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Employment Law Changes Leave Employers In Limbo

Over the last 12 months, employment lawyers who advise companies in advance of changes in employment law may have begun to feel some unease. Even those who have been practicing for years have been at a loss as to how to predict what may be coming next. In addition to the many questions that remain for dealing with immigration issues, we are left scratching our heads with respect to overtime, joint employment, the persuader rule and tip pools, just to name a few issues. In this environment, how should employment lawyers guide their clients forward?

In summer 2016, many attorneys were busy helping companies restructure, as necessary, positions that were likely to become subject to overtime rules with major increases in the minimum salary test for exemption purposes. Raising the minimum threshold for exemption to almost $47,000, about double what it was previously, would surely impact many employees around the country. Suddenly, a federal district judge in Texas put a stop to the implementation of those rules and issued a preliminary injunction, which the U.S. Department of Justice then appealed.

Under the current administration, it is unclear what will come next. The DOJ recently filed its reply brief before the court of appeals and took the position that changes may still be made to the salary test, but that it is unlikely to be as high as the previously proposed change. The DOJ's brief called for the Fifth Circuit to reject the notion that the U.S. Department of Labor cannot set any minimum salary test and that its previous regulations violated the 10th Amendment. But it also noted that the DOL would undertake further rulemaking to determine the correct minimum salary level, expressly stating it was not going to advocate for the previous level set by the Obama administration. If the Fifth Circuit reverses the district court, it is possible that the new rules from last year, which were supposed to start on Dec. 1, 2016, will take effect immediately.

In any event, on July 25, 2017, the DOL announced its intent to start the rulemaking process to determine the correct minimum salary for exempt employees. The agency's goal is to lower the "regulatory burden." In particular, the DOL is seeking responses to several important questions, which now remain uncertain, including the appropriate measure for the inflation factor; the question of using multiple levels depending on the region and position; using different levels depending on the specific exemption claimed; whether the short and long tests should be reinstated

and/or updated; the importance of salary level versus the duties test; evaluating the response and impact to the 2016 final rule; and determining whether the various salary levels should automatically update based on changes to the inflation rate/consumer price index. Those desiring to submit written comments must send them to the DOL by Sept. 25, 2017.[1]

Additionally, Labor Secretary Alexander Acosta withdrew the prior administration's administrative interpretations (AIs) from 2015 and 2016 relating to Fair Labor Standards Act issues, but cautioned generally that employers must still obey the FLSA. This may also signal a change in practice at the DOL, which used to issue opinion letters in response to specific requests for guidance on particular questions. Opinion letters may once again become the norm.

And then there is the issue that seemed to be spreading throughout many different agencies, not just the DOL: the question of what constitutes a joint employer. Employment lawyers, with the more expansive view started first by the National Labor Relations Board, cautioned employers to review and consider changes to agreements in a variety of contexts: franchises, management services agreements and joint ventures. It seemed that the definition of joint employment would be so broad that it would cover employers far beyond what was originally imagined when using temporary staffing agencies or other types of workers to supplement their regular workforce or partnering with other entities on joint ventures or projects. On June 7, 2017, the DOL withdrew its guidance that many employers were already implementing or in the process of implementing. It remains unclear when the DOL will issue new guidance on this topic. Moving forward, employers may be dealing with different standards in DOL investigations compared to civil actions. Additionally, there are also differences among agencies that are also cause for confusion. These conflicts will continue until all relevant agencies adopt a clear, uniform statement.

Another area that garnered much attention last year is the persuader rule, which was set for expansion until those changes were enjoined from taking effect. The rule would have obligated those consultants (even attorneys) involved in union elections to disclose their relationships and payments related to such services, among other things. The proposed changes were set back further on June 12, 2017, when the DOL announced proposed rulemaking in this arena, too.

Likewise, the Occupational Safety and Health Administration had proposed a rule mandating electronic reporting of certain information relating to accidents, which was supposed to go into effect on July 1, 2017. That too has been postponed, until Dec. 1, 2017, to give OSHA additional time to consider and review the rule.

The DOL also announced on July 20, 2017, that it intends to repeal the 2011 regulations that severely limited tip pooling. Some employers use tips received to offset the amount they must pay the employees to reach minimum wage requirements. The DOL required all tips to be distributed to employees even if beyond minimum wage and even if they did not take any credit. A recent federal appellate decision from the Tenth Circuit Court of Appeals decided that the DOL exceeded its authority when it promulgated rules that required employers who pay above minimum wage to distribute tips to employees even if they are not using the tip credit to offset payment of their employees' wages. It now appears the DOL is reversing its position. The DOL has announced that its investigators may not enforce the Obama-era rule, which limited an employers' ability to use tips to offset its minimum wage obligations. The DOL is expected to embark on new rulemaking in this area sometime this month.

All these changes mean that employers remain in limbo on some key employment issues that had been the subject of much discussion over the past 18 months and, in many cases, had already started them on paths of change. Many states had changed their rules to track federal standards. Now that these areas have become murkier, to be safe, employers can choose to comply with the stricter prior guidelines until more definite standards are issued. Failure to do so is a riskier path forward, and more definite guidance upon which to base some fairly significant policy positions, is not likely to come in the near future.

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[1] For more details on the reasoning behind this request for information and its parameters, see https://www.regulations.gov/document?D=WHD-2017-0002-0001.

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