

HRAGC LEGAL UPDATE

OCTOBER 20, 2022

FEDERAL

United States Supreme Court

Earlier this month the Supreme Court agreed to hear a case that presents the question of what test is used to determine whether communications between a lawyer and corporation are privileged. The issue arises when the legal communication has both legal and non-legal purposes. In this case a law firm was subpoenaed by a grand jury to provide communications with a corporate client that it advised on tax matters but also prepared the company's tax returns. There are two principal tests used by courts to resolve these issues. One test examines whether the legal advice is the primary purpose of the communication with the lawyer. If so the communications are likely privileged. Under that test, a relaxed rule could permit multiple primary purposes. The other test examines whether the legal advice is a significant purpose of the communication. If more significant than the non-legal purpose then the communications are likely privileged. There is another test that is more restrictive as it finds the communications not privileged if there are dual purposes.

A ruling is expected by June 2023. It could have significant implications for in-house lawyers and outside counsel who advise corporations on both legal and business matters. Employers should examine company practices with respect to legal communications and consider whether steps should be taken to ensure the sole purpose is for legal advice or if there are multiple purposes whether the primary purpose of the communication is for legal advice. Doing so may better protect the privileged nature of the communications.

Department of Labor

A new independent contractor rule was proposed by the Department of Labor on October 11, 2022 and formally published in the Federal Register two days later. The DOL explained its reasoning in a press release: "The proposed rule would provide guidance on classifying workers and seeks to combat employee misclassification. Misclassification is a serious issue that denies workers' rights and protections under federal labor standards, promotes wage theft, allows certain employers to gain an unfair advantage over law-abiding businesses, and hurts the economy at-large."

The proposed rule states:

"In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the employer for work or is in business for themselves."

The six factors are:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Degree of permanence of the work relationship
4. Nature of degree and control

5. Extent to which the work performed is an integral part of the employer's business
6. Skill and initiative

If issued as a final rule, this rule would make it more difficult for a worker to qualify as an independent contractor and it would be a return to the analysis utilized before the early 2021 DOL rule. The timing for the final rule to be issued is early 2023. The public comment period ends November 28, 2022.

NEW HAMPSHIRE

Legislature

There were a little over 200 Legislative Service Requests (LSRs) filed in the initial filing period. The employment related LSRs are listed below. Most will turn into bills. Though the text is not yet available, the description provides a sense of what the bill will address. Most of the LSRs are either retries of bills that failed last year or an attempt to undo what was done last year. The filing period for bills opens in November after the election for both House and Senate and runs until November 22 for the House and mid-December for the Senate.

LSR #	Description
LSR 6	prohibiting collective bargaining agreements that require an employee to join a labor union.
LSR 7	relative to the state minimum hourly rate.
LSR 9	prohibiting payment of subminimum wages.
LSR 39	relative to employee protections from COVID-19 in the workplace.
LSR 45	relative to employment restrictions for registered sex offenders.
LSR 105	prohibiting employers from engaging in certain anti-union activities.
LSR 121	relative to employment protection for participants in the therapeutic cannabis program.
LSR 162	relative to an employee's unused earned time.
LSR 168	relative to youth employment during the school year and at night.
LSR 195	commemorating the first labor strike in the United States by women.

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