SSDA News

Service Station Dealers of America and Allied Trades

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Government Affairs Update

By Roy Littlefield

SSDA-AT hit the ground running in November analyzing the results of the midterm elections and planning a strategy for the lame duck session as the 117th Congress wraps up priorities and legislative actions for 2022. The 118th Congress will be split, and SSDA-AT will explore opportunities to pass bipartisan legislation.

In Maine, SSDA-AT joined efforts on election day to gather 63,000 signatures to place Right to Repair on a ballot referendum in the state in 2023. Through successful efforts, 68,000 certified signatures were collected in one day. The law in Massachusetts faced another delay in November.

Last month, SSDA-AT met with NHTSA staff to discuss pending consumer education regulations as well as tire registration and recall. The staff at NHTSA was sympathetic to our concerns and issues. SSDA-AT plans to hold future meetings with NHTSA to follow up on these pending regulations.

In November, SSDA-AT took part in a Small Business Labor Safety (OSHA/MSHA) Roundtable. The agenda included a discussion of OSHA's recent PSM stakeholder meeting and Advocacy's public comments on EPA's proposed RMP revisions, OSHA's On-Site Consultation Program, and the role of essential minerals in the future economy.

At the end of the month, SSDA-AT attended the 2022 Highway Users Annual Meeting featuring key Congressional and Administration policy makers, as well as top industry experts examining critical transportation issues. At the event SSDA-AT connected with Senator Deb Fischer (R-NE), House Transportation & Infrastructure Committee Chairman Peter DeFazio (D-OR), Representative Earl Blumenauer (D-OR), Carlos Monje, U.S. Department of Transportation Under Secretary for Transportation Policy, Jack Ruddy, Staff Director, House Transportation & Infrastructure Committee, Adam Tomlinson, Staff Director, Senate Environment & Public Works Committee, Dean Foreman, Chief Economist, American Petroleum Institute, Congressional Staff Panel, Jack Ruddy, House Transportation & Infrastructure Committee Staff Director, and Adam Tomlinson, Senate Environment & Public Works Committee Staff Director.

Building a Successful Website

By: McKensie Curnow of Net Driven

Building your own website has become increasingly simple and inexpensive in recent years. Though easy and accessible, DIY websites do not guarantee a website that works well or leaves a lasting impression for your business and your audience.

Your website is a reflection of you and your business, so you're obviously going to want to build a strong, professional, and positive presence to attract customers. Taking the risk of building a website on your own is taking the risk of losing potential leads and damaging your business's reputation – we never get a second chance to make a first impression!

When you invest in a professional web design team, such as our team here at Net Driven, you're not only investing in the visual appearance and accessibility of your website, you also invest in expert advice, techniques, and best practices to create the best possible user experience. Spending less money and trying to do it on your own may seem like the easy way out, but let's dive into why it's important to give your business the professional auto service website design it deserves.

COMMON MISTAKES MADE BY INEXPERIENCED DESIGNERS

Poor Structure & Navigation

A website should be attractive, accessible, and easy to navigate; all in all, user-friendliness is vital. A site's content should be understandable and full of useful information without being cluttered. In today's day and age, people like quick and simple. If they can't find what they need without gaining a headache, they're going to leave your site and find a frustration-free one instead. At Net Driven, we know how to organize automotive websites in a way that makes sense for both the business owner and their potential customers.

Lack of SEO

If no one can find your website, what's the point in making the effort of creating one? Many rookie designers forget the importance of SEO, or Search Engine Optimization.

As a certified Google Partner, our team highly knowledgeable of automotive SEO and works hard to make sure your site gets found.

Missing CTA

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NET DRIVEN

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Your website is one of the most powerful marketing tools for your business.

Not only does your website have the power to bring in new customers, it also helps current customers remain loyal if they find what they're looking for with minimal frustrations.

One of the main components of a great website is a clear CTA, or call-to-action.

A CTA is what converts website visitors into customers by driving them to purchase your good or service. If your website is missing a clear CTA, you'll lose sales and customers.

At Net Driven, our team ensures that every website offers conversion-focused responsive web design.

Using Free or Low-Cost Templates

Rookie designers are likely to use a free or low-cost template for their website.

While this may seem like an easy solution, it will make your website look generic and unconnected to your brand.

Your business is unique, your website should be, too. Our designers take the time to ensure each one of our automotive websites are exclusive to the client and capture the individuality of their business. As with any service or good, you get what you pay for.

Your money buys value, which in turn, will actually build your business's bank account in the long run.

Your company's website is no exception. If you want to leave a lasting, positive impression of your brand, leave website design to the professionals.

Still not convinced?

Check out our portfolio of the finest responsive web design in the automotive industry.

For further details, visit our solutions and packages pages.

Chevron, Jera to Explore Low Carbon Opportunities

Chevron business unit Chevron New Energies and Japanese utility Jera have agreed to collaborate on low-carbon opportunities including hydrogen and carbon capture, utilisation, and storage (CCUS) with a focus on the US and the Asia-Pacific region.

The firms will explore the potential of co-developing "lower carbon fuel" in Australia by leveraging on Chevron's knowledge and experience in LNG and CCUS, Chevron said on 7 November. They plan to conduct a feasibility study that will be completed next year.

The firms will also study liquid organic hydrogen carriers (LOHC) in the US as part of a broader focus on hydrogen production, export and transportation. Both firms are part of a group of companies investing in German engineering firm Hydrogenious LOHC Technologies that has been building LOHC storage plants. The group also includes Singapore's state-controlled investor Temasek, Japanese trading house Mitsubishi and South Korean automaker Hyundai.

Federal Contractor Minimum Wage Increasing January 1

The U.S. Department of Labor (DOL) has announced that the applicable minimum wage rate for workers performing work on or in connection with federal contracts entered into before January 30, 2022, or that are renewed or extended before January 30, 2022,will increase to $12.15 per hour beginning January 1, 2023.

The minimum wage rate that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to $8.50 per hour.

Covered contracts entered into on or after January 30, 2022, or that are renewed or extended on or after January 30, 2022,will increase to $16.20 per hour beginning January 1, 2023.

The minimum wage rate that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to $13.75 per hour.

American Trucking Associations Victorious in Truck-Only Toll Fight

On September 21, 2022, the United States District Court for the District of Rhode Island ruled that the state of Rhode Island's truck-only tolling plan was unconstitutional.

The lawsuit came as the result of the American Trucking Associations (ATA) and three motor carriers filing a lawsuit against the state of Rhode Island.

The state placed tolls on existing bridges which had been found structurally deficient.

These tolls were intended to raise revenue from trucks operating in interstate commerce as the state found that tractor trailers contributed the majority of the wear and tear on the state's bridges.

SSDA-AT believes that investment in our nation's roads and bridges is essential for the safe and efficient movement of passengers and freight, but these investments must be made soundly, and they should not penalize one user over another.

The truck only tolling plan from Rhode Island discriminated against trucks, and if it had won its lawsuit, it would have incentivized other states to follow suit.

IRS Provides Tax Inflation Adjustments for Tax Year 2023

The Internal Revenue Service today announced the tax year 2023 annual inflation adjustments for more than 60 tax provisions, including the tax rate schedules and other tax changes. Revenue Procedure 2022-38 provides details about these annual adjustments.

New for 2023

The Inflation Reduction Act extended certain energy related tax breaks and indexed for inflation the energy efficient commercial buildings deduction beginning with tax year 2023. For tax year 2023, the applicable dollar value used to determine the maximum allowance of the deduction is $0.54 increased (but not above $1.07) by $0.02 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent. The applicable dollar value used to determine the increased deduction amount for certain property is $2.68 increased (but not above $5.36) by $0.11 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent.

Highlights of changes in Revenue Procedure 2021-38:

The tax year 2023 adjustments described below generally apply to tax returns filed in 2024.

The tax items for tax year 2023 of greatest interest to most taxpayers include the following dollar amounts:

The standard deduction for married couples filing jointly for tax year 2023 rises to $27,700 up $1,800 from the prior year. For single taxpayers and married individuals filing separately, the standard deduction rises to $13,850 for 2023, up $900, and for heads of households, the standard deduction will be $20,800 for tax year 2023, up $1,400 from the amount for tax year 2022.

Marginal Rates: For tax year 2023, the top tax rate remains 37% for individual single taxpayers with incomes greater than $578,125 ($693,750 for married couples filing jointly).

The other rates are:

35% for incomes over $231,250 ($462,500 for married couples filing jointly);

32% for incomes over $182,100 ($364,200 for married couples filing jointly);

24% for incomes over $95,375 ($190,750 for married couples filing jointly);

22% for incomes over $44,725 ($89,450 for married couples filing jointly);

12% for incomes over $11,000 ($22,000 for married couples filing jointly).

The lowest rate is 10% for incomes of single individuals with incomes of $11,000 or less ($22,000 for married couples filing jointly).

The Alternative Minimum Tax exemption amount for tax year 2023 is $81,300 and begins to phase out at $578,150 ($126,500 for married couples filing jointly for whom the exemption begins to phase out at $1,156,300). The 2022 exemption amount was $75,900 and began to phase out at $539,900 ($118,100 for married couples filing jointly for whom the exemption began to phase out at $1,079,800).

The tax year 2023 maximum Earned Income Tax Credit amount is $7,430 for qualifying taxpayers who have three or more

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IRS Provides Tax Inflation Adjustments for Tax Year 2023

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qualifying children, up from $6,935 for tax year 2022. The revenue procedure contains a table providing maximum EITC amount for other categories, income thresholds and phase-outs.

For tax year 2023, the monthly limitation for the qualified transportation fringe benefit and the monthly limitation for qualified parking increases to $300, up $20 from the limit for 2022.

For the taxable years beginning in 2023, the dollar limitation for employee salary reductions for contributions to health flexible spending arrangements increases to $3,050. For cafeteria plans that permit the carryover of unused amounts, the maximum carryover amount is $610, an increase of $40 from taxable years beginning in 2022.

For tax year 2023, participants who have self-only coverage in a Medical Savings Account, the plan must have an annual deductible that is not less than $2,650, up $200 from tax year 2022; but not more than $3,950, an increase of $250 from tax year 2022. For self-only coverage, the maximum out-of-pocket expense amount is $5,300, up $350 from 2022. For tax year 2023, for family coverage, the annual deductible is not less than $5,300, up from $4,950 for 2022; however, the deductible cannot be more than $7,900, up $500 from the limit for tax year 2022. For family coverage, the out-of-pocket expense limit is $9,650 for tax year 2023, an increase of $600 from tax year 2022.

For tax year 2023, the foreign earned income exclusion is $120,000 up from $112,000 for tax year 2022.

Estates of decedents who die during 2023 have a basic exclusion amount of $12,920,000, up from a total of $12,060,000 for estates of decedents who died in 2022.

The annual exclusion for gifts increases to $17,000 for calendar year 2023, up from $16,000 for calendar year 2021.

The maximum credit allowed for adoptions for tax year 2023 is the amount of qualified adoption expenses up to $15,950, up from $14,890 for 2022

Items unaffected by indexing:

By statute, certain items that were indexed for inflation in the past are currently not adjusted.

The personal exemption for tax year 2023 remains at 0, as it was for 2022, this elimination of the personal exemption was a provision in the Tax Cuts and Jobs Act.

For 2023, as in 2022, 2021, 2020, 2019 and 2018, there is no limitation on itemized deductions, as that limitation was eliminated by the Tax Cuts and Jobs Act.

The modified adjusted gross income amount used by joint filers to determine the reduction in the Lifetime Learning Credit provided in § 25A(d)(2) is not adjusted for inflation for taxable years beginning after December 31, 2020. The Lifetime Learning Credit is phased out for taxpayers with modified adjusted gross income in excess of $80,000 ($160,000 for joint returns).

DOL Issues Proposed Rule on Independent Contractors

The U.S. Department of Labor (DOL) has issued a proposed rule to clarify who is an independent contractor under the Fair Labor Standards Act (FLSA).

The DOL is proposing to rescind a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors.

The 2021 rule, which is still in effect, made it easier for employers to classify workers as independent contractors, rather than as employees.

Employers interested in explaining the effect the proposed rule would have on their businesses will have until November 28, 2022, to submit their concerns and arguments to the DOL.

After the comment period closes, it is believed that the DOL would issue a final rule sometime in the second half of 2023, or perhaps in early 2024.

Under the new proposed rule, employers would use a totality-of-the-circumstances analysis, in which all of the factors do not have a predetermined weight. The six factors the DOL would look at are:

Opportunity for profit or loss. If a worker can set or negotiate his pay, accept, or decline jobs, choose the order or time of performance, engage in marketing to expand the business, and hire others, purchase materials or otherwise invest in the business, the worker is more likely to be an independent contractor. However, deciding to do more work or accept more jobs is not indicative of contractor status. It is unclear how the ability to "accept or decline jobs" indicates contractor status, while the decision to "take more jobs" does not.

Investments by the worker and the employer. Investments that are "capital or entrepreneurial" in nature, such as those increasing the worker's ability to do different types or more work, reducing costs or extending market reach are indicative of contractor status. However, investing in tools to do the job indicate employee status. It is not clear how this factor would be applied in jobs that do not require any significant investment beyond a computer and internet connection. This factor also embraces the idea that the worker's level of investment should be compared to the business' investments. The utility of the relative-comparison factor is at best unclear and at worst illogical, as nearly eve-

DOL Issues Proposed Rule on Independent Contractors

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ry business will have invested more overall than any individual worker, and it would change the nature of the employment relationship based not on the worker's activities or the work done, but simply on the size of the business engaging the worker.

Degree of permanence of the work relationship. When the working relationship is indefinite or continuous, it indicates employee status. When the work is definite in duration, nonexclusive, project-based, or sporadic "based on" the worker providing services to other businesses, it is indicative of contractor status. When the work is project-based or sporadic for some other reason (such as the nature of the business), then it does not indicate contractor status.

Nature and degree of control. This factor looks at various indicia of control over the work and the economic aspects of the relationship. Importantly, control that is merely reserved, but not exercised, still counts as "control." Also notable is the DOL's statement that control exercised to ensure compliance with "legal obligations, safety standards, or contractual or customer service standards may be indicative of control." Prohibiting a subcontractor from engaging in unlawful discrimination, requiring it to follow safety rules or flowing down compliance clauses, would therefore appear to undermine contractor status.

Extent to which the work performed is an integral part of the employer's business. This factor weighs in favor of employee status when the work is "critical, necessary, or central to the employer's principal business." It is unclear what role a contractor could play that would not be "critical, necessary, or central to the employer's business." For instance, external accounting and marketing functions, both historically areas for independent contractors, would seem to be both "critical" and "necessary."

Skill and initiative. This factor looks at whether the worker uses "specialized skills" in performing the work, and whether those skills "contribute to business-like initiative." Being highly skilled in the substance of a particular field (such as engineering, journalism, or hospitality) does not seem to be the kind of "skill" contemplated. Rather, skill in running an independent business is what matters.

The DOL then includes a catch-all provision stating that additional factors may be relevant "if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work."

If employers have any questions or concerns, we recommend they contact us to ensure compliance.

Pronouns and Gender Identity in the Workplace

In June 2020, the U.S. Supreme Court held that Title VII's "because of sex" terminology prohibits sexual orientation and gender identity discrimination in employment. The specific holding of that case was that an employee may not be fired or subject to other adverse employment actions based on the employee's sexual orientation or gender identity status.

In June 2021 and March 2022, the U.S. Equal Employment Opportunity Commission (EEOC) issued Guidance for employers extending the U.S. Supreme Court's decision to "correlated conduct", such as the use of employee preferred pronouns, dress code policies, bathroom policies, etc. However, a federal district court has now blocked enforcement of that Guidance.

Pronouns are the way another's gender identity is referred to; for example: he/she/they. Employees adding pronouns to email signatures and social media profiles, such as LinkedIn, has become more common. While the EEOC's specific Guidance on the issue is now blocked and subsequent court cases may provide more direction in the future, for now we recommend whether an employee includes pronouns on email signatures and social media profiles be optional and leave such up to each individual employee: mandating or prohibiting such is not recommended.

If employers have any questions or concerns, we recommend they contact us to ensure compliance.

Employers Warned to Beware of Third Parties Promoting Improper Employee Retention Credit Claims

The Internal Revenue Service warned employers to be wary of third parties who are advising them to claim the Employee Retention Credit (ERC) when they may not qualify. Some third parties are taking improper positions related to taxpayer eligibility for and computation of the credit.

These third parties often charge large upfront fees or a fee that is contingent on the amount of the refund and may not inform taxpayers that wage deductions claimed on the business' federal income tax return must be reduced by the amount of the credit.

If the business filed an income tax return deducting qualified wages before it filed an employment tax return claiming the credit, the business should file an amended income tax return to correct any overstated wage deduction.

Businesses are encouraged to be cautious of advertised schemes and direct solicitations promising tax savings that are too good to be true. Taxpayers are always responsible for the information reported on their tax returns. Improperly claiming the ERC could result in taxpayers being required to repay the credit along with penalties and interest.

What is the ERC?

The ERC is a refundable tax credit designed for businesses who continued paying employees while shutdown due to the COVID-19 pandemic or had significant declines in gross receipts from March 13, 2020, to Dec. 31, 2021. Eligible taxpayers can claim the ERC on an original or amended employment tax return for a period within those dates.

To be eligible for the ERC, employers must have:

sustained a full or partial suspension of operations due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19 during 2020 or the first three quarters of 2021,

experienced a significant decline in gross receipts during 2020 or a decline in gross receipts during the first three quarters of 2021, or

qualified as a recovery startup business for the third or fourth quarters of 2021.

As a reminder, only recovery startup businesses are eligible for the ERC in the fourth quarter of 2021. Additionally, for any quarter, eligible employers cannot claim the ERC on wages that were reported as payroll costs in obtaining PPP loan forgiveness or that were used to claim certain other tax credits.

To report tax-related illegal activities relating to ERC claims, submit Form 3949-A, Information Referral. You should also report instances of fraud and IRS-related phishing attempts to the Treasury Inspector General for Tax Administration at 800-366-4484.

Latest Large Producing Wells in Oklahoma, OK Energy Today

Blaine and Garvin Counties in Oklahoma are sites of the biggest new oil producers. Ovintiv did it again, scoring a Garvin County well with production of 2,159 barrels of oil a day along with 1,910 Mcf of natural gas. The Kellner 0304 1h-22x, located at 33 3N 4W, a site several miles south of Lindsay, was completed in May at a drilled depth of 23,730 feet in the Springer formation. The completion report showed a September 2021 spud date.

Devon Energy filed a completion report on a December 2021 well in Blaine County that had production of 1,056 barrels of oil a day and 3,706 Mcf of natural gas. The Columbine 22_15_10-15n-10w 4hxx is located at 27 15N 10W or about 9 miles northeast of the town of Geary. Drilled depth was 26,640 following a spud date of April 2021 according to the completion report.

Oklahoma City's Revolution Operating Company LLC reported spring-time completions of two wells on a single pad in Canadian County. Combined production was 776 barrels of oil a day.

The High Roller 1106 3-10 1mh, located at 3 11N 6W, a site two miles south of Yukon's C-E Page Airport along I-40, had production of 327 barrels of oil a day and 455 Mcf of natural gas. The well, drilled at a depth of 19,022 feet, was completed in May of this year following a March spud date according to the completion report.

The High Roller 1106 3-10 2mh, completed in May produced 449 barrels of oil a day and 2,233 Mcf of natural gas from a drilled depth of 18,712 feet. The completion report showed a March spud date.

A Pittsburg County well showed production of 15,490 Mcf of natural gas. Drilled by Trinity Operating USG LLC, the Clifton 2-21/28h had a drilled depth of 17,885 feet at 16 7N 13E, a site several miles northwest of McAlester. The well was spudded in October 2021 and completed in December of that year according to the completion report.

Supreme Court May Scale Back Agency Enforcement Power, E&E

The Supreme Court appeared open to allowing agency enforcement actions to move more quickly to federal court.

During back-to-back oral arguments, justices seemed sympathetic to challenges to the constitutionality of using in-house administrative law judges to resolve disputes within the Federal Trade Commission and Securities and Exchange Commission. Opponents say the process is costly and time-consuming and can unfairly tip the scales toward the agencies.

Challengers say they should be permitted to contest the constitutionality of the process in federal courts — without waiting for a final agency action.

"Let me ask a question that — that is simplistic perhaps," said Justice Samuel Alito, a member of the court's six-justice conservative majority. "What sense does it make for a claim that goes to the very structure of the agency having to go through the administrative process?"

Depending on how broadly they are written, rulings against the SEC and FTC have the potential to limit the enforcement power of other agencies with administrative law judges, such as EPA, the Interior Department and the Federal Energy Regulatory Commission — and add to a growing body of case law undercutting the so-called administrative state.

The Supreme Court's conservative supermajority has demonstrated an interest in curbing agency powers, including in its recent ruling in West Virginia v. EPA, which took away one of the federal government's options for slashing greenhouse gas emissions (Greenwire, June 30).

There are more than 1,900 administrative law judges across the federal government, according to the Office of Personnel Management. The vast majority work for the Social Security Administration. Interior has nine, EPA has three and FERC has 13.

At FERC, for example, administrative law judges oversee investigations of pipeline operators for issues like spills and groundwater contamination. Companies have said that the agency proceedings are unfair, affording FERC a "home court advantage" in enforcement investigations (Energywire, May 25).

In the SEC case before the Supreme Court, Gregory Garre, a partner with the firm Latham & Watkins LLP and former solicitor general during the George W. Bush administration, argued on behalf of Michelle Cochran, a certified public accountant who faced allegations that she had violated federal auditing documentation requirements.

Paul Clement, partner at the boutique law firm Clement & Murphy PLLC and another Bush-era solicitor general, argued in the FTC case on behalf of Axon Enterprise Inc., a body camera manufacturer that found itself subject to an antitrust investigation when it tried to acquire a competitor.

Cochran and Axon face proceedings before administrative law judges at the SEC and FTC, respectively.

Clement compared Axon's case to the Supreme Court's 2012 ruling in Sackett v. EPA, which found that Idaho landowners Michael and Chantell Sackett were entitled to judicial review of a compliance order EPA had issued against them to stop construction of their dream home near Priest Lake until they had obtained a Clean Water Act permit. The justices are revisiting Sackett this term to answer the substantive question of whether the couple needs a permit at all.

In the first Sackett case, the government "was telling the citizen: Hey, wait, you can't get into court to challenge this determination. You have to wait until we bring an enforcement action," Clement said.

He added: "And this court rejected that argument."

Deputy Solicitor General Malcolm Stewart argued on behalf of the agencies in both the SEC and FTC cases, defending the role of in-house courts in administrative proceedings.

He added that that is the role Congress envisioned for administrative law judges.

IRS Updates Information on Tax Credit Helping Businesses to Hire Certain Categories of Workers

The IRS updated information on the Work Opportunity Tax Credit (WOTC), available to employers that hire designated categories of workers who face significant barriers to employment.

For employers facing a tight job market, the WOTC may be able to help.

The updates include information on the pre-screening and certification process.

To satisfy the requirement to pre-screen a job applicant, on or before the day a job offer is made, a pre-screening notice (Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit) must be completed by the job applicant and the employer.

The Targeted Jobs Tax Credit (TJTC), which preceded WOTC, did not contain a pre-screening requirement. In enacting WOTC to replace the TJTC in 1996, Congress included the requirement that employers pre-screen job applicants before or on the same day the job offer is made. In doing so, Congress emphasized that the WOTC is designed to incentivize the hiring and employment of certain categories of workers.

After pre-screening a job applicant, the employer must then request certification by submitting Form 8850 to the appropriate state workforce agency no later than 28 days after the employee begins work.

Other requirements and further details can be found in the instructions PDF to Form 8850.

WOTC has 10 designated categories of workers. The 10 categories are:

Qualified IV-A Temporary Assistance for Needy Families (TANF) recipients

Certain veterans, including unemployed or disabled veterans

The formerly incarcerated or those previously convicted of a felony

Designated community residents living in Empowerment Zones or Rural Renewal Counties

Vocational rehabilitation referrals

Summer youth employees living in Empowerment Zones

Food stamp (SNAP) recipients

Supplemental Security Income (SSI) recipients

Long-term family assistance recipients

Qualified long-term unemployment recipients.

Although the credit generally is not available to tax-exempt organizations, a special provision allows them to claim the WOTC against the employer's share of Social Security tax for hiring qualified veterans.

These organizations claim the credit on Form 5884-C, Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans.

Visit the WOTC page on IRS.gov for more information.

Fall Regulatory Action

With the September 30 passage of a continuing resolution (CR) to fund the government through December 16, 2022, Congress has largely turned its attention to the midterms. While we do not expect much action from the Hill until after Election Day, there is still lots to watch coming out of the agencies:

DOL Proposes New Independent Contractor Rules

On October 11th, the Department of Labor (DOL) released the text of its much anticipated proposed rules on independent contractors. The proposal was formally published in the Federal Register on Oct. 13 and the comment period will be held open for forty-five days.

Since the DOL first made it clear that it would be revisiting the independent contractor rules, the big question has been whether the agency would look to implement a stringent ABC test like the one adopted in California. To the relief of employers, in the proposed rule the DOL has declined to pursue an ABC test and is instead simply returning to and fleshing out the economic realities test that was in place prior to 2021.

Taking a step back, it is important to note that the DOL's independent contractor rule technically only applies for the purposes of determining worker classifications under federal wage and hour laws – namely the federal Fair Labor Standards Act (FLSA). There are a whole host of different areas outside of the scope of these rules where the distinction between an employee and an independent contractor comes into play – including federal and state taxes, state unemployment and workers' compensation. But because it is logistically untenable and legally impermissible to have someone classified as an independent contractor for the purposes of some laws (such as unemployment) and an employee for others (such as wage and hour) – businesses must in practice follow the most restrictive rules (whether they be set by the DOL, the IRS, or a state agency) when determining how to classify their workers. For example, changes to the DOL's independent contractor rules shouldn't change how employers in California classify their workers because those employers are already having to comply with the much more rigorous rules set by the state. The distinction would however come into play if a worker's classification was challenged, in which case the nature of the dispute would govern which test would be applied.

To understand the DOL's new proposed rules it is important to understand the history of the rules over the last couple years. Before 2021, the DOL used what is known as the economic realities test to determine if a worker can qualify as an independent contractor. The economic realities test looked at five factors: (1) the nature and degree of the worker's control over the work; (2) the worker's opportunity for profit or loss; (3) the amount of skill required for the work; (4) the degree of permanence of the working relationship; and (5) whether the work is part of an integrated unit of the business.

In the waning days of the Trump Administration, the DOL issued a new final rule that was intended to make it easier for businesses to satisfy the economic realities test and classify workers as contractors. Under the Trump independent contractor rule, the DOL focused primary on the first two factors of the economic realities test. Under that rule, if a worker would qualify as an independent contractor when looking at the factors of control and opportunity for profit and loss then the inquiry would stop there and the independent contractor classification would be permissible. Only if there was uncertainty or ambiguity would the Trump rule call for looking at the third, fourth and fifth factors noted above. The rule also allowed businesses to offer certain benefits to independent contractors without undermining their classification.

Fall Regulatory Action

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The Trump independent contractor rule was originally slated to go into effect on March 8, 2021. Unsurprisingly, when the Biden Administration came to town it issued an instruction that the agencies should hold and reconsider any rules that had been finalized but had not yet gone into effect – thus the effective date of the independent contractor rule was delayed. On March 11, 2021, the DOL issued a notice of its intent to entirely withdraw and strike the Trump independent contractor rule. Shortly after the notice was published, the Coalition for Workforce Innovation, which includes companies like Uber and Lyft, filed a lawsuit challenging the DOL's decision to delay and potentially withdraw the rule. This March, the U.S. District Court for the Eastern District of Texas struck down the DOL's notice. The DOL appealed this decision to the Fifth Circuit Court of Appeals. On request of the DOL, the Fifth Circuit Court of Appeals has stayed that case until December 7, 2022 based on the DOL's plans to release the new proposed rules which would make the issue of withdrawing the 2021 rules moot.

The new proposed rules would reinstate the economic realities test with each factor receiving equal weight and with the worker's and employer's investments into their respective businesses being broken out as its own factor in the test. The proposed rules also provide additional detail on how businesses should assess the issue of control and determining whether the work is integral to the employer's business. The DOL's stated goal in these proposed regulations is to bring the regulations back in line with the case law and standards that employers have become accustomed to.

NLRB Proposes New Joint Employer Rules

Also on the employment regulatory front, in September, the National Labor Relations Board (NLRB) proposed new rules for determining when businesses will be considered joint employers for the purposes of the National Labor Relations Act (NLRA). Comments on the proposed rules are due November 7.

The concept of joint employers and the determination of when two entities that do business together will be considered jointly responsible for specific employees has been a big issue over the last decade not just for the NLRB but also for the Department of Labor (which is also has the issuance of new joint employer rules on its to do list).

For the NLRB's part, the new proposed rules would replace the Trump-era rules which took effect in April 2020 and which substantially narrowed when employers would be considered joint employers for the purposes of the NLRA (which among other things governs issues like unfair labor practices, collective bargaining agreements and protected employment activities). Under the preexisting rule, a business would only be considered a joint employer if it had "direct and immediate control" over the worker's essential terms and conditions of employment. Under the new rule, two businesses would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." Under the proposed rules, to "share or codetermine matters" would mean to "possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment."

In other words, the new proposed rules (which harken back to the rules that existed before the last set of rules were finalized in 2020) would dramatically expand the circumstances when two businesses could be considered joint employers.

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