Biden Withdraws the Trump Era "Independent Contractor Rule"

The Labor Department is rescinding a rule that made it harder for “gig economy” and 1099 contract workers to argue they were employees and, thus, entitled to employee and minimum wage and overtime protections from the business that was paying them. The withdrawal of the “Independent Contractor” rule is consistent with the Biden administration’s push to undo many of the Trump-era U.S. Department of Labor rules and regulations and foreshadows a harder burden of proof for employers and businesses who classify workers as 1099.

“By withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect,” Labor Secretary Marty Walsh said in a statement. “Legitimate business owners play an important role in our economy but, too often, workers lose important wage and related protections when employers misclassify them as independent contractors. We remain committed to ensuring that employees are recognized clearly and correctly when they are, in fact, employees so that they receive the protections the Fair Labor Standards Act provides.”

Under the Biden administration, the U.S. Labor Department could find that many 1099 workers are misclassified, exposing employers to liability for failure to pay wages, provide benefits, withhold and remit taxes, provide workers’ compensation coverage and other similar employer obligations.

Jessica Looman, principal deputy administrator for the Labor Department’s Wage and Hour Division, stated, “When it comes to digital workers and app-based workers — they’re workers. And so we want to make sure we continue to look at their needs, and how they are interacting with their individual employer and whether they have protection.”

In view of the rescission of the Independent Contractor Rule, employers that engage independent contractors should take the time to review their classification of these workers as non-employees, to ensure that those workers are not incorrectly classified as independent contractors.

If you have any questions about this topic or the classification of workers as employees or independent contractors generally, please reach out to us.

Paid Vaccination Leave Qualifies for Tax Credits

Employers with less than 500 employees are eligible for tax credits under Biden’s American Rescue Plan (the “Rescue Plan”), which we have discussed in the past in our alerts, for employers that provide full pay for employees who take time off to receive and recover from a COVID-19 vaccination. The Rescue Plan will cover up to $511 per day for each vaccinated employee.

As a reminder, all employers in New York State are required to provide up to 4 hours per vaccine for employees who need to take time off to become vaccinated. With the federal government offering tax credits to employers who pay employees for vaccination leave, eligible employers can, in part, subsidize the cots of paying their employees for vaccination

leave.

Gov. Cuomo signs the HERO Act into Law

As we reported merely several days ago, the New York State Legislature had passed a law that would require employers to implement COVID-related safety measures and, if they failed to do so, face the risk of private lawsuits by their employees. Business groups staunchly opposed the law, noting that it exposed already struggling employers with additional risks of frivolous and costly lawsuits. Nonetheless, the bill was signed into law by the Governor last night.

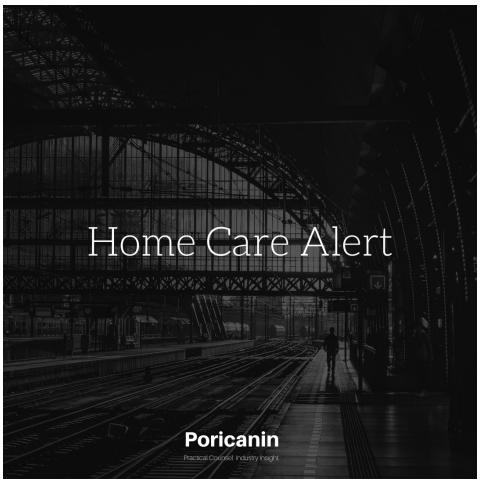
Cuomo's approval of the bill came with the caveat that employers would be given a timeline by which to come into compliance with the Hero Act's requirements, so that employers were not immediately caught in lawsuits alleging violations of the safety requirements. It is not yet clear what that timeline is.

As a reminder, penalties for non-compliance with the Hero Act's requirements may include a fine of $50 per day for failure to implement a compliant plan or between $1,000 and $10,000 for failure to abide by an adopted plan. If it is determined by the State that an employer previously violated the Act in the preceding six (6) years, such penalties may increase to $200 per day for failure to implement a compliant plan or between $1,000 and $20,000 for failure to abide by an adopted plan. Further, **employees may bring a civil action against an employer and seek injunctive relief, costs, attorneys' fees and liquidated damages**.

Employers (especially employers looking to bring their employees back to the office over the next few weeks, as office capacity restrictions are lifted) should promptly begin reviewing their current safety plans and making any necessary adjustments.

As a reminder, our prior alert highlights the Hero Acct compliance requirements, here https://conta.cc/331DfCF . If you have any questions about the Hero Act's requirements and need assistance implementing the safety requirements of the Hero Act, please let us know.

NYC Agencies with City Contracts, New Requirements are in Effect



Effective March 3, 2021, any organization that provides services per contract with a New York City agency related to "day care, foster care, home care, homeless assistance, housing and shelter assistance, preventive services, youth services, and senior centers; health or medical services including those provided by health maintenance organizations; legal services; employment assistance services, vocational and educational programs; and recreation programs" will be subject to new sexual harassment reporting obligations.

Under this Order, covered New York City providers are now required to make the following information available to NYC's Department of Investigation (DOI):

- A copy of the organization's sexual harassment policies, including complaint procedures;
- A copy of *any* complaint or allegation of sexual harassment or retaliation brought by an employee, client, or any other person against the chief executive officer or equivalent principal of the organization;
- A copy of the final determination or judgment regarding any complaint or allegation; and

- Any additional information the DOI requests to effectuate its review of any investigation and determination.

This information must be uploaded through PASSPort, the city's digital Procurement and Sourcing Solutions Portal. Copies of complaints or allegations raised must be provided to the Department of Investigation via PASSPort within 30 days of receipt. Any names or other identifying information of individuals, other than the accused, that are mentioned in any complaint, final determination, or judgment must be redacted.

Providers will be required to certify annually in writing that they have filed all required reports or that they have no information to report.

The New York City Department of Investigation ("DOI") reserves the right to later request information that had been redacted previously. The DOI will review any materials received that relate to a complaint or allegation of sexual harassment and, at the conclusion of such review, will provide its findings in a confidential manner to all City agencies (e.g., Department of Aging) that contract with the provider. City agencies will be permitted to consider the DOI's findings or an organization's failure to furnish the above information when determining whether to continue, modify, amend, or renew a contract.

This obligation will be reflected in all future city contracts, renewals, amendments, and modifications. In addition, each year, the board of directors or equivalent authority of the provider will be required to upload to PASSPort a written certification that all required reports have been made or that there was no information to report.

This Order does not change a provider's general duty to conduct an independent investigation of any complaints or allegations of sexual harassment.

Covered providers should be vigilant as City agencies begin amending existing contracts and future contracts to include this new requirement. To ensure compliance, covered providers should consider revising their sexual harassment policies and implementing proper training to ensure that these complaints are being properly reported within the required timeframe. Executives should also advise their boards of directors or trustees of these new requirements.

Providers with New York City contracts (e.g., HRA)

should review these requirements carefully and ensure that their current sexual harassment policies, education, and procedures, comply with all current State and City mandates.

This Week, on the Home Care Forum Podcast

This week on the Home Care Forum Podcast, we will be discussing the New York City and New York State reopening plans, and what that means for providers who may be struggling to return their workforce to the office. We will also discuss waivers of liability for providers, as negligence lawsuits related to COVID surge across the country, the passage of nursing home and hospital staffing bills (and what that likely means for home care staffing -HINT, it will become even harder for home care to recruit staff!), Biden's American Families Plan and what that means for home health aide recruitment and retention, and the status of LHCSA regulatory relief and waivers.

If you have not already done so, subscribe to the **Home Care Forum** podcast HERE, on Apple Podcasts, or wherever you get your podcasts.

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