



Labor Department Shows No Signs of Slowing Down

Insights

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The Labor Department is busy.

Yes, that is a stand-alone paragraph. The Notice of Proposed Rulemaking for the “Overtime Rule” was published on March 22, 2019, followed shortly thereafter by proposals regarding regular rate requirements and then joint employer status. As the comment periods for these proposed regulations begin to expire (the comments for the “Overtime Rule” were due on or before May 21, 2019, while the deadline for comments on the regular rate and joint employment are due on or before June 12, 2019 and June 25, 2019, respectively), it appears that USDOL's Wage and Hour Division is rolling up its proverbial sleeves to continue getting down to work.

According to the President's long-term action plan that was released last week, it appears that USDOL is working on at least three additional proposed regulations affecting the Fair Labor Standards Act, including an update to the retail and service establishment exemption. Although exactly what this means remains to be seen, we can reasonably anticipate that USDOL will update what types of industries are considered retail or service in modern society (as the definitions are dated – including references to “Dance Halls” and “Scalp-treatment establishments”).

The action plan also detailed a proposal to “expand the flexibility” of the fluctuating workweek, apparently with the goal to expressly provide that employers may rely upon the fluctuating workweek when they also pay additional compensation, such as a bonus or commission. Although we believe that this is already the case, if a proposed regulation is released, it would certainly serve to clarify the issue and ensure that employers can pay both a salary and additional compensation under a fluctuating workweek pay plan. Finally, the action plan indicates that USDOL may propose changes to the 3(m) credit for food, housing and other facilities, apparently with the goal of modernizing the rule.

Although there is no way to know for certain whether these “action” items will ever be released as proposed regulations, and if so, what these proposed regulations will actually look like, the USDOL certainly has been very active already, and apparently has no intentions of slowing down. If you are keeping track, we remain on the “lookout” for proposed regulations on USDOL's interpretation of independent contractors, and proposed regulations regarding ownership of tips and use of the tip credit.

In reviewing the full plate that USDOL took on in 2018, it looks like USDOL is steadily tackling all, or at least most of, the regulatory issues on its agenda. It is noteworthy, however, that we have not explicitly seen USDOL propose to consolidate or remove any regulations. It is possible that, in order to comply with Executive Order 13771, which requires “for every one new regulation issued, at least two prior regulations be identified for elimination,” USDOL may begin to propose to remove some regulations altogether. Of course, a lack of “regulations” is not the same as curbing the government’s “regulating” altogether. In the case of the FLSA, where much of the law comes from the statutes themselves, consolidation or simplification through regulation may be the agency’s adapted goal. Only time will tell. In the meantime, hope you are on pins and needles with the rest of us...

Related People



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