Beware Offering "Examples" In Comments To USDOL

Insights
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Comments on the U.S. Labor Department's proposed changes in regulations defining the federal Fair Labor Standards Act's Section 13(a)(1) exemptions are, for the moment, still due on Friday, September 4, 2015.

USDOL is considering including in the final version some additional "examples" for the "regulated community" of how the exemptions apply, and it has asked for suggestions along those lines. Employers and trade groups should think very carefully about whether, and if so in what form, to accept this invitation.

"Examples" With Teeth

Prior to 2004, USDOL's Section 13(a)(1) exemption provisions consisted of "General Regulations" (29 C.F.R. Part 541, Subpart A) and "Interpretations" (29 C.F.R. Part 541, Subpart B). The much-shorter Subpart A contained the specific exemption requirements and had the force and effect of law. By contrast, Subpart B did not have that status and was instead of an explanatory nature, so it contained a wide variety of examples, discussion, and illustrations.

But effective with the 2004 revisions, *all* of Part 541 took on regulatory status. It too contains examples and illustrations, but now these statements have binding effect. Describing them innocuously as "examples" does not change their fundamental nature.

One thing this means is that USDOL's incorporating any such examples into the regulations as an outgrowth of the current comment process, that is, without later proposing *actual* examples for further comment, would not comply with the Administrative Procedure Act. This would be doubly true if, in effect, the new examples indirectly or implicitly changed the regulations' duties tests or other requirements.

Potential Complications

Moreover, ten years of experience has shown that these "examples" tend to take on a life of their own, and that they can result in unforeseen or unintended consequences. For instance, exemption-favoring interpretations of already-vague 2004 examples referring to "[e]mployees in the financial services industry" ultimately contributed to USDOL's issuing Administrator Interpretation 2010-1 (March 24, 2010), relating to the exemption status of mortgage loan officers. This further provoked

extensive litigation involving the positions taken in that Administrator Interpretation, as well as a dispute about the Interpretation's legal status that was eventually decided by the U.S. Supreme Court.

Furthermore, which submissions USDOL might select, how USDOL might word the final versions of them, and whether those adaptations will do more harm than good from the proponents' perspective cannot be known in advance. It could also be difficult to predict how various courts might react to any such illustrations in coming years.

The Bottom Line

Those who consider suggesting examples should thoroughly weigh the pros and cons in evaluating whether it is prudent to do so. One might reasonably conclude that it is preferable not to risk the possibility that enshrining USDOL's version in these regulations will result in an unfavorably stacked-deck in future investigations or in litigation.

If the decision is to propose examples, then whatever is submitted should be very carefully worded and structured with an eye to the day when a court or a USDOL investigator might be applying it. Proponents cannot control the content of what is included in the final regulations, but it is still wise to present the best-possible take.