



Prepare Business For Increased Wage Costs & Risks From American Rescue Plan Act Of 2021 FLSA Minimum Wage Changes

U.S. businesses will face sharply increased wage costs if Senate Democrats succeed in their plan to pass this week the [American Rescue Plan Act of 2021](#) (the “Act”) passed by the House of Representatives on Friday, February 24, 2021

One of many provisions of the Act impacting employers and their employee benefit plans, the Act will amend the Fair Labor Standards Act of 1938 (“FLSA”) to increase the federal minimum wage for all employees followed by additional annual adjustments in the federal minimum wage that will impose a federal minimum wage of at least \$15.00 per hour for all non-exempt employees by 2025. In addition, the Act also phases out current rules allowing employers to pay tipped employees, new employees under age 20 and handicapped employees less than the regular minimum wage over the next five years.

Aside from the direct impact of these increases to the base minimum wage, the significance and cost of these increases for U.S. businesses will be further heightened by the Biden-Harris Administration’s plan to reimplement Obama-era FLSA worker classification rules that treat as employees workers providing services under contract labor relationships historically characterized as independent contractor, subcontractor and other non-employee capacities as well as narrow other requirements for treating workers as exempt from the FLSA minimum wage and overtime requirements as well as step up enforcement of FLSA rules.

Senate Majority Leaders Chuck Schumer has announced plans to schedule a vote in the Senate on the Act the first week in March. With Congressional Democrats currently holding the majority of seats in the Senate by a narrow margin, the Act stands an excellent chance of enactment when put to the vote. Consequently, U.S. businesses should prepare to deal with these impending requirements. In response to these developments, most U.S. businesses should both prepare to implement anticipated changes in the federal minimum wage for their recognized employees as well assess their likely exposure to added costs and liabilities arising from workers rendering services to their businesses directly or indirectly as independent contractors, through subcontractor relationships or in other capacities that the business does not view as an employment relationship.

Act Raises Federal Minimum Wage

Introduced and promoted by House Democrats as their latest COVID-19 relief package, Section 2101 of the Act provides an immediate increase in the federal minimum wage employers covered by the FLSA must pay to most non-exempt employees (“regular rate”) from the current rate of \$7.25 to \$9.50 per hour on the effective date of the Act, followed by the gradual increase of the federal minimum wage to \$15.00 per hour over the next four years through scheduled annual increases as follows:

- \$9.50 an hour on the Effective Date of the Act;
- \$11.00 an hour on the Act’s anniversary date in 2022;
- \$12.50 an hour on the Act’s anniversary date in 2023;
- \$14.00 an hour on the Act’s anniversary date in 2024;
- \$15.00 an hour on the Act’s anniversary date in 2025; and
- Annually thereafter in the amount “determined by the Secretary” by the annual percentage increase, if any, in the median hourly wage of all employees as determined by the Bureau of Labor Statistics rounded up to the nearest multiple of \$0.05.

This means the base minimum wage employers must pay most hourly employees would increase immediately by \$2.25 per hour and would more than double by 2025.

Act Phases Out Tipped & Other Special Minimum Wage Rates

In addition to increasing the general federal minimum wage, beginning in 2026, the Act eliminate current exceptions in the FLSA that allow employers to pay less than the regular federal minimum wage to tipped employees, new employees under age 20 and handicapped workers subject to certificates issued by the Department of Labor under FLSA 6(g) and requires phased increases the minimum wage rates for those employees between now in 2026.

For tipped employees, the Act immediately will raise the federal minimum wage for tipped employees from the current rate of \$2.35 per hour to \$4.95 an hour beginning on the Act's effective date and annually increase this rate by an additional \$2.00 per hour on the anniversary date of the Act until the separate rate for tipped employees ends in 2025. Accordingly, the Act raise the federal hourly minimum wage for tipped employees annually on the anniversary date of the Act over the next 4 years as follows:

- \$4.95 in 2021;
- \$6.95 in 2022;
- \$8.95 in 2023;
- \$10.95 in 2024;
- \$12.95 in 2025; and
- After 2025, the lesser of the prior year's rate increased by \$2.00; or the amount necessary for the tipped employee minimum wage to equal the regular rate.

Additionally, pending its elimination of the special wage rate for new employees hired under 20 years of age under FLSA Section 6(g)(1) in 2025, the Act gradually will increase that special minimum wage rate from the current rate of \$4.25 an hour to \$6.00 per hour immediately on the effective date of the Act with that rate to increase annually on the Act's anniversary date by the lesser of the prior year's rate increased by \$1.75 or the general rate.

The Act also modifies the FLSA's rules that allow special rates of pay for "handicapped workers." Currently, Section 14(c) allows the Secretary of Labor to issue certificates authorizing the payment of rates less than the federal minimum wage to employees whose earning or productive capacity is impaired by age, physical or mental deficiency or injury ("handicapped workers"). The Act would end the authority of the Secretary of Labor to issue new certificates authorizing reduced rates of pay for handicapped workers on the date of the Act's enactment. In addition, the Act will transition the minimum wage employers must pay handicapped employees working under certificates issued before the Act's enactment to a rate that equals or exceeds, for each year, the greater of:

- \$5.00 an hour beginning on the date of the Act's enactment; , beginning on the effective date under section 2101€ of the American Rescue Plan Act of 2021;
- \$7.50 an hour beginning on the Act's anniversary date in 2022;
- \$10.00 an hour on the Act's anniversary date in 2023;
- \$12.50 an hour beginning on the Act's anniversary date in 2024;
- \$15.00 an hour beginning on the Act's anniversary date in 2025; and
- The regular rate beginning in 2026.

Other Regulatory Changes Heighten FLSA Scope & Business Risk

Businesses assessing their costs and exposures from the Act's amendments to the FLSA should take into account the likely impact of the implications of the Biden-Harris Administration's policies expanding the scope of the FLSA and other federal laws through revisions and enforcement of rules for characterizing workers as employees rather than independent contractors and enforcing expansive joint employer liability rules as well as other announced or expected Biden-Harris Administration proworker regulatory and enforcement changes expected to expand the potential reach and cost of the Act's increases to federal minimum wage rates.

Policy changes announced by the Biden-Harris in January clearly signal that businesses need to prepare to defend characterizations of workers as exempt from the FLSA minimum wage and overtime rules based upon independent contractor or other characterizations.

Businesses should expect that defending their characterizations of workers as exempt from the FLSA rules will become more difficult under the current administration. The Biden-Harris Administration's January 20, 2021 [Memorandum on](#)

[Regulatory Freeze Pending Review](#) suspended the implementation of the Trump Administration led Labor Department's [Final Rule: Independent Contractor Status under the Fair Labor Standards Act](#) slated to take effect on March 8, 2021, which sought to reinstitute and clarify historical policies for distinguishing employee versus independent contractor relationships for purposes of the FLSA established by judicial precedent prior to the Obama Administration. Since then, the Biden-Harris Administration led Department of Labor Wage and Hour Division ("WHD") has made clear that it is moving forward to aggressively reimplement and enforce Obama Administration-era standards and practices for distinguishing employees from independent contractors by among other things:

- Withdrawing WHD opinion FLSA2019-6, which applied a more expansive view of independent contractor status as applied to a virtual marketplace company (VMC) than the WHD's approach during the Obama Administration and WHD opinion FLSA2019-10;
- Relying on the much more restrictive standards for recognizing independent contractor status in its opinion in FLSA2021-8 on whether distributors of a manufacturer's food products are employees or independent contractors under the FLSA and FLSA2021-addressing whether requiring tractor-trailer truck drivers to implement safety measures required by law constitutes control by the motor carrier for purposes of their status as employees or independent contractors under the FLSA, and whether certain owner-operators are properly classified as independent contractors.

Based on the agenda announced by the Biden-Harris Administration, businesses also should expect the Biden-Harris Administration and private plaintiffs to use these more employee friendly interpretation and enforcement policies to attack employer characterizations of workers as contractors to justify nonpayment of minimum wage and overtime to those workers. Along with being forced to pay unpaid wages and overtime with interest, businesses unsuccessful in defending their worker classification characterizations can expect to face liquidated damage awards to private litigants equal to two times the amount of the back pay liability or in the case of WHD enforcement for repeated or willful violations, civil monetary penalties.

In assessing and managing these risks, businesses should evaluate their potential joint employer exposure to liability for unpaid minimum wage and overtime violations by other businesses providing labor or other services as the Biden-Harris Administration also is expected to seek to apply the much more expansive interpretation of joint employment applied during the Obama Administration abandoned during the Trump Administration.

These misclassification mistakes can be particularly costly. FLSA liabilities arising from misclassification of workers as independent contractors carry significant risk both because businesses often fail to pay required minimum wages or overtime as well as don't keep required time records. The Biden-Harris Administration has made clear that it plans to move quickly to reinstitute the regulatory and enforcement practices used during the Obama Administration to aggressively challenge employers' characterization of workers as exempt from the FLSA's minimum wage and overtime rules as independent contractors.

Considering these developments, all U.S. businesses and business leaders are well-advised both to begin preparing to comply with anticipated increases in federal minimum wage rates, as well as well as assess and take appropriate steps to mitigate their exposure to anticipated aggressive efforts to reclassify service providers considered to perform work as independent contractors, as contractors or employees of subcontractors or other businesses or both.



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Cynthia Marcotte Stamer, P.C.

More Information

The FLSA reforms are only one of a number of provisions of the Act impacting employers and their employee benefit plans. If you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information including your preferred e-mail by creating your profile [here](#) or connect with us on [Facebook](#), on [LinkedIn](#) or [Twitter](#). For specific information or counsel about the these or other legal, management or public policy developments, please contact the author Cynthia Marcotte Stamer via [e-mail](#) or via telephone at [\(214\) 452-8297](tel:2144528297).

About the Author

Recognized by her peers as a Martindale-Hubbe “AV-Preeminent” (Top 1%) and “Top Rated Lawyer” with special recognition LexisNexis® Martindale-Hubbell® as “LEGAL LEADER™ Texas Top Rated Lawyer” in Health Care Law and Labor and Employment Law; as among the “Best Lawyers In Dallas” for her work in the fields of “Labor & Employment,” “Tax: ERISA & Employee Benefits,” “Health Care” and “Business and Commercial Law” by D Magazine, Cynthia Marcotte Stamer is a practicing attorney board certified in labor and employment law by the Texas Board of Legal Specialization and management consultant, author, public policy advocate and lecturer widely known for 30+ years working as an on demand, special project, consulting, general counsel or other basis with domestic and international business, charitable, community and government organizations of all types, sizes and industries and their leaders on labor and employment and other workforce compliance, performance management, internal controls and governance, compensation and benefits, regulatory compliance, investigations and audits, change management and restructuring, disaster preparedness and response and other operational, risk management and tactical concerns.

Most widely recognized for her work with health care, life sciences, insurance and data and technology organizations, she also has worked extensively with health plan and insurance, employee benefits, financial, transportation, manufacturing, energy, real estate, accounting and other services, public and private academic and other education, hospitality, charitable, civic and other business, government and community organizations. and their leaders.

Ms. Stamer has extensive experience advising, representing, defending and training domestic and international public and private business, charitable, community and governmental organizations and their leaders, employee benefit plans, their fiduciaries and service providers, insurers, and others has published and spoken extensively on these concerns. As part of these involvements, she has worked, published and spoken extensively on these and federal and state discrimination, affirmative action and accommodation and other related human resources, employee benefits and other workforce and services; insurance; workers’ compensation and occupational disease; business reengineering, disaster and distress; and many other risk management and compliance concerns.

A former lead advisor to the Government of Bolivia on its pension project, Ms. Stamer also has worked internationally and domestically as an advisor to business, community and government leaders on these and other legislative, regulatory and other legislative and regulatory design, drafting, interpretation and enforcement, as well as regularly advises and represents organizations on the design, administration and defense of workforce, employee benefit and compensation, safety, discipline, reengineering, regulatory and operational compliance and other management practices and actions.

Ms. Stamer also serves in leadership of a broad range of professional and civic organizations and provides insights and thought leadership through her extensive publications, public speaking and volunteer service with a diverse range of organizations including as Chair of the American Bar Association (“ABA”) Intellectual Property Section Law Practice Management Committee, Vice Chair of the International Section Life Sciences and Health Committee, Past ABA RPTE Employee Benefits & Other Compensation Group Chair and Council Representative and current Welfare Benefit Committee Co-Chair, Past Chair of the ABA Managed Care & Insurance Interest Group, past Region IV Chair and national Society of Human Resources Management Consultant Forum Board Member, past Texas Association of Business BACPAC Chair, Regional Chair and Dallas Chapter Chair, former Vice President and Executive Director of the North Texas Health Care Compliance Professionals Association, past Board President of Richardson Development Center (now Warren Center) for Children Early Childhood Intervention Agency, past North Texas United Way Long Range Planning Committee Member, past Board Member and Compliance Chair of the National Kidney Foundation of North Texas, a Fellow in the American College of Employee Benefit Counsel, the American Bar Foundation and the Texas Bar Foundation and many others.

For more information about these concerns or Ms. Stamer’s work, experience, involvements, other publications, or programs, see www.cynthiastamer.com or contact Ms. Stamer via e-mail [here](#).