

# MSPA<sup>®</sup> AMERICAS

## Legislative Update April 2019

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## Important Information

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A slide with a light blue header box containing the word "Agenda" in bold black text. Below the header, the slide lists three parts: "Part I Federal Developments", "Part II State Developments", and "Part III Call to Action", all in bold black text. There are small black dots in the bottom left and bottom right corners of the slide area.

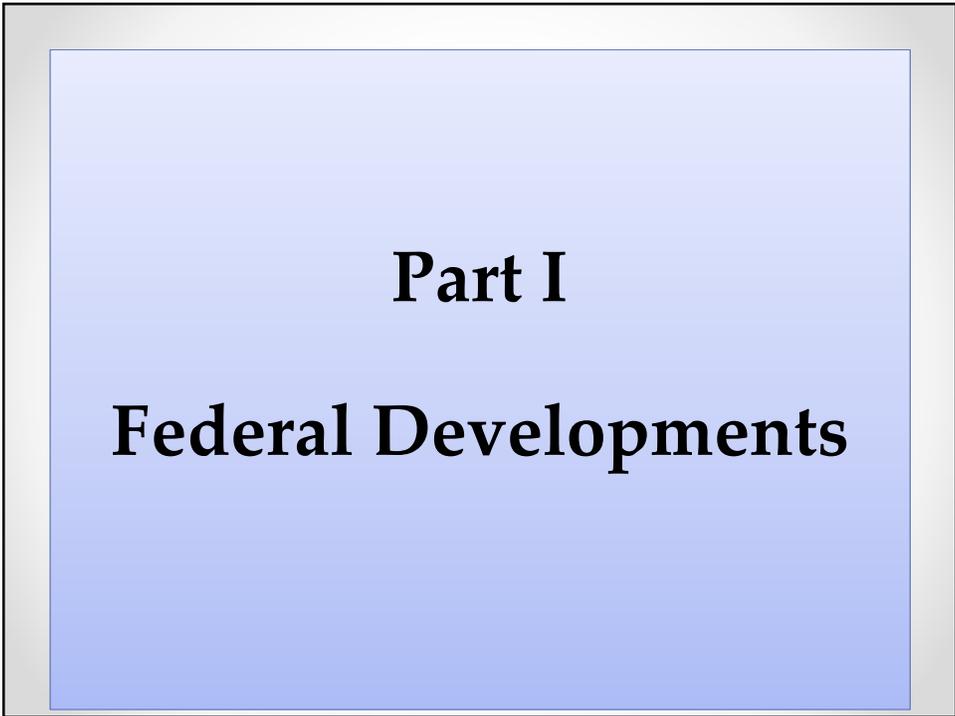
**Agenda**

**Part I Federal Developments**

**Part II State Developments**

**Part III Call to Action**

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A slide with a light blue background and a dark blue border. The text "Part I" is centered at the top in a large, bold, black serif font. Below it, "Federal Developments" is centered in a slightly smaller, bold, black serif font.

**Part I**

**Federal Developments**

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## New Emerging Issue... Data Privacy

- March 12, 2019, Senate Judiciary Committee Hearing on data privacy
  - GDPR
  - CCPA
- Apparent bipartisan support to develop a federal data privacy law
- MSPA is monitoring this issue at the federal level
  - Might include this issue in forthcoming “Day on the Hill”

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

**Goal:** Harmonize the Definition of 'Employee' by Adopting a 'Common-Law' Test for Purposes of the FLSA

**Rationale:** MSPA member companies historically have successfully defended their independent-contractor relationships with evaluators under a common-law test

- More predictable than an “economic realities” test

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

### Background

- More than 10 tests define the term "employee" for purposes of federal and state statutes
- Relevant History
  - FLSA part of New Deal statutes (FLSA, NLRA, SSA)
  - Early courts apply a common-law test for New Deal statutes
  - U.S. Supreme Court decides *NLRB v. Hearst Publs.*, 322 U.S. 111 (1944), adopting an "economic realities" test for purposes of NLRA
  - Based on *Hearst* – Court adopts an "economic realities" test for purposes of the SSA and FLSA

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

### Background

- Congress amends the NLRA and SSA to adopt a common-law test, overruling *Hearst*
  - Arguably should have affected the FLSA as well...
- More recently, U.S. Supreme Court adopts a common-law test for purposes of the Copyright Act and ERISA
- ERISA and FLSA contain the **identical** statutory definition of the term "employee" and both are administered by DOL

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

### Three Possible Strategies for Adopting a Common-Law Test for FLSA

- **Legislative** – Not viable in the current Congress
- **Administrative** – Actively pursuing
- **Judicial** – Actively pursuing

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

### Administrative

- Urge Labor Secretary Acosta to open a rulemaking project to update the definition of "employee" for purposes of the FLSA to conform to more recent U.S. Supreme Court decisions
- During "Day on the Hill" will urge Members of Congress to sign a letter to Secretary Acosta
  - Member Offices receptive to the idea
  - Draft Member letter prepared
- MSPA is part of a broad coalition working on this solution

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## Harmonize the Definition of 'Employee' in FLSA with Federal Law

### Judicial

- Seeking an opportunity to file an *amicus brief* in connection with FLSA litigation concerning worker-status, urging the court to apply a common-law test instead of an "economic realities" test

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## Proposed New Safe Harbor (*NEW GIG Act*)

### **NEW GIG Act Reintroduced as S. 700 and H.R. 1625**

- Would create a new safe-harbor protection for independent-contractor relationships for all federal tax purposes
  - Jeopardies the continued viability of Section 530 of the Revenue Act of 1978 – by creating a parallel safe harbor
- To qualify for the new safe harbor, a company would need to **withhold 5% of the first \$20,000 paid to an independent contractor** during a calendar year and remit the amount to IRS
  - Compromises a bedrock tax distinction between independent contractors and employees

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## Proposed New Safe Harbor (*NEW GIG Act*)

### *NEW GIG Act continued ...*

- Other eligibility criteria for the proposed new safe harbor also would be problematic
  - An individual would need to incur tax-deductible business expenses (with a significant portion not reimbursed)
- A prior version of the bill, introduced in 2017, was **defeated**
  - A broad coalition is working to defeat the bill again

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## Part II

# State Developments

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## State Harmonization Project

**Goal:** Harmonize the Definition of the term "Employee" by Replacing "ABC" Tests with a "Common-Law" Test

**Rationale:** Infirmities of the "ABC" Test / Support Federal Harmonization Effort

"ABC" Test Factors:

- A. that the worker is free from the control and direction of the hirer in connection with the performance of the work
- B. that the worker performs work that is outside the usual course of the hiring entity's business; and
- C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

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## State Harmonization Project

- Bills **have been** introduced in the following states:
  - Arkansas (H.B. 1850)
    - Introduced: 3/15/2019. Passed House, Referred to Senate
  - Oklahoma (H.B. 1095)
    - Introduced: 2/4/2019. Passed House, Referred to Senate
  - Tennessee (H.B. 539/S.B.466)
    - Both Introduced: 2/6/2019. H.B. 539 Passed House; S.B. 466 in Committee
  - West Virginia (H.B. 2365/S.C.R. 56)
    - 3/7/2019: Converted into a study
- Bills are **expected** to be introduced in the following states:
  - Indiana
  - Nebraska
  - Utah
  - Wyoming

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## State Legislative Activity

- We are tracking more than 50 bills that would affect independent contractors and their clients
  - At this time, no bills have been enacted
- Some bills would increase penalties for misclassification
  - **Illinois**
  - **Iowa**
  - **Rhode Island**
  - **Texas**
  - **Vermont** would create a Private Attorneys General Act that empowers individual plaintiffs to file lawsuits based on misclassification

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## State Legislative Activity

- Some bills would amend the test defining the term employee or modify the statutory inclusions/exclusions
  - **California:** in response to *Dynamex*, one bill would codify *Dynamex* another would reverse the decision
  - **Kentucky:** ABC test for minimum-wage and overtime purposes
  - **Missouri:** common-law test to statutory test
  - **Oregon:** would add factor to statutory test
  - **Washington:** uniform statutory test
- A Washington Senate bill would apply minimum wage requirements to independent contractors

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# Part III

## Call to Action

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- ### Call to Action
- **Especially important to participate in forthcoming “Day on the Hill” meetings**
    - The more attendees, the more effective MSPA can be in communicating its message
  - **Send emails or letters in support of the state bills to replace the “ABC” test, when asked to do so**

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