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Federal Regulatory Agenda Previews Anticipated FLSA Rule Changes

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The Trump Administration unveiled its Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions (the "Regulatory Agenda") earlier this week. That's the biannual report from the federal administrative agencies on the regulatory actions they plan to take in the near and long term.

Lots of juicy information in the Regulatory Agenda, but we'll focus on the priorities of the U.S. Department of Labor and, specifically, the agency's Wage and Hour Division.

The DOL's 2018 Regulatory Plan emphasizes regulatory restraint, and underscores the current administration's commitment to a more business-friendly regulatory framework, noting:

- "In general, the [DOL] will work to assist employees and employers to meet their needs in a helpful manner, with a minimum of rulemaking."
- "Where regulatory actions are necessary, they will be accomplished in a thoughtful and careful manner. The [DOL] seeks to achieve needed employee protections while limiting the burdens regulations place on employers."
- "The [DOL's] regulatory actions will provide American employers with certainty about workforce rules. The [DOL's] regulatory plan will make employers' obligations under current law clear, while respecting the rule of law."
- "Where Congress is silent, the [DOL] does not have the authority to write the

law."

So this all sounds like good news for employers. Let's look at what's in the Regulatory Agenda for the Wage and Hour Division.

A Proposed New Overtime Rule

The DOL announced its intention to issue a Notice of Proposed Rulemaking (NPRM) in March 2019 "to determine the appropriate salary level for exemption of executive, administrative and professional employees." Revisions to the minimum salary requirements for these "white collar" exemptions were finalized by the Obama Administration in 2016, but a federal judge declared them invalid days before they were to take effect. Now they're back on the table.

Updates to the Regular Rate and "Basic Rate" Rules

The DOL anticipates a proposed rule on the regular rate and the basic rate in December 2018. Per the DOL:

- "In this Notice of Proposed Rulemaking, the Department will propose to amend 29 CFR parts 548 [regarding "authorized basic rates" for calculating overtime pay] and 778 [regarding overtime compensation and calculation generally], to clarify, update, and define basic rate and regular rate requirements under sections 7(e) and 7(g)(3) of the Fair Labor Standards Act."

- "The majority of 29 CFR part 778 was promulgated more than sixty years ago. The [DOL] believes that changes in the 21st century workplace are not reflected in its current regulatory framework. While the [DOL] has periodically updated various sections of part 778 over the past several decades, they have not addressed the changes in compensation practices and relevant laws. The [DOL] is interested in ensuring that its regulations provide appropriate guidance to employers offering these more modern forms of compensation and benefits regarding their inclusion in, or exclusion from, the regular rate. Clarifying this issue will ensure that employers have the flexibility to provide such compensation and benefits to their employees, thereby providing employers more flexibility in the compensation and benefits packages they offer to employees."

- "Similarly, the [DOL] believes that the proposed changes will facilitate compliance with the FLSA and lessen litigation regarding the regular rate."

Many employers will be unfamiliar with the "basic rate" methods for calculating overtime pay (a statutory alternative to the regular rate of pay that allows, under specific conditions, the use of an authorized "basic" rate), but any changes to the rules around the regular rate of pay—the methodology most employers use to calculate overtime pay—could be very meaningful.

Updated Joint Employment Rules

The DOL also announced a proposal to "update to its regulations concerning joint employment, *i.e.*, those situations in which a worker is considered an employee of

two or more employers jointly." An NPRM is expected in December 2018. As the DOL explains:

- "In this Notice of Proposed Rulemaking, the [DOL] will propose to clarify the contours of the joint employment relationship to assist the regulated community in complying with the [FLSA]."
- "The [DOL] believes that changes in the 21st century workplace are not reflected in its current regulatory framework.... These proposed changes are intended to provide clarity to the regulated community and thereby enhance compliance. The [DOL] believes the proposed changes will help to provide more uniform standards nationwide."

Our readers will recall the Obama Administration's 2016 Administrator's Interpretation that urged a more expansive definition of joint employment under the FLSA. The DOL withdrew that guidance in July 2017.

Revised Tip Rules

The DOL announced forthcoming revisions to the FLSA tip regulations, with an NPRM expected in October 2018.

Back in 2011, the Obama Administration amended the FLSA tip rules to codify the DOL's interpretation of FLSA § 3(m) that "mandatory tip pools ... can only include those employees who customarily and regularly receive tips." The rule prohibited employers from allowing employees who are not customarily and regularly tipped—e.g., cooks, dishwashers, and other "back of the house" employees—to participate in tip pools.

In the 2018 Consolidated Appropriations Act signed by President Trump in March 2018, Congress withdrew the 2011 regulatory amendments pending additional DOL rule making. In the Regulatory Agenda, the DOL announced its intention to "align its regulations with the recent statutory changes."

Looking Forward

Employers that have struggled with FLSA compliance and/or been plagued by the rapid increase in wage and hour litigation over the last decade will surely welcome any regulatory changes that make it easier to comply—or less likely to be sued. It remains to be seen whether the rule changes proposed by the DOL will achieve these goals, but employers nationally are paying close attention. The notice-and-comment rule making process gives employers a unique opportunity to educate the DOL about the economic, practical, and other implications of proposed regulatory changes, so if you want to be heard on these issues, your opportunity will soon be here.