Notes From Acosta Confirmation Hearing

Insights
3.24.17

U.S. Labor Secretary candidate Alexander Acosta's March 22 appearance before the Senate's Health, Education, Labor & Pensions Committee produced some interesting interchanges having to do with matters relating to the federal Fair Labor Standards Act and other federal wage-hour provisions.

The "Overtime Rule"
Several Senators sought Mr. Acosta's views about the salary-related regulatory changes affecting the FLSA's Section 13(a)(1) exemptions that were the subject of a nationwide federal-court preliminary injunction issued last November.

Some pressed Mr. Acosta to commit that he would defend those changes in the ongoing Texas litigation. He was unwilling to make that commitment for now, saying that, among other things, he must first evaluate the legal merits of the lower court's ruling that the U.S. Department of Labor has no authority to impose such a salary requirement.

Mr. Acosta also declined to take a specific position on the appropriate amount of any salary threshold. He did express concerns about the possible adverse effects of a $913-a-week figure upon aspects of the nation's economy, particularly in areas that are lower-wage ones. Doubling the $455-a-week level creates a "stress on the system", as he put it.

However, he also finds it "troubling" that the salary threshold had not been adjusted since 2004, and he voiced his concern about the long periods of time that tend to pass between re-evaluations of the proper level. He expressed his intention to look at this matter "very closely". One exchange seemed to suggest that Mr. Acosta would at least be open to considering a figure in the $635-a-week range (which would annualize to about $33,000).

Opinion Letters
Readers will recall our longstanding opposition to the Obama Administration's 2010 decision to stop providing opinion letters, that is, official, scenario-specific written explanations of how the FLSA and other, analogous federal laws work in particular situations. Reinstating this practice was at the top of our December 2016 partial wish list.

Mr. Acosta observed that these opinions provide "a value" by addressing the application of the law to "specific facts". Interestingly, one of the considerations the prior administration cited for *discontinuing* the practice was that these responses deal with particular circumstances

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Mr. Acosta said that he saw "no reason that [he] would not encourage" the resumption of this procedure.

The Bottom Line

It is of course wise to be cautious in speculating on the basis of a nominee's statements made in a confirmation hearing.

This said, our guess is that, if Mr. Acosta is indeed confirmed, it is at least conceivable that USDOL will conclude that it has no authority to impose a salary requirement as a condition of exempt "white collar" status.

But if the agency decides instead that it *is* appropriate to retain this requirement (which USDOL has kept in place for decades), then we believe employers should remain alert for new white-collar-exemption rulemaking that aims to dial-back the $913 salary threshold, but not down to a $455-a-week level. What new figure might be proposed is at best difficult to predict, but something in the mid-$600s would not surprise us.