



## American Rescue Plan Act Of 2021 Raises Health Care Workforce Costs & Liabilities

Health care organizations can expect to face sharp increases in their wage and other workforce costs and risks if Senate Democrats succeed as expected in their plan to pass as early as this week the [American Rescue Plan Act of 2021](#) (the “Act”) passed by the House of Representatives on Friday, February 24, 2021 due to the Act’s amendments to the minimum wage rates and other provisions of the Fair Labor Standards Act of 1938 (“FLSA”).

Upon enactment, the Act will immediately increase the federal minimum wage for non-exempt employees by \$2.25 per hour and subsequently will continue to annually increase the federal minimum wage. 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. Given their heavy dependency on nonexempt employees and contract staffing, these changes obviously will hit health care and other workforce dependent industries hard.

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’s Federal Minimum Wage Amendments

Introduced and promoted by House Democrats as their latest COVID-19 relief package, Section 2101 of the Act amends the FLSA to immediately increase the federal minimum wage for all employees as well as phases out special FLSA minimum wage rates for tipped employees, new employees under 20 years of age and handicapped workers covered by Labor Department FLSA certificates.

- **Increases In Federal Minimum Wage Rates For All Employees**

The Act will immediately increase the federal minimum wage for non-exempt employees covered by the FLSA (“regular rate”) from the current rate of \$7.25 to \$9.50 per hour and will gradually 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.

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.

- **Elimination of Special Minimum Wage Rates For Special Classes Of Employees By 2025**

In addition to increasing the general federal minimum wage, beginning in 2026, the Act eliminates 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 and 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.

# Regulatory & Enforcement Changes Heighten Health Industry Risks

Health industry leaders and organizations 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 Administration in January clearly signal that businesses need to prepare to defend their wage and hour compliance under the new Administration. Shortly after the Biden-Harris Administration took over in January, the WHD ended a Trump Administration Payroll Audit Independent Determination Program that offered noncompliance employers a pathway to voluntary compliance. See [US Department Of Labor Ends Program That Allowed Employers To Self-Report Federal Minimum Wage And Overtime Violations](#).

In assessing and managing these risks, health industry should keep in mind that WHD already has targeted health industry employers for special guidance and heightened compliance and enforcement. See e.g., [Health Care Surveys, Fact Sheets, and Other Resources](#); [Nurses, Part 541 Exemptions](#); [The Home Health Care Industry Under the Fair Labor Standards Act](#); [Nursing Care Facilities Under the Fair Labor Standards Act](#); [The Health Care Industry and Youth Employment](#); [The Healthcare Industry and Hours Worked](#); [The Healthcare Industry and Calculating Overtime Pay](#). Consistent with this high attention to health industry compliance and oversight, WHD already has sanctioned several health industry employers since the first of the year. See, e.g., [Ohio Health Care Service Provider For Individuals With Developmental Disabilities Pays \\$92K In Overtime Back Wages To 61 Employees](#) (February 5, 2021)(Failure to pay overtime.); [Modesto Residential Care Facilities To Pay Employees \\$135K In Back Wages After US Department Of Labor Finds Minimum Wage, Overtime Violations](#) (February 5, 2021) (Owner of eight residential care facilities in Modesto will pay \$135,092 in back wages to 56 employees and \$27,872 in civil penalties); [U.S. Labor Department Recovers \\$35,492 in Overtime Back Wages For 12 Employees of Pittsburgh Area Ambulance Service](#) (January 4, 2021) (Jefferson Hills Area Ambulance Association – a private ambulance service operating as Southeast Regional EMS in Clairton and Elizabeth, Pennsylvania paid \$35,492 in back wages to 12 first responder employees for FLSA overtime violations); [U.S. Department Of Labor Recovers \\$81,399 In Back Wages For 45 Employees Of Columbus, Ohio, Nursing Home](#) (December 30, 2020) (Chelsea Health Care LLC paid \$81,399 in back wages to 45 employees for FLSA overtime violations).

With the COVID-19 crisis challenging the staffing resources of many health care organizations and changes in remote work and other COVID-19 driven adjustments disrupting typical staffing, timekeeping and other resources, health care organizations should consider conducting a documented self-audit to verify the defensibility of their compliance within the scope of attorney-client privilege to identify and provide an opportunity to address potential resulting compliance risks.

Along with assessing their compliance risks with regard to employees carried on their payroll, health industry and other businesses also should carefully review their potential risk to minimum wage, overtime, recordkeeping and other liability from services performed by independent contractors, staffing contractors, contract labor contractors, and other third parties rendering services to or within their operations. The Biden-Harris Administration made clear upon taking office that it plans to review and challenge workers as exempt from the FLSA minimum wage and overtime rules based upon independent contractor or other characterizations of workers rendering services critical to operations as non-employees. 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 various WHD opinions which applied the more expansive view of independent contractor status contemplated by the now suspended Trump Administration-issued Final Regulations as compared to the more narrow standards applied for administration and enforcement during the Obama Administration; see e.g., [US Labor Department Finds Guam Construction Contractor Illegally Attempted To Avoid Paying Overtime By Misclassifying Workers As Independent Contractors](#) (February 18, 2021)( ruling employer attempted to avoid paying overtime when workers exceeded 40 hours in a workweek by intentionally misclassifying the workers as independent contractors until a federal investigation uncovered the scheme).

## Proactively Manage Compliance & Risks

Given these signals, health care and other organizations should prepare to defend against WHD and private plaintiffs efforts to use the Biden-Harris Administration’s more employee friendly interpretation and enforcement policies to attack employer characterizations of workers as contractors relied upon by the employing organization to justify nonpayment of minimum wage and overtime to those workers.

In making these preparations, health care organizations should scrutinize and tighten both their own wage and hour practices as well as their contracts, recordkeeping and retention and compliance auditing of any staffing, contract labor, subcontractors and other third-party service providers to reduce potential liability. Advance planning and efforts for work provided by contractors or other third parties is particularly critical as FLSA liabilities arising from misclassification of workers as independent contractors or joint employer liability claims can be both hard to defend and expensive because the organization charged often lacks sufficient management oversight, involvement or records to launch an effective defense. 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. Health care and other organizations receiving services from contractors or other third parties often can reduce reclassification or joint employer exposures by strengthening contractual, data reporting and collection, processes and other practices.

Considering these developments, all U.S. health care and other organizations and business leaders are well-advised both to begin preparing to comply with anticipated increases in federal minimum wage rates, as well as assess and take appropriate steps to mitigate their exposure to anticipated aggressive efforts to use worker reclassification, joint employer or both rules to assess liability to their organizations taking into account the changing interpretations and policies of the new Biden-Harris Administration.

## 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](#).

## About the Author

Recognized by her peers as a Martindale-Hubble “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 health care and life sciences, charitable, community and governmental, and other business organizations and their leaders, employee benefit plans, their fiduciaries and service providers, insurers, and others. A widely published author and popular speaker, Ms. Stamer also has published and spoken extensively on wage and other and other health care, human resources, employee benefits and other workforce and services; insurance; workers’ compensation and occupational disease; business reengineering, disaster and distress; and many other compliance, governance, risk management, operational and public and regulatory affairs 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 health, managed care, insurance, and other 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](http://www.cynthiastamer.com) or contact Ms. Stamer via e-mail [here](#). ©2021 Cynthia Marcotte Stamer. All rights reserved.