joint investigations, and pursue joint enforcement of violations. Their Memorandum of Understanding (“MOU”) creates a formal process for information sharing and complaint referral between them. This means that the DOL and NLRB can share information that supports the other agency’s enforcement mandates, either upon request or upon the agency’s own initiative. And, it also means that if DOL conducts an investigation and finds a possible violation of the NLRA, it will advise the employee that they should file a complaint with the NLRB; the reverse, of course, is true as well.

Given the MOU, employers should consider reviewing their practices in areas targeted by the MOU, namely unlawful compensation, retaliation against workers for reporting concerns, and independent contractor misclassification. More specifically, employers should examine issues such as whether employees are correctly classified as exempt, whether employees are being paid overtime correctly, whether improper deductions are being made from exempt employees’ pay, and whether there is a process to report complaints about compensation.

Employers should also examine whether independent contractors are properly classified as such. The MOU states that the agencies will share information related to, among other topics, “the identification and investigation of complex or fissured employment structures, including single or joint employer, alter ego, and business models designed to evade legal accountability, such as the misclassification of employees.” The enforcement landscape on independent contractor classification is likely to experience a seismic shift shortly. David Weil, a public opponent of independent contractor relationships, has been nominated to lead the DOL, and the NLRB is currently reviewing whether to revise its standard for determining independent contractor status.

Stay tuned for further developments.