USDOL Clarifies Status of "Administrator Interpretations"

Insights
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As we previously reported, the U.S. Wage and Hour Division says that it will no longer provide substantive responses to fact-specific requests for interpretation submitted by employers or other individuals. At the recent Division "Stakeholder Forum" in which Fisher Phillips participated in Washington, D.C., officials indicated that this position includes requests that were pending at the time the new policy was announced.

Instead, from time-to-time the Division intends to release wide-ranging "Administrator Interpretations" announcing its general positions under the Fair Labor Standards Act and related provisions on topics of interest to enforcement officials. The Division will then apply these AIs across-the-board to all employers and employees affected by the views expressed. Wage and Hour Deputy Administrator Nancy J. Leppink issued the first Administrator Interpretation (stating that the "typical" Mortgage Loan Officer is a non-exempt employee) simultaneously with the Division's announcement.

The position of Wage and Hour Administrator remains vacant, so Fisher Phillips immediately inquired about both the source of Ms. Leppink's authority to take such positions on the Division's behalf and the status of these AIs as authoritative Division pronouncements. Acting Deputy Administrator for Enforcement Thomas M. Markey has now advised us that, in the Division's view:

(1) In the absence of an Administrator, Ms. Leppink is authorized to issue official rulings and interpretations on the Division's behalf; and

(2) The initial AI (and presumably every future one issued by Ms. Leppink, or an Acting Administrator, or whoever is eventually confirmed as Administrator) is an official ruling of the Division.

It remains to be seen whether as a practical matter this new approach will result in what amounts to rulemaking that should instead take place within the framework of the federal Administrative Procedure Act. And while AIs will affect how the Division seeks to enforce the FLSA, courts are not required to follow them.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the U.S. Supreme Court said that these sorts of interpretations represent "a body of experience and informed judgment" guiding courts as to the

FLSA's meaning and application. However, it also said that their *weight* as guidance varies according to things like:

- The thoroughness of the interpretation;
- The validity of the interpretation's reasoning;
- Whether and to what extent the interpretation is consistent with other DOL positions; and
- Other factors giving the interpretation "power to persuade, if lacking power to control".

In the future, there might well be occasions when it is appropriate to challenge an AI on the basis that it should carry no weight, or that it is outside the bounds of the Division's interpretative purview.