10 DOL Policy And Enforcement Priorities To Expect In 2022

By **Timothy Taylor and Tessa Tilton** (January 26, 2022)


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The U.S. Department of Labor's headquarters is the Frances Perkins Building in Washington, D.C., a monolithic, 1.85 million-square-foot[1] ode to brutalist architecture that sits kitty-corner to the Capitol building.

In normal times, it holds roughly 4,000 DOL employees,[2] though it is largely unoccupied at the moment.[3] Another 11,000 or so employees work elsewhere in D.C., and in regional offices throughout the country.

So the question arises: What will this impressive army of civil servants do in 2022?

In 2021, we saw the pendulum predictably swing toward the priorities of the new administration: repeals of Trump-era regulations, a new focus on equity, and — most prominently — efforts by the Occupational Safety and Health Administration to protect workers from COVID-19.

We predict that 2022 will see the DOL finish clearing the regulatory decks and move forward aggressively on both policy and enforcement fronts. Expect the DOL to once more enter the breach on issues like employee classification, overtime, Employee Retirement Income Security Act fiduciary duties, and more.

Here we highlight 10 key issues.

1. COVID-19 and OSHA Enforcement

The biggest legal news for the DOL in 2022 may have already happened with the Jan. 13 defeat of OSHA's emergency temporary standard at the U.S. Supreme Court, and OSHA's Jan. 25 withdrawal of the standard.[4]

But does this mean employers can relax on COVID-19 safety measures? No.

Within hours of the Supreme Court issuing its opinion, Labor Secretary Marty Walsh stated, "OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and General Duty Clause."[5]

This year we can expect that OSHA will continue to use these still-available tools to enforce COVID-19 safety measures. OSHA's COVID-19 National Emphasis Program prioritizes certain places for inspection, such as:

- Locations where work-related COVID-19 deaths have occurred;
- Health care settings like hospitals, assisted living facilities, nursing homes and emergency providers;
- Prisons; and

- Places where workers have close contact with other people, such as meatpacking plants, poultry processing facilities and grocery stores.[6]

OSHA has several existing standards that may be applicable, including those for respiratory protection, sanitation and the general duty clause, which OSHA is interpreting in light of guidance from the Centers for Disease Control and Prevention.[7]

It is an open question whether OSHA will cite employers in high-risk industries for failing to require employee vaccination. However, that seems very aggressive and, in our view, doubtful, especially if the employer has undertaken other mitigation measures such as spacing, barriers, air filtering and mask-wearing.

As for vaccine mandates or other more thoroughgoing regulation, that may be back on the table later this year. Health care employers should be mindful that OSHA recently stated in a court filing that its expired temporary emergency standard for COVID-19 in health care will be succeeded by a permanent final rule in the next six to nine months.[8]

OSHA could also try again with a finalized version of the broader emergency temporary standard stayed by the Supreme Court. An emergency temporary standard is a binding rule, but it also serves as the proposal for a permanent standard. OSHA recently stated that while it has withdrawn the emergency temporary standard as a rule, it remains on the books as a proposal.

OSHA also stated that it is prioritizing its resources on the COVID-19 health care standard,[9] but it is possible OSHA could turn to the broader rule after that.

Employers should also be mindful that OSHA has also rebooted rulemaking for an infectious disease standard in high-risk environments like hospitals, labs and correctional facilities that would expressly cover COVID-19 along with other dangerous pathogens.[10] But most likely that standard will take a year or even longer — perhaps much longer — to finalize.

2. Heightened Enforcement Across the Board

The DOL is seeking additional funding to administer the administration's agenda, including stricter enforcement of federal labor and employment laws. In its proposed fiscal year 2022 budget, the DOL outlined that its enforcement agencies have lost approximately 14% of their staff in previous years, limiting its "ability to perform inspections and conduct investigations."[11]

As such, the DOL's proposed budget includes substantial increases to staff up enforcement agencies, including OSHA, the Wage and Hour Division and the Office of Federal Contract Compliance Programs. This funding will be used to double OSHA's inspectors by the end of President Joe Biden's first term, aggressively combat worker misclassification, and enforce anti-discrimination laws for federal contractors.[12]

The DOL was also set to receive additional enforcement funding of $1.93 billion via the Build Back Better Act.[13] After the U.S. House of Representatives' passage, however, the bill sits in political peril in the U.S. Senate.[14] Only time — and the administration's next move — will tell whether the these agencies receive the additional funding.

Regardless of the funding level, however, if past is prelude, we can expect a return of the DOL to some of its more aggressive pre-2016 legal positions and perhaps less of an emphasis on compliance assistance.

3. Increased Cooperation With NLRB and EEOC

The DOL, the National Labor Relations Board and the U.S. Equal Employment Opportunity Commission have signaled that they are working together more cohesively. This may lead to more whole-of-employment investigations, where the agencies conduct broad reviews of companies' labor and employment practices.

In late 2020, the DOL's OFCCP entered into a revised memorandum of understanding with the EEOC and the U.S. Department of Justice to streamline enforcement of equal opportunity laws.[15]

More recently, on Jan. 12, 2022, the OFCCP and the EEOC announced an initiative to promote racial equity in hiring.[16] While this initiative appears focused on best practices rather than enforcement, it's an example of agency collaboration and may give clues as to where the agencies are headed with their legal theories.

Meanwhile, on Jan. 6, the DOL's Wage and Hour Division and the NLRB entered into a new memorandum of understanding.[17] The agencies pledged to share information regarding unlawful denial of minimum wages or overtime pay, retaliation toward employees who exercise their rights, discriminatory failure to hire, and the "investigation of complex or fissured employment structures, including single or joint employer, alter ego, and business models designed to evade legal accountability."

This increased cooperation between the agencies highlights the importance for companies to ensure that their compliance programs are comprehensive, and to expect that an enforcement issue with one agency may soon multiply into an enforcement issue with two or three.

4. Independent Contractors

David Weil, the administrator of the Wage and Hour Division during the Obama administration, may get his old job back. Weil's confirmation is currently pending a vote by the full Senate.

When he held the administrator position before, Weil took a critical view of the sharing economy and issued guidance espousing an expansive view of the employment relationship under the Fair Labor Standards Act.[18] More of the same can likely be expected if he resumes his previous post.

Regardless of whether the Wage and Hour Division gets an appointed head in the near future, the DOL has made clear that employee misclassification is a top priority. It is telling that the department so rapidly repealed a Trump-era rule that sought to clarify independent contractor status under the FLSA.

The DOL issued its proposed rule for repeal within six weeks of the new administration taking office and finalized the rule within three-and-a-half months. It is also telling that the new administration's first budget seeks a $30 million increase for the Wage and Hour Division to, first and foremost, "aggressively combat worker misclassification."[19]

5. Joint Employers

During the Obama administration, Weil's Wage and Hour Division issued guidance espousing a broad view of joint employment that could have swept in many staffing agency and franchise businesses as joint employers.[20]

The Trump-era DOL withdrew that guidance and in 2020 issued an update to the department's 1958 rule on joint employment, presenting a new and potentially narrower joint employment test.[21] Alas, the wheel turned again and in July 2021 the Biden DOL withdrew that rule.[22] Thus the landscape today for both independent contractor and joint employer issues is occupied principally by case law.

We can expect aggressive movement on joint employment from the DOL in 2022. Here, too, it is telling that the department moved with remarkable speed to rescind the previous rule — though that may have been spurred in part by a desire to outsprint a decision from the U.S. Court of Appeals for the Second Circuit on the legal challenge to the previous rule.

And we can guess where the DOL will focus its efforts in litigation. In rescinding the 2020 rule, the department sympathized with commenters who expressed concern that a narrower joint employment test "would have made it more difficult for workers to collect back wages owed and incentivized workplace fissuring."[23] So, franchisors, staffing agencies and those who contract with them should be on the alert.

6. Overtime Threshold

The White House's fall 2021 regulatory agenda added notice of a new potential rulemaking updating the overtime thresholds for white collar employees.[24] The basic rule is that employees who work in an executive, administrative or professional capacity are exempt from the FLSA's overtime requirements, unless they are paid less than $35,568 per year

The rationale for the threshold is that it serves as a proxy — employees paid less than that, even if they have a title stating otherwise, probably aren't actually executives or white collar professionals.

History may tell the future here. In 2004, the DOL simplified and raised the threshold to $23,660 per year. There was no litigation.

In 2016, the DOL ambitiously raised it to $47,476 per year. This action was held invalid by the U.S. District Court for the Eastern District of Texas in August 2017, the DOL opted to return to the drawing board.

In 2019, the DOL issued a final rule simply adjusting the 2004 threshold for inflation, which resulted in the current threshold of $35,568.[25] And again there was no litigation.

The DOL may simply update the threshold for inflation, or may try to raise the threshold even higher. While the current methodology for setting the threshold has proven durable, it is not set in stone.

Our best guess is that the DOL will seek to revamp the methodology and substantially increase the threshold. Sen. Sherrod Brown, D-Ohio, has called for the threshold to be raised to $82,732 by 2026,[26] though it seems doubtful the DOL will try to clamber heights that lofty.

7. Fiduciary Rule

This is another measure with a backstory.

In 2016, after many years of development, the DOL issued a regulatory package collectively called the fiduciary rule. The DOL provided a broad new definition of who is considered a fiduciary of employees' savings — and thus subject to stringent fiduciary duties under ERISA. Then, it placed on these fiduciaries a series of requirements to qualify for relief under a prohibited transaction exemption.

In particular, the fiduciary rule covered rollover advice, including one-time rollover advice. According to the U.S. Court of Appeals for the Fifth Circuit's 2018 opinion in Chamber of Commerce of the U.S. v. DOL, the fiduciary rule was "of monumental significance to the financial services and insurance sectors of the economy."[27] The rule was vacated by the Fifth Circuit's ruling in that case.[28]

In 2020, the DOL provided a new prohibited transaction exemption for fiduciaries giving investment advice to retirement investors.[29]

Among other things, the exemption (for those who seek it) imposes impartial conduct standards, including a best interest standard comparable to the U.S. Securities and Exchange Commission's 2019 so-called Regulation Best Interest. It also explains that the DOL views rollover transactions as falling within its jurisdiction when they signify an ongoing or intended ongoing fiduciary relationship.

The 2020 exemption can be fairly viewed as providing additional investor protections compared to the pre-2016 status quo.

The DOL nonetheless will likely issue a proposed new version of the fiduciary rule in 2022, perhaps early in the year. The DOL's latest target for the proposed rule was December 2021.[30] Compliance with the 2020 exemption is required by Feb. 1, 2022, except for certain provisions related to rollovers.[31] So the long-running fiduciary saga is likely to continue well into the future.

8. ESG Investing

In October 2021, the DOL proposed replacing two Trump-era rules that, respectively, tapped the breaks on environmental, social and corporate governance investing by plan fiduciaries, and required additional scrutiny of plans' proxy voting practices.[32]

This proposed rule is in line with Biden's Executive Order No. 13990,[33] which encouraged agencies to take action against climate change, as well as Executive Order No. 14030, which encouraged consideration of climate-related financial risk and directed the DOL to consider repealing the two earlier rules.[34]

The DOL finalized the two Trump-era rules at lightning speed — both within three-and-half months of their respective notices of proposed rulemaking. Such alacrity may have been spurred in part by the realities of a presidential election year.

But even in more quotidian times like 2022, we may see the DOL's pro-ESG rule finalized sooner rather than later, especially if the department wants to free up its resources for work on a new fiduciary rule.

9. OFCCP Procedural Changes

Over the last several years, the OFCCP has reformed many of its processes to speed up its compliance reviews and provide more clarity and certainty to its audited contractors.[35] One of these reforms is a rule promulgated in 2020 codifying its prelitigation review processes and the legal standards by which it judges potential discrimination and moves investigations toward enforcement.[36]

Critically, the rule reins in use of statistical evidence alone as proof of discrimination and highlights the need in most cases for qualitative evidence.[37] The rule also requires the OFCCP to disclose to the contractor its statistical methods for arriving at its conclusions.[38]

Those provisions may be on the chopping block.

The DOL has proposed a rule[39] with a target release date of February 2022 that would modify the 2020 rule to "promote effective enforcement through OFCCP's regulatory procedures."

The rule on the books today is candid that its enforcement approach was not at the outer bounds of what nondiscrimination law might permit, so it seems likely that, whatever changes are made to OFCCP's procedures, the agency will take a more aggressive view of what statistics alone permit the agency to do.

10. OFCCP and Subcontractors

We are christening this last action the sleeper regulation for 2022. New to the DOL's fall 2021 regulatory agenda is a proposed rule that "would add provisions(s) to the regulations implementing Executive Order 11246 requiring contractors to provide notice to OFCCP when they award supply and service subcontracts."[40]

The agenda further notes that "the notice would include information currently unavailable to OFCCP, enabling it to schedule supply and service subcontractors for compliance evaluations."[41]

Such a regulation would enable the OFCCP to create a scheduling list for federal subcontractors and begin auditing them systematically. While subcontractors have always been included in Executive Order No. 11246,[42] they have received little attention from the OFCCP in practice.

This regulation, combined with the grandly named Affirmative Action Program Verification Interface[43] — the OFCCP's new portal requiring in June 2022 that contractors and subcontractors certify their affirmative action plan compliance — may result in the OFCCP reaching down to subcontractors more thoroughly than ever before and vastly expanding its regulatory footprint.

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[1] Daniel J. Sernovitz, "GSA Floats Swapping Labor Department Headquarters for New Site," Wash. Bus. J. (Dec. 21, 2015), available here.

[2] GSA, Notice-PBS-2016-02 (Jan. 23, 2017), available here.

[3] Rebecca Rainey, "Labor Department Delays Staff Return until End of February," Bloomberg (Jan. 20, 2022), available here.

[4] OSHA, COVID–19 Vaccination and Testing; Emergency Temporary Standard (interim final rule withdrawal), available here (public inspection version).

[5] U.S. Dep't of Labor, "Statement from Secretary of Labor Marty Walsh on Supreme Court Ruling on OSHA Emergency Temporary Standard on Vaccination, Testing" (Jan. 13, 2022), available here.

[6] OSHA, Directive 2021–03: Revised National Emphasis Program—Coronavirus Disease 2019 (COVID-19) (July 7, 2021) Appendix 1, Tables 1 & 2, available here.

[7] OSHA, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (July 7, 2021), available here.

[8] Bruce Rolfsen, "Health-Care Virus Standard Close to Nine Months Away, OSHA Says," Bloomberg (Jan. 21, 2022), available here.

[9] OSHA, "Statement on the Status of the OSHA COVID-19 Vaccination and Testing ETS" (Jan. 25, 2022), available here.

[10] OIRA, Fall 2021 Regulatory Agenda: RIN 1218-AC46 (DOL/OSHA: Infectious Diseases), available here.

[11] U.S. Dep't of Labor, FY 2022 Department of Labor Budget in Brief at 2, available here.

[12] Id. at 2–3.

[13] H.R. 5376 § 21001 (Sept. 27, 2021).

[14] Coral Davenport & Lisa Friedman, "'Build Back Better' Hit a Wall, but Climate Action Could Move Forward," N.Y. Times (Jan. 20, 2022), available here.

[15] "Memorandum of Understanding among the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the U.S. DOJ" (Nov. 2020), available here.

[16] U.S. EEOC, "EEOC and OFCCP Launch 'Hire' Initiative to Advance Equal Opportunity" (Jan. 12, 2022), available here.

[17] "Memorandum of Understanding between the U.S. Department of Labor, Wage and Hour Division and the National Labor Relations Board" (Dec. 2021), available here.

[18] U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015) (withdrawn), available here.

[19] U.S. Dep't of Labor, FY 2022 Department of Labor Budget in Brief at 3, available here.

[20] U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1 (Jan. 20, 2016) (withdrawn), available here.

[21] Joint Employer Status under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020), available here.

[22] Rescission of Joint Employer Status under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939 (July 30, 2021), available here.

[23] See id. at 40952.

[24] OIRA, Fall 2021 Regulatory Agenda: RIN 1235-AA39 (DOL/WHD: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees), available here.

[25] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019), available here.

[26] Sen. Sherrod Brown, "Brown Urges Secretary Walsh to Restore Overtime Pay Protections for Ohio Workers" (Apr. 7, 2021), available here.

[27] Chamber of Commerce of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360, 366 (5th Cir. 2018).

[28] Id.

[29] Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798 (Dec. 18, 2020), available here.

[30] OIRA, Fall 2021 Regulatory Agenda: RIN 1210-AC02 (DOL/EBSA: Definition of the Term "Fiduciary"), available here.

[31] U.S. Dep't of Labor, EBSA, Field Assistance Bulletin No. 2021-02 (Oct. 25, 2021), available here.

[32] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (Oct. 14, 2021), available here.

[33] Executive Order 13990 (Jan. 20, 2021), available here.

[34] Executive Order 14030 (May 20, 2021), available here.

[35] U.S. Dep't of Labor, OFCCP, "What Federal Contractors Can Expect" (Apr. 2018), available here. See generally OFCCP's directives issued from 2018 onward, available here.

[36] Nondiscrimination Obligations of Federal Contractors and Subcontractors; Procedures to Resolve Potential Employment Discrimination, 85 Fed. Reg. 71553 (Nov. 10, 2020), available here.

[37] 41 C.F.R. §§ 60-1.33(a)(2)(ii) (in disparate-treatment cases, statistical evidence alone is sufficient only when it is "extraordinarily compelling"), (a)(3)(iii) (in disparate-impact

cases, OFCCP generally must identify the contractor policy or practice causing the statistical disparity).

[38] Id. § 60-1.33(a)(4).

[39] Modification of Procedures to Resolve Potential Employment Discrimination, RIN: 1250-AA14, available here.

[40] OIRA, Fall 2021 Regulatory Agenda: RIN 1250-AA15 (DOL/OFCCP: Notification of Supply and Service Subcontract Awards), available here.

[41] Id.

[42] Executive Order 11246 (Sept. 28, 1965), available here.

[43] OFCCP, "Introducing the Contractor Portal" (Dec. 2, 2021), available here.