



A Full Plate for USDOL in 2018

Insights

5.10.18

The latest regulatory agenda shows four wage-hour items on the U.S. Labor Department's (USDOL) plate. In addition to revisiting the federal Fair Labor Standards Act's (FLSA) white-collar exemptions and tips-related regulations (as we discussed last year and last month, respectively), USDOL intends to publish *proposed* rules later this year on child labor restrictions and the regular rate.

Child Labor

The FLSA's child labor restrictions, including the hazardous occupations orders, currently provide limited exceptions for apprentices and student learners under certain circumstances (*i.e.*, not your typical youth employment scenario). The USDOL plans to consider whether these exceptions to certain child labor restrictions should be expanded to allow for more safe, "meaningful" opportunities: a need which benefits the future workforce and help abate a common complaint among employers that "youth" are not pursuing some vocations. Notably, although the abstract provided is heavily focused on these programs, perhaps the title of the rule ("Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA") leaves some room for broader changes to the hazardous occupations themselves.

Regular Rate

The FLSA requires employers to use an employee's "regular rate" when determining the overtime premium for a particular workweek. While the actual calculation for the "regular rate" based on remuneration for employment and the hours worked comes from case law, the statute itself sets forth that it includes "all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include" eight categories of remuneration. Indeed, there are no regulations in this regard; rather Part 778 as it currently stands is the agency's "official interpretation" with respect to overtime compensation.

While the agenda item broadly reads "Regular Rate Under the Fair Labor Standards Act", the abstract specifically states that the USDOL "will propose to amend 29 CFR part 778, to clarify, update, and define regular rate requirements under section 7(e)(2) of the Act." Subsection 7(e)(2) in particular provides that the remuneration shall not include:

Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for

traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.

Though the title might lead one to speculate optimistically that the agency is going to (i) clarify that fluctuating workweek plans are not so rigid (yet again needing to revisit a mess created in [2011](#)) or (ii) clarify and update the examples at Part 778 regarding how the overtime premium actually is calculated with respect to amounts that do *not* fall within any of the eight categorical exclusions, the abstract indicates that the revisions will be far more limited. Nonetheless, clarifying the USDOL's position on 7(e)(2) could resolve some of the [disputes](#) that have increased over the last few years.

The Bottom Line

Of course, it is not uncommon for an agency to fail to meet the target dates given in these agendas, so exactly when we will see any developments remains uncertain. Moreover, the USDOL's authority varies across these areas and in particular, similar to how its [authority](#) is limited with respect to tip practices, it cannot define the regular rate contrary to the statutory language (employers looking for more extensive [solutions](#) should, again, look to Congress). Regardless, between the four items identified on the agenda, it appears USDOL will be *very* busy.

Agency / Division	Anticipated NPRM	Title of Proposed Rulemaking	RIN
DOL/WHHD	August 2018	Tip Regulations Under the Fair Labor Standards Act (FLSA)	1235-AA21
DOL/WHHD	September 2018	Regular Rate Under the Fair Labor Standards Act	1235-AA24
DOL/WHHD	October 2018	Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA	1235-AA22
DOL/WHHD	January 2019	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees	1235-AA20